

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

Titan Tire International, d/b/a  
Titan Tire Corporation, Titan Tire  
Corporation of Bryan and Titan Tire  
Of Freeport,

Respondents

Case No. 13-CA-46757  
JD-32-12

and

United Steel, Paper and Forestry, Rubber,  
Manufacturing, Energy, Allied Industrial and  
Service Workers International Union, AFL-CIO-CLC,

Charging Party

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**CHARGING PARTY USW'S ANSWERING BRIEF IN SUPPORT OF ALJD**

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## GUIDE TO CITATIONS, ABBREVIATIONS AND DATES

Administrative Law Judge Geoffrey Carter’s June 12, 2012 decision (JD-32-12) is cited as “**ALJ \_\_\_.**” The ALJD is published at 2012 WL 2135410.

Charging party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC is cited as “**USW.**” USW represents bargaining units at three Titan-facilities: Bryan, Ohio; Freeport, Illinois; and Des Moines, Iowa. The facilities are cited as the “**Bryan facility,**” “**Freeport facility,**” and “**Des Moines facility.**”

Respondent Titan Tire International, d/b/a Titan Tire Corporation of Bryan and Titan Tire Corporation of Freeport, is cited as “**Titan.**” Titan’s answer to the complaint is cited as “**Answer ¶ \_\_\_.**” Titan’s Exceptions are cited as “**Titan Ex. \_\_\_.**”

Negotiations occurred in 2010, beginning October 12 and ending December 17. Prior to the formal negotiations, Titan CEO Morry Taylor met with local officials in Bryan, Ohio on August 20. Following this meeting, there was another pre-bargaining “kick-off” meeting on September 21.

The April 10-12, 2012 hearing transcript is 415 pages: April 10 (pages 1-201), April 11 (202-362) and April 12 (363-415). The Counsel for General Counsel (“**GC**”) introduced exhibits 1-27, 30-34. Titan introduced exhibits 2, 9, 10 and 11. GC exhibits are cited as “**GC \_\_\_.**”

The GC called five witnesses and Titan called one witness: John Bowling, Bryan Local 890L chairperson (24-160); Kevin Kirk, Freeport Local 745L president (161-236); Chap Apaliski, USW Technician (237-312); James Robinson, USW District Director of District 7 (313-361); Joseph Davis, former Bryan vice-president (367-374) and William Campbell, Titan president and negotiator (375-412).

Citation to testimony is by the witnesses’ name and transcript page, e.g., “**Bowling \_\_\_.**”

## INTRODUCTION

On June 12, 2012, Administrative Law Judge Geoffrey Carter issued a decision finding that Respondent Titan Tire in December 2010: (1) failed to provide relevant bargaining information to USW; (2) imposed its final offer on USW bargaining units at Bryan, Ohio and Freeport, Illinois before any lawful impasse had been reached; (3) reduced its hourly pension contribution prior to the expiration of the benefits agreement; and (4) failed to pay the annual holiday bonus, all in violation of Section 8(a)(5) of the Act.

Titan has taken exceptions to these rulings. But Titan's own exceptions show that its declaration of impasse and implementation of its final offer was unlawful. Titan admits, for example, that it imposed its final offer after ending bargaining on December 17, at a time when the "parties had achieved agreement on 99% of the collective bargaining agreement," and after USW made "significant movement during the last week of bargaining." (Brief 21, 23). Titan "acknowledges that it did not provide the specific information set forth in the [ALJ] decision." (Brief 14, 16, 17). Titan admits it failed to pay the holiday bonus and cut the pension contribution before the benefits agreement had expired.

Ahead, we show that Judge Carter correctly found that the parties were not at impasse, that Titan had failed to provide information, and that Titan unlawfully implemented its final offer. **(Argument I)**. We show that the excuses offered by Titan for its unilateral implementation are legally, factually, and logically without merit. Titan did not, and cannot, prove a valid impasse existed when it implemented its "final offers." **(Argument II)**. We show that Titan's two other unilateral changes imposed in December 2010 were unlawful. **(Argument III)**. We also show that the Titan exception as to the remedy is without merit. **(Argument IV)**.

## STATEMENT OF FACTS

**A. USW and Titan.** USW represents three bargaining units at Titan’s Bryan, Des Moines, and Freeport facilities. USW and Titan were parties to three separate collective bargaining agreements (“CBAs”) for the period 2006 to 2010, initially set to expire November 19, 2010. (ALJ2-3; GC 1-2, 17-18). Freeport’s benefit agreement was set to expire February 17, 2011. (ALJ 5, 17; GC 18; Kirk 165-166). While the three CBAs were all with Titan, they had originated with the three prior owners of the plants and were thus different in many ways. Titan purchased the Freeport facility in 2006 from Kelly Springfield, a subsidiary of Goodyear. (Kirk 162-163; Robinson 324-325). Titan purchased the Bryan facility in 2006 from Continental Tire, Inc. Bowling 26). Titan had purchased the Des Moines facility from Armstrong & Pirelli Tire Company in 1995. (ALJ 4, n. 4). USW reached an agreement with Titan in Des Moines, based on the old Pirelli CBA, only after a “difficult labor dispute.” (Robinson 324).

