UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	
CHICAGO BRIDGE & IRON COMPANY N.V. a foreign corporation,	)	
CHICAGO BRIDGE & IRON COMPANY, a corporation, and	)	DOCKET NO. 9300
PITT-DES MOINES, INC., a corporation.	)	

ORDER ON RESPONDENTS' MOTION TO STRIKE TRIAL TESTIMONY

I.

On January 13, 2003, Respondents filed a Motion to Strike Trial Testimony Relating to Exhibits CX 1577 and CX 1578. Complaint Counsel filed its opposition on January 15, 2003. For the reasons set forth below, Respondents' motion is GRANTED in part and DENIED in part.

II.

Complaint Counsel asserts that Respondents' expert, Dr. Barry Harris, testified on direct examination that it is inappropriate to compare budget prices and firm prices. On cross examination, Complaint Counsel sought to elicit testimony from Harris regarding CX 1577 and CX 1578, two transcripts of the deposition taken of John Vaughn, an expert witness whom Respondents chose not to call at trial. Complaint Counsel represented that it intended to use CX 1577 and CX 1578 to impeach Harris' testimony.

At the time Complaint Counsel began its questioning of Harris about CX 1577 and CX 1578, the two exhibits were in evidence, but were subject to a pending motion to withdraw them. Complaint Counsel was permitted to question Harris about the statements made by Vaughn in CX 1577 and CX 1578 for proper impeachment purposes only and was instructed that if CX 1577 and CX 1578 were excluded from evidence, a motion to disregard portions of Harris' testimony that refer to those documents would be entertained. Tr. at 7602, 7612-13.

Subsequent to the testimony elicited from Harris about the statements made by Vaughn, Respondents' motion to withdraw CX 1577 and CX 1578 was granted. Tr. at 7666-74. The two exhibits had previously been admitted pursuant to a joint stipulation. Respondents demonstrated that inclusion of the two exhibits in the joint stipulation was inadvertent and demonstrated good cause for withdrawing the two exhibits. Complaint Counsel's independent bases for admission of CX 1577 and CX 1578 were rejected. Thus, CX 1577 and CX 1578 are not in evidence.

III.

By this motion, Respondents seek to strike testimony elicited by Complaint Counsel from Harris about the statements made by Vaughn in CX 1577 and CX 1578. Complaint Counsel asserts that the out of court statements made by Vaughn are contradictory or inconsistent statements that may be used to impeach the testimony of Harris. Complaint Counsel does not assert, nor has it established, that the statements made by Vaughn were reviewed or relied upon by Harris in forming Harris' expert opinions in this case.

"The credibility of a witness may be attacked by any party, including the party calling the witness." Fed. R. Evid. 607. Complaint Counsel seeks to attack Respondents' expert's credibility by confronting the witness with contradictory statements made not by this witness, but by another expert witness who Respondents had retained but did not call to testify at trial. This is not proper impeachment. In *Bryan v. John Bean Div. of FMC Corp.*, 566 F.2d 541 (5th Cir. 1978), the Court of Appeals held that cross-examining counsel's use of the written conclusions of a non-testifying expert "under the guise of impeachment" of a testifying expert was impermissible. *Id.* at 546-47. There, defendant's expert witness had partially based his opinion on statistical evidence established by two other non-testifying experts. The Court of Appeals held that the conclusions reached by non-testifying experts did not impeach the testifying expert's use of the statistics. *Id.* *See also* *Box v. Swindle*, 306 F.2d 882, 887 (5th Cir. 1962) (reports of non-testifying expert examined by a testifying expert and conflicting with the testimony of the expert could not be admitted even as impeachment evidence unless the testifying expert based his opinion on the opinion of the examined report.) In the instant case, Complaint Counsel has not established that Harris relied upon or even reviewed the conclusions reached by Vaughn.

Complaint Counsel, who proffered the statements made by Vaughn, has not demonstrated that the statements are proper impeachment evidence. The cases cited by Complaint Counsel in its motion in no way support its argument that the hearsay statements of a non-testifying witness that are not in evidence may be used to impeach the credibility of an expert witness. The majority of Complaint Counsel's cases are criminal cases: *U.S. v. Havens*, 446 U.S. 620, 624-26 (1980) (government permitted to use an item of clothing that had been seized through an invalid search to impeach criminal defendant's statement about such item of clothing); *U.S. v. Abel*, 469 U.S. 45, 55 (1984) (statement made at trial in criminal case by one witness that demonstrated bias of another witness admissible for impeachment); *U.S. v. Warren*, 453 F.2d 738, 742 (2nd Cir. 1972) (records showing how often criminal defendant gave drugs to patients admissible to impeach

defendant's testimony that he had dispensed illegal drug to only a small percentage of his patients); *U.S. v. Jamieson*, 806 F.2d 949, 952 (10th Cir. 1986) (where defendant testified he had never prescribed drugs except for a legitimate medical purpose, defendant's medical records admissible to impeach); *U.S. v. Dweck*, 913 F.2d 365, 369 (7th Cir. 1990) (where wife of criminal defendant testified she had met husband in 1979, government permitted to impeach wife by asking if husband had been in prison in 1979 even though Fed. R. Evid. 609 prohibits impeachment of defendants by convictions over 10 years old). The civil cases cited by Complaint Counsel are also not on point: *Lubbock Feedlots Inc.*, 630 F.2d 250, 261-62 (5th Cir. 1980) (where first witness on the stand had made a prior inconsistent statement, second witness permitted to testify about first witness' previous out of court statement); *DiStefano v. Otis*, 1997 U.S. Dist. LEXIS 14039, *2 (E.D. Fla. 1997) (plaintiffs' expert witness' own elevator maintenance records maintained when he had been an elevator mechanic admissible to impeach him on the issue of the claimed insufficiency of defendant's maintenance records); *Jones v. Southern Pac. RR*, 962 F.2d 447, 449 (5th Cir. 1992) (records of safety infractions committed by train conductor admissible to impeach testimony offered by that same train conductor). In the instant case, Complaint Counsel is clearly not referring to any prior statement made by Harris or to any of Harris' own records or documents.

As previously ruled, the deposition statements of Vaughn are not in evidence. Use of these statements with Harris is not proper impeachment. Thus, the portions of the trial transcript containing or referring to the statements of Vaughn will be disregarded. However, Respondents overreached in their motion to strike, seeking to strike more than just the testimony wherein Harris was asked about the statements made by Vaughn. Accordingly, Respondents' motion is GRANTED in part and DENIED in part. The following portions of the trial transcript are not in evidence and will be disregarded:

> 7604:24-7605:8; 7616:11-13; 7618:9-20; 7619:9-10; 7619:18-7622:5; 7624:20-7625:11; and 7629:18-7630:5.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: January 28, 2003