**B. Titan’s plant shutdown notice.** In May 2010, Titan’s president, and soon to be chief negotiator, William Campbell, sent letters to the Freeport and Bryan locals, and posted the letters in the facilities, stating that Titan “intends to close” the Bryan and Freeport facilities on “November 15, 2010.” (ALJ 3-4; GC 3, 19; Bowling 27-28; Kirk 167-168). USW immediately demanded to bargain over the decision or effects, but Titan ignored the demand. (ALJ 3; GC 25; Robinson 321-322).

**C. Titan CEO announces plan to get to impasse.** A few months later, on August 20, Titan CEO Morry Taylor arranged to meet with local Bryan union officials John Bowling and Joseph Davis. (ALJ 3-4). Taylor spoke about upcoming negotiations. He told the local officials that he would seek drastic changes, that they would reach “impasse,” there would be a strike, and he would replace them. (ALJ 3-4). Bowling testified:

Morry told me that he felt sorry for me. That I wasn't going to be very popular with my members. They were going to be upset with me. My contract was going to look nothing like it did now. He said that he wasn't going after our wages or our seniority. He was, but work rules and minimum guarantee employment no way, not in this economy. He said that we had problems. Freeport was in trouble, and Des Moines would be happy just to sneak out of the room.

He said we'd come to impasse, we'd go on strike, and then he pointed to the wall and he made the, like he was drawing a newspaper article, and he said, I'll place a full-page ad in the paper. I'll post the wages and benefits. I'll have no problem getting people in here to replace you. He went on talking about how he met with the boys from Ford, how he talked to, told them they needed to get rid of the UAW because whatever one got, they all three ended up with.

And he said he met with the Governor of Illinois, as well, and said that, told him that they needed to file bankruptcy because they didn't have money to pay for their roads. All along, what stuck in my mind is what he said about declaring that we were going to come to impasse, we were going to strike, and he was going to replace us. (Bowling 30-31).

Davis heard the same statements: “[Morry Taylor] started telling us on, his take on how the contract was going to play out. He told us that we wouldn't come to an agreement, that we would come to impasse, that the local would go out on strike, and that he would place a full place ad” and he would have no problem “filling our jobs.” (Davis 370; ALJ 3-4).

**D. “Kick off” meeting: September 21.** CEO Taylor followed-through on his August 20 plan. (Robinson 320; ALJ 4). The CEO told the local and USW officials at the kick-off meeting that he would turn Freeport and Bryan “upside down” and would tell them how much he was going to pay:

He said that he was going to tell us how much he was going to pay for each classification. That he was going to turn Bryan and Freeport upside down. If we didn't turn around, he was going to close us, move us, or whatever. He said that there'd be no guarantee employment. He also said that as of November 19th, if we didn't either have a contract or the alternative, and he said there would be no extension. And he said those who want to live in the past are going to have a miserable future. (Bowling 35-36).

Titan handed out its initial proposal, which sought one CBA modeled after the Des Moines CBA. (GC 4; Campbell 380; Bowling 32, 36; ALJ 4). This proposal radically changed the CBAs for Freeport and Bryan. (Bowling 42; Kirk 172; ALJ 4, n. 4).

**E. Formal bargaining begins in October.** The first bargaining session was held October 11. At this meeting, CEO Taylor stated that USW's initial proposal was the "kiss of death to the plant," that "hemorrhaging had to stop" and the "goose is dead." (Bowling 40, 43; Kirk 175; ALJ 4). Eventually, USW and the Locals agreed to "work off the company's original proposal." This was a "huge undertaking for all three locals" as each had different contracts, different language issues, and different formats from Des Moines. (Bowling 40-42, 120; Kirk 173-175; ALJ 4-5).

**F. Tentative agreements reached as parties work toward Des Moines format.** Agreements were reached on a variety of topics on October 18, 19, 20, 21, 29, November 16, 18, 22, 30, and December 1. (GC 7; Bowling 43-45; ALJ 6).

**G. 30-day extension: November 19 to December 17, 2010.** Because many issues had not been discussed, including economics, on November 18, the parties extended the CBAs for 30-days. (GC 8; Bowling 45; Kirk 177-179; ALJ 5).

**H. December 13: plants "going down."** CEO Taylor started the meeting by announcing: "All three plants will be going down." (Bowling 47; Kirk 179; Robinson 334; ALJ 5). He stated that "what happens after that is in our [union] hands" and that we either have a contract or the alternative of the plants going down. There will be "no contract extension" and if the union wanted to "drink the Kool-Aid" it should do so "somewhere else." (Bowling 47; Kirk 179; Robinson 334; ALJ 5). Taylor said: "We are going to do it my way." (Robinson 334; See ALJ 5).

**I. December 13 Bargaining.** Economic terms were discussed for the first time on December 13. (Bowling 48; GC 9(a)-(d): unions “first economic proposal”; ALJ 5-6). Within “ten minutes” Titan rejected USW’s economic proposals. (Bowling 49). USW’s economic proposals included points raised by Titan, including agreement to mandatory overtime and increasing notice to be given for vacation. (Bowling 50-51; ALJ 6).

**J. December 14 Bargaining.** Working through the night, USW made another wage proposal, significantly reducing its wage demands at all three facilities. (GC 10(a); Bowling 53-56). Within minutes of receiving the new wage proposal and without explanation, Titan rejected it. (Bowling 56-57; ALJ 6). USW agreed to Titan’s overtime proposals. (Bowling 58-60; GC 10(d)). USW made another insurance proposal even though Titan had not presented its proposal. (Bowling 62-63). USW proposed to increase the employee premium copay at Freeport. (Bowling 62-63; ALJ 6). USW offered to freeze pension contributions at the current levels with some increases in years one and two at Bryan and Des Moines in an attempt to bring the rates to the same level as Freeport. (GC 10; Bowling 68; ALJ 6). At 6:43 p.m., Titan made its first health insurance proposal. (Bowling 63-64; GC 10(f); ALJ 6). USW received a two-page highlight of Titan’s proposed plans. (GC 10(f); Bowling 64, 159). This was the “first time” that the parties discussed insurance. (Bowling 64). Titan’s insurance proposal caused USW to make an information request regarding the insurance proposal in a December 15 letter. (GC 33 at page 6, items 1-5).

**K. December 15 Bargaining.** USW made new economic proposals, which included acceptance of the wage freeze for two years as sought by Titan. (Bowling 66-67; GC 7, 11(a)-(c); ALJ 6). USW proposed to freeze the pension contribution amount. (Bowling 68). USW also changed its insurance proposal to a percentage rather than fixed dollar amount.

(Bowling 70). VEBA contributions would remain the same. (Bowling 70). The parties also reached agreement on arbitration, based on changes sought by Titan. (Bowling 72-73; ALJ 6). Overall, USW's December 15 proposal was clearly a "concessionary proposal" and USW had made significant movement, getting closer to Titan's proposals. (Bowling 71-72). There were tentative agreements also on Articles 9, 13, 15, 18, 19, and 20. (GC 7; Bowling 58-62; ALJ 6).

**L. December 16 Bargaining.** USW and Titan agreed to more than 15 new terms. For example, the parties agreed to combine job classifications and to "red circle" certain workers. (GC 12; Bowling 79-84; Kirk 182-186; ALJ 6). The parties also agreed to changes to Articles 2.2 and 5.1 and 12, 13, 14, 15 and 20, 24 and Schedule F. (Bowling 84-88; GC 7; ALJ 6). In a significant concession, USW agreed to Titan's proposal for a two-year CBA. (Bowling 88). USW agreed to Titan's schedule F which contained letters of understandings. (Bowling 87-88; Kirk 188-198, 209-230; Robinson 334-338; GC 7; ALJ 6). USW had more movement and was willing to continue to bargain. (Bowling 90; Robinson 334-336).

**M. Titan's December 16 Lockout-Notice.** During the evening, Titan issued lockout notices effective for 11 p.m., December 17. (GC 13; Bowling 90-92; Kirk 186-187; Robinson 336-337; ALJ 6-7). The notices stated that the plants will be closed until a new CBA is ratified or the employees were notified. The notices were issued even though the parties were exchanging proposals, had reached significant agreements on December 16, had a meeting scheduled for December 17, and USW was waiting for information. (Bowling 92; Kirk 186-187, 209-230; Robinson 33-337; GC 33).

**N. December 17 Bargaining; Titan Walks Away.** Much progress was made on December 17. The ALJ found that on "December 17 alone (the last day that Titan Tire was at the bargaining table), the parties were able to work out agreements on over 15 items, including

agreements on issues such as the probationary period for new employees, the length of time that an employee on layoff status retains his or her recall rights, and guidelines for when employees may be assigned mandatory overtime. Even in the final minutes before Titan Tire abruptly declared that it was done negotiating, the parties reached agreements on successorship language and on reductions to the premiums that employees receive for working one of the night shifts.” (ALJ 18). Indeed, USW agreed to more than 20 new terms. (GC 7; Bowling 92-105; Kirk 188-198, 209-230; Robinson 337; GC 14(b); ALJ 7-9).

**O. ALJ Chart Highlight December 17 Progress.** The ALJ prepared a detailed chart listing all 19 agreements, which is some, but not all of the agreements reached by the parties on December 17, the day that Titan walked away from the table and locked out the unit employees at all locations. (ALJ 7-9, 15). The various terms are found in Articles 1, 6, 8, 9, 10, 11, 14, 15, 17, 19, 21, 22 and 23. (GC 7 at 3; Bowling 92-105; Kirk 188-198, 209-230; ALJ 7-9). For example, USW agreed to change from a panel of arbitrators to FMCS selection; agreed to increase the probationary period from 30 to 180 days; agreed to reduce recall rights from medical leave from 5-years to 24-months; agreed to reduce overtime language; agreed to reduced holidays, shift premiums, and life insurance amounts; and agreed to delete the successorship language. (Bowling 92-105; Kirk 188-198; Robinson 337; ALJ 7-9). Another significant concession was USW acceptance of Titan’s health, dental and STD “salaried” plan proposal. (Campbell 392; Robinson 349; Kirk 221-222; ALJ 9). Titan negotiators, after a brief discussion with the absent CEO Taylor, abruptly ended bargaining announcing that it is “done” or “that’s it.” (Bowling 107; Kirk 193; Campbell 399, 402; ALJ 10). USW wanted to keep bargaining, stating that the parties were not at impasse and that USW still had “room for movement.” (Bowling 107; Kirk 193-195; Robinson 339). Because Titan was locking out employees, USW

stated it would take back the “final” offer to the members but that did not mean that there was impasse. (Bowling 107; Robinson 339). Robinson’s assertions that the parties were not at impasse was not disputed by Titan. (Robinson 339). Titan would not agree to extend the CBA despite USW’s offer. (Robinson 339; Kirk 192). The meeting ended because Titan said it was done and it had already started escorting workers from the plants. (Robinson 339-340; Bowling 108-109). The final offer document was sent by Titan to USW on December 18 via email. (Bowling 109-110).

**P. Lockout.** While locked out, each bargaining unit voted the following week. Bryan and Freeport units rejected the “final” offer. (Bowling 110; Kirk 194-195; Robinson 195; ALJ 10). After the vote, Titan sent a letter asserting “impasse,” stating the lockout would end December 27 and that the final offers would be implemented. (GC 16; Bowling 111; GC 22; Kirk 194-198; ALJ 10). USW immediately responded that the parties were not at impasse and that bargaining should continue. (GC 26-27; Robinson 341-342; ALJ 10).

**Q. Titan Refuses to Issue Holiday Gifts.** Titan provided unit employees at the Bryan facility with an annual holiday gift certificate, per the CBA, since 2006. Titan gave the gift certificates to Local 890 officials to distribute to unit employees during the first full week of December, to ensure that employees received the certificates before he holidays. In December 2010, however, Titan did not give Bryan employees the gift certificate. (Kirk 112,115; Davis 371-372; GC 2 at 82; ALJ 5, 17).

**R. Titan Reduces Pension Contribution before February 17, 2011.** On December 26, Freeport employees returned to work after Titan ended the lockout. When they returned to work, Titan reduced its contribution to the Steelworkers Pension Trust from \$1.85 to \$1.25 (per employee per hour worked). (Kirk 198). This reduction took place before the benefits

agreement expired on February 17, 2011. See GC 18 (Freeport benefits agreement that took effect in 2006, stating that Titan Tire will make a \$1.85 contribution to the Steelworkers Pension Trust per employee per hour worked); GC 8 (November 18 agreement to pay benefits to Bryan and Freeport employees at the existing rates until February 17, 2011, unless the parties agreed to an extension or to a new benefits agreement)). (ALJ 10-11, 17).

## **ARGUMENT**

### **II. THE ALJ CORRECTLY FOUND ON THE “RECORD AS A WHOLE” THAT THE PARTIES WERE “NOT AT IMPASSE WHEN TITAN” WALKED AWAY FROM BARGAINING AND IMPLEMENTED NEW TERMS AND CONDITIONS IN DECEMBER 2010**

The ALJ found that, based on many different factors, that USW and Titan were not at impasse when Respondent’s representatives abruptly summarily walked away from the bargaining table on the night of December 17. (ALJD 3-10, 18-19; see also GC Post-hearing Brief 30-38). The ALJ found “on the record as a whole” that the parties were not at impasse when Titan Tire left the bargaining table on December 17 or when Titan Tire implemented the terms of its last, best and final offer on December 26.” (ALJ 18-19). As we show ahead, Judge Carter correctly applied *Taft Broadcasting Co.*, 163 NLRB 475, 476 (1969), to find that Titan did not prove good faith impasse, rendering the December 26 implementation unlawful.

#### **A. Taft Impasse Factors**

“Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes.” *Lawrence Livermore National Security*, 357 NLRB No. 23, slip op. at 3 (2011).

Impasse factors are outlined in *Taft Broadcasting Co.*, 163 NLRB 475, 476 (1969): “Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed”. “The *Taft* factors are appropriately applied to determine whether a bargaining impasse has been reached when parties have bargained in good faith.” *Smurfit-Stone Container*, 357 NLRB No. 144 (2011).

The “end of their rope” and futility are expressions that capture the impasse doctrine. As recently explained by the NLRB, adopting a Judge Carter decision, in *Quality Health Services of Puerto Rico, Inc. d/b/a Hospital San Cristobal*, 358 NLRB No. 89, slip op. 11 (7/25/2012):

On the issue of whether the parties bargained to an impasse, the Board defines a bargaining impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile because both parties believe they are at the end of their rope. See *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 64 (2011); *Daycon Products Co.*, 357 NLRB No. 92, slip op. at 11 (2011). The question of whether an impasse exists is a matter of judgment based on the following factors: the bargaining history; the good faith of the parties in negotiations; the length of the negotiations; the importance of the issue or issues as to which there is disagreement; and the contemporaneous understanding of the parties as to the state of negotiations. *Id.* The party asserting impasse bears the burden of proof on the issue.

These *Taft* factors, considered individually, or collectively, show that Judge Carter was correct in finding no impasse. (GC 22-23).

## **B. Applying the *Taft* Factors, Titan Did Not Prove Impasse**

### **1. USW agreed to significant concessions**

The ALJ found several factors show Titan did not prove impasse:

Based on the record as a whole, I find that the parties were not at impasse when Titan Tire left the bargaining table on December 17 or when Titan Tire implemented the terms of its last, best and final offer on December 26. The Board

has recognized that where a party has already made significant concessions indicating a willingness to compromise further, “it would be both erroneous as a matter of law and unwise as a matter of policy for the Board to find impasse merely because the party [that made concessions] is unwilling to capitulate immediately and settle on the other party's unchanged terms.” Grinnell Fire Protection Systems Co., 328 NLRB 585, 586 (1999) (noting that a finding of impasse under those circumstances “would encourage rigid, inflexible posturing in place of the give-and-take of true bargaining”), enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied 534 U.S. 818 (2001); see also Royal Motor Sales, 329 NLRB 760, 772 (1999) (finding that the parties were not at impasse, in part because one of the union's proposals demonstrated flexibility and significant movement, and thus raised the possibility that further negotiation might produce other or more extended concessions), enfd. 2 Fed. Appx. 1 (D.C. Cir. 2001). Thus, even if we accept Titan Tire's assertion that it reached the end of its rope with negotiations on December 17, the evidentiary record shows that the parties were not at impasse because the Union remained more than willing to negotiate and, if necessary, make additional concessions to reach an agreement. Specifically, the length of negotiations (approximately 3 months) remained reasonable, and the outlines of a new collective-bargaining agreement were taking shape, save for a handful of remaining “open” issues (seven, according to Titan Tire) that needed to be resolved after the numerous tentative agreements that the parties made on December 17. Rather than hearing the Union out on the remaining issues (none of which could be characterized as a deal-breaker, given the Union's demonstrated desire to hammer out an agreement and avoid plant closures), Titan Tire left the bargaining table the moment the existing collective-bargaining agreement expired in the evening on December 17.

(ALJD 18).

Despite the drastic changes sought in substance and form by Titan, USW made significant movements in an effort to reach new agreements. All three units agreed to work off Titan's format, and to try to reach a standard agreement, itself a “huge” concession that required much work, time, and effort by USW bargainers, consuming much of October and November bargaining. In essence, the parties were creating two new CBAs at Freeport and Bryan at the same time.

In its exceptions, Titan states that the parties “were able to reach agreement on 99% of the collective bargaining agreement” but that on certain issues, Titan “had never changed” its position and “was not going to change its position.” (Brief 21). Titan admits also that much of

the progress occurred during the last week of bargaining, including the last day of bargaining, when Titan walked away.

In addition to drastically rewriting the Freeport and Bryan CBAs to follow Titan's preferred format, Titan sought significant concessions in economics and non-economic areas. For example, Titan sought to freeze wages for 2-3 years, freeze the pension, reduce vacations and holidays, increase the amount of mandatory overtime, increase the probationary period from 60 days to 365 days, eliminate the panel of arbitrators, reduce the progression for discipline, reduce business leave time, reduce the number of job classifications by more than 50%, and to change to a new healthcare plan with a whopping 50% premium co-pay up from the 2-5% rate. (Titan Ex. 2; Campbell 405; Compare 2006 CBAs at GC 2, 17 with Titan's final offer at GC 20). Titan's president and chief negotiator, however, did not know the cost savings from going from the current insurance plan to the salaried plan. (Campbell 404-406). Titan had "no idea" of the cost savings due to Union's agreement to the various concessions, thus reflecting that its rigidity was without factual basis. (Campbell 406).

In view of USW's major movement, "good dialogue," and agreements to more than 30 items on December 16 and 17, Titan's decision to walk away and then implement new terms was unlawful. (ALJ 18). The decision to end bargaining and walk away was made by the absent CEO, who did not testify and who was not aware of the significant progress made. Titan negotiators ended bargaining on December 17 after a brief phone conversation with CEO Taylor who told Campbell: "There is no more. We're at the end." (Campbell 399, 402). This dictate by the absent CEO shows no consideration as to the state of the bargaining. This abrupt decision did not recognize the 30-plus agreements reached on December 16-17 or USW's announced and

demonstrated flexibility. The “no more” dictate of December 13 is consistent, however, with the CEO’s earlier threats.

Titan cites no NLRB law demonstrating any error in its 9-pages of its brief devoted to impasse. Titan does not show how Judge Carter misapplied Board law. Judge Carter’s decision, which cites NLRB law, is well-reasons and supported by *Quality Health Services of Puerto Rico, Inc. d/b/a Hospital San Cristobal*, 358 NLRB No. 89, slip op. 11 (7/25/2012); *Newcor*, 345 NLRB 1229, 1238 (2005) (“The record here shows that the negotiations had not broken down, but rather were succeeding in narrowing the differences between the parties and moving them closer to a contract”); *Whitesell Corp.*, 352 NLRB 1196, 1197-1198 (2008) (employer unlawfully declared impasse even though parties exchanged proposals and reached agreements the day before and day of impasse declaration); *Towne Plaza Hotel*, 258 NLRB 69, 78 (1981) (employer's declaration of impasse invalid where the union had significantly reduced its wage demand only two weeks earlier and the union never stated it was unwilling to make further concessions); *Royal Motor Sales*, 329 NLRB 760, 763 (1999) (rather than explore the possibilities raised by the Union's proposal, however, the Respondent “rushed to declare impasse and implement” its own final proposal. This action “precluded further exploration of possible tradeoffs and foreclosed any finding that good-faith bargaining exhausted the prospects of reaching an agreement”; no valid impasse when the Union had made a dead-lock breaking proposal only 2 days earlier); *Royal Motor Sales*, 329 NLRB at 772 (given the Union's demonstrated willingness to make further compromises on major issues, the company was “required to recognize that negotiating sessions might produce other or more extended concessions”)(citation omitted).

## 2. Titan's pre-determined scheme to get to "impasse" shows bad faith

Titan does not and cannot challenge the testimony of John Bowling and Joseph Davis. Their testimony shows that Titan entered negotiations with a predetermined scheme to bargain to impasse and cause a labor dispute. Bowling testified that Titan CEO Taylor said on August 20: "we'd come to impasse, we'd go on strike, and then he pointed to the wall and he made the, like he was drawing a newspaper article, and he said, I'll place a full-page ad in the paper. I'll post the wages and benefits. I'll have no problem getting people in here to replace you." (Bowling 30-31). Likewise, Davis testified: "[Morry Taylor] started telling us on, his take on how the contract was going to play out. He told us that we wouldn't come to an agreement, that we would come to impasse, that the local would go out on strike, and that he would place a full place ad" and he would have no problem "filling our jobs." (Davis 370). CEO Taylor did not testify and there was no effort to rebut or challenge this testimony.

These comments reflect bad faith and a scheme to reach impasse by seeking drastic changes based on artificial deadlines. *Newcor Bay*, 345 NLRB 1229, 1238-1239 (2005) (no impasse where, *e.g.*, respondent sought drastic changes, yet imposed the contract expiration date as an artificial deadline for negotiations, bargained for only a short period, and declared impasse at a time when the parties were reaching agreements on bargaining issues); *Regency Service Carts*, 345 NLRB 671, 672 (2005) ("comments indicative of the Respondent's bad faith" include the company stating "[y]ou don't get it. You go on as long as you want, impasse is not an issue. Sooner or later, defecate or get off the pot." This statement strongly implied that the Respondent manifested no real intent to adjust differences, but essentially adopted the take-it-or-leave-it approach"); *PCI, Inc.*, 2000 WL 33664214 (2000) ("The evidence demonstrates instead that the Company, with a motive of getting rid of the Union and restoring the plant's nonunion status,

had a predetermined strategy of frustrating negotiations to bring about an impasse, to provoke the employees into striking, and to permanently replace them”).

### **3. Titan’s inflexible position shows bad faith**

Titan continues to state that its bargaining position remained virtually unchanged from the “kick off” meeting. (Brief 21). Titan admits that there “is no dispute that there was significant movement by the Union during the last week” but that as to certain issues, “there was no change in the position by Titan.” (Brief 23).

Titan’s inflexibility, which it admits and trumpets, coupled with drastic changes sought in both form and substance, and artificial deadlines, does not support a finding of impasse. *General Electric Co.*, 150 NLRB 192, 196 (1964), *enfd.* 418 F.2d 736 (2d Cir. 1969) (“a party who enters into negotiations ‘with a predetermined resolve not to budge from an initial position’” demonstrates an attitude “inconsistent with good-faith bargaining”); *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001) (refusal to budge from an initial bargaining position can constitute evidence of bad-faith bargaining); *John Ascuaga's Nuggett*, 298 NLRB 524, 527 (1990) (“refusal[s] to budge from an initial bargaining position, [refusals] to offer explanations for one’s bargaining proposals (beyond conclusional statements that that is what a party wants), and [refusals] to make any efforts at compromise in order to reach [a] common ground” can constitute evidence of bad-faith bargaining).

### **4. The contemporaneous understanding shows no impasse**

The “contemporaneous understanding of the parties as to the state of negotiations” shows no impasse. USW made repeated compromises, moving closer to Titan’s Des Moines format in every respect as the December 17 expiration date approached. Titan’s negotiators did not declare “impasse” and did not make what it called its “Last, Best, and Final” offer until late on the evening on December 17. At no time during bargaining the week of December 13 did any

Titan negotiator claim impasse, or that further bargaining would be futile, or offer to allow additional time to review the “final” offer before locking out the workers and implementing new terms. Only after implementation, did Titan assert “impasse.” (GC 16, 22).

**5. Titan's December 16-lockout announcement shows bad faith**

Despite the significant movement by USW the week of December 13, including more than 15 agreements reached on December 16, Titan told employees on December 16 that they would be locked out the next day.

**6. Titan's frustration with USW's pace in agreeing to concessions**

Titan impatience cannot create impasse. *Newcor*, 345 NLRB 1229, 1238 (2005) (while company negotiator “was impatient with the Union's pace in agreeing to concessions, his frustration is not the equivalent of a valid impasse, nor did it mean that a negotiated settlement was not within reach”); *General Die Caster*, JD-26-11; 2011 WL 1654422 (2011) (company's “frustration with the Union's pace in agreeing to what the Respondent was seeking is not the equivalent of a valid impasse, nor does it indicate that a negotiated agreement was not possible”).

**7. Titan's refusal to provide information precludes impasse**

Judge Carter's decision describes in great detail Titan's admitted failure to produce relevant bargaining information. (ALJ 11-15). The Judge correctly found that Titan” does not deny that it “failed to provide some of the information” requested, including medical expense data, a compounding table for costing changes in wages, pension actuarial data, and information related to the health care plan. (ALJ 11-12, 14). Titan “acknowledges that it did not provide the specific information set forth in the decision.” (Brief 14, 16, 17).

Robinson and Apaliski testified that USW submitted several information requests during bargaining, including the day after Titan made its December 14 healthcare proposal (GC 14), the first day the subject was discussed. (Robinson 334, 337-338; Apaliski 252-279; GC 33-34).

Titan did not provide much information related to pensions, labor costs, insurance, and how the salaried plan would impact workers; information which involved matters at the core of collective bargaining. (GC 34: Summary Chart; GC 33, “Insurance Information,” items 1-5 at page 6; Apaliski 272-279; Robinson 334-338).

The ALJ correctly rejected Titan’s claim that the information was not relevant because the parties had reached tentative agreements on pension and medical plan issues. This does not excuse an employer from having to produce relevant information. (ALJ 15). Titan’s failure to provide relevant and necessary bargaining-related information *standing alone* precludes a finding of impasse. See *Decker Coal Co.*, 301 NLRB 729, 740 (1991) (“A legally recognized impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations”); *Wilshire Plaza Hotel*, 353 NLRB 304, 305 (2008) (“Respondent failed to provide to the Union admittedly relevant detailed calculations for the cost savings that the Respondent expected from its proposed wage and benefit concessions that were ‘core’ issues in the negotiations”).

**8. Titan’s threats to close the facilities and refusal to meet shows bad faith**

Titan’s bad faith was first shown by its May 2010 threat to shut down the Freeport and Bryan facilities. Titan’s chief bargainer and president, William Campbell, sent and posted May 12 closing notices. (GC 3, 19). Campbell announced that Titan intends to “close” the facilities effective November 15, 2010, near the CBA’s expiration dates. (GC 3, 19). Despite USW’s May 17 letter demanding to bargain over the decision or “effects” (GC 25, Titan bates-stamp 1693), Titan did not meet with USW. (Campbell 379, 409-410; Robinson 321-322).

On other occasions, such as at the August 20 meeting or at the kick-off meeting or the December 13 meeting, CEO Taylor said he would “shut down the plants.” These pre- and post-

bargaining threats by Titan’s top two officers are factors showing bad faith. *Regency Service Carts*, 345 NLRB 671, 672 fn. 3 (2005) (The Board will “consider the earlier bargaining as background in elucidating the nature of the Respondent’s conduct at the table during the 10(b) period”).

\* \* \*

In sum, applying the *Taft* factors, Judge Carter correctly found that Titan did not meet its burden of proving good-faith impasse. Titan’s December 23 implementation of its “last best final offer” at the Bryan and Freeport facilities was therefore unlawful. *E.I. Dupont de Nemours*, 355 NLRB No. 176 slip op. at 1-2 (2010) (“It is settled law that when parties are engaged in negotiations for a collective-bargaining agreement an employer is obliged to refrain from making unilateral changes, absent an impasse in bargaining for the agreement as a whole”) (citations omitted).

## **II. TITAN’S IMPASSE ARGUMENTS ARE WITHOUT MERIT**

Titan argued to the ALJ that impasse existed for three reasons. These reasons demonstrate a lack of impasse.

### **A. The “Take It or Leave It” Argument**

Titan argued that from “day one” it made its “position clear” what it “needed in the contract” and it “maintained its position on the issues that it stuck to at the end.” (Opening Statement 21). This is a surprising position to take. As shown in Argument I, such a “take it or leave it approach” is evidence of bad faith and does not help Titan meet its burden. See *General Electric Co.*, 150 NLRB 192, 196 (1964), *enfd.* 418 F.2d 736 (2d Cir. 1969) (“a party who enters into negotiations ‘with a predetermined resolve not to budge’ shows lack of good faith”). In other words, Titan’s admitted inflexibility does not demonstrate intent to reach an agreement and cannot support a finding of good faith impasse.

## **B. The “30-Day” Extension Argument**

Titan also argued that the November 18 agreement to extend the CBA expiration for 30-days supports an impasse finding. (Opening Statement 20; GC 8). This claim is not supported by the facts, the law or logic. As of November 18, the parties were still reformatting the Freeport and Bryan CBAs to follow Des Moines and economic issues had not been discussed. The November 18 “extension” cannot support a finding of impasse just because the extension period ended. Indeed, USW’s December 17 offer to extend the CBA but Titan refused.

## **C. The “No Choice” Argument**

Titan argued it had “no choice” but to implement its final offer because it was losing money and USW was moving slowly. (Opening Statement 21-22). The Board has repeatedly rejected such a claim, holding that a company’s “feelings that the Union should have realized the seriousness and immediacy of its financial condition is immaterial and the Union cannot be made responsible for the resulting events because it was skeptical of the Employer's claims and therefore was slow to respond to or failed to immediately capitulate to Respondent's terms.” *Page Litho, Inc.*, 311 NLRB 881, 889 (1993), *enfd.* in relevant part 65 F.3d 169 (6th Cir. 1995).

In fact, many of the implemented changes did not take place until February or March 2011, showing this urgency claim is without merit. (GC 15 at “Transition issues” at 4th unnumbered page from the last page; GC 20 at “Transition issues” at last page).

\* \* \*

In sum, Titan’s impasse-arguments are without merit.

### **III. TITAN'S (A) REDUCTION OF PENSION CONTRIBUTIONS FOR FREEPORT FACILITY EMPLOYEES AND (B) FAILURE TO PAY HOLIDAY BONUS FOR BRYAN FACILITY EMPLOYEES IS UNLAWFUL**

It is unlawful for an employer to make unilateral changes as to mandatory subjects (1) before impasse or (2) before a CBA has expired, *NLRB v. Katz*, 369 U.S. 736, 743,747 (1962). Titan violated these legal principles. Titan admits it made both unilateral changes and offered no defense at the hearing. (ALJ 17, 18). As a result, the ALJ found that these two unilateral changes, separate from the impasse ULP, were unlawful. (ALJ 17-18). Titan devotes one page to these exceptions and cannot demonstrate any error. (Brief 29-30).

**First**, Titan admitted it “reduced payments to the Steelworkers Pension Trust for employees at the Freeport facility” in December 2010. (Answer ¶VII(b)). Titan reduced the rate from \$1.85 an hour to \$1.25, the latter rate is from Titan’s “final” Freeport implemented terms. (GC 20 at unnumbered page 56, entitled “Steelworkers Pension Trust”). While the CBA expired on December 17, Titan remained bound to the “Benefits Insurance Agreement,” which required a \$1.85 pension contribution rate until February 17, 2011, when that Agreement expired. (GC 18 at 28; ALJD 10-11). Even assuming an impasse as of December 17, Titan must pay the pension benefit contribution of \$1.85 per at least until the agreement expired on February 17, 2011. The finding of unlawful reduction supports the lack of impasse argument and also constitutes a separate violation, regardless of whether or not the overall implementation was unlawful. (ALJD 17-18)

Titan’s appeal fails to confront the ALJ’s undisputed findings or Board law. That Titan’s imposed final offer provided for a reduced contribution rate does not permit Titan to prematurely terminate the contractual time period. Titan ignores the fact that the CBA as to pension contributions remained in effect until February 17, 2011. (ALJ 4, 17).

**Second**, Titan refused to pay the \$25 gift certificate due under Bryan’s CBA-Letter #22. (GC 2: 2006 CBA at 82; Bowling 112-115; Davis 371-372). The CBA Letter 22 required Titan to use sales proceeds from the vending machines to provide a \$25 gift certificate to the Bryan facility workers before Christmas. The certificate was to bear the name of Bryan Local as the provider. It was issued between Thanksgiving and Christmas holidays. (Bowling 112-115; Davis 371-372). Titan admits it “did not pay employees the \$25 holiday gift certificate in 2010.” (Answer ¶VII(a)). There is no justification for this unilateral change. As a result, ALJ correctly ruled that Titan’s failure to issue the holiday gift certificates was unlawful. (ALJ 17).

\* \* \*

In sum, the Board should affirm the ALJ’s findings and rulings finding that Titan’s unilateral changes as to pension contributions and the gift certificate payments were unlawful.

**IV. THE REMEDY OF RESTORING THE TERMS OF THE EXPIRED CBA IS APPROPRIATE WHERE AN EMPLOYER HAS UNLAWFULLY IMPLEMENTED NEW TERMS UPON THE CBA’S EXPIRATION**

Titan argues that even if the Board were to adopt the ALJD, Titan should not be required to restore the terms and conditions set forth in the expired agreements. Titan claims such a remedy is an “unjust penalty.” (Brief 31).

Section 10(c) provides that the Board, upon a finding that an unfair labor practice has been committed, “shall issue ... an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.” 29 U.S.C. § 160(c). In situations involving unlawful unilateral changes, the required remedy is to order restoration of the status quo ante as a means to ensure meaningful bargaining. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (“There has been no showing that the Board's order

restoring the status quo ante to insure meaningful bargaining is not well designed to promote the policies of the Act”); See also *Lapeer Foundry & Machine*, 289 NLRB 952, 955-956 (1988); *Wilco Mfg.*, 321 NLRB 1094, 1100 (1996)(and cases cited therein). As a result, Titan’s exception to the remedy is without merit.

### CONCLUSION

Applying the *Taft* and other controlling law, Judge Carter correctly held that Titan failed to reach good-faith lawful impasse and unlawfully implemented new terms and conditions. During 2010 bargaining, Titan walked away from the bargaining table before the parties had come to the end of their ropes. Indeed, Titan walked away as part of its predetermined plan to reach “impasse” in order to cause a labor dispute. In addition, Titan made unilateral changes and failed to provide relevant and necessary bargaining information. As a result, we ask the Board to affirm the Judge's rulings, findings, and conclusions and to adopt the recommended Order.

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## CERTIFICATE OF SERVICE

I certify that a copy of **USW's Answering Brief In Support of ALJD** was emailed and mailed on August 3, 2012 to:

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