

In the Matter of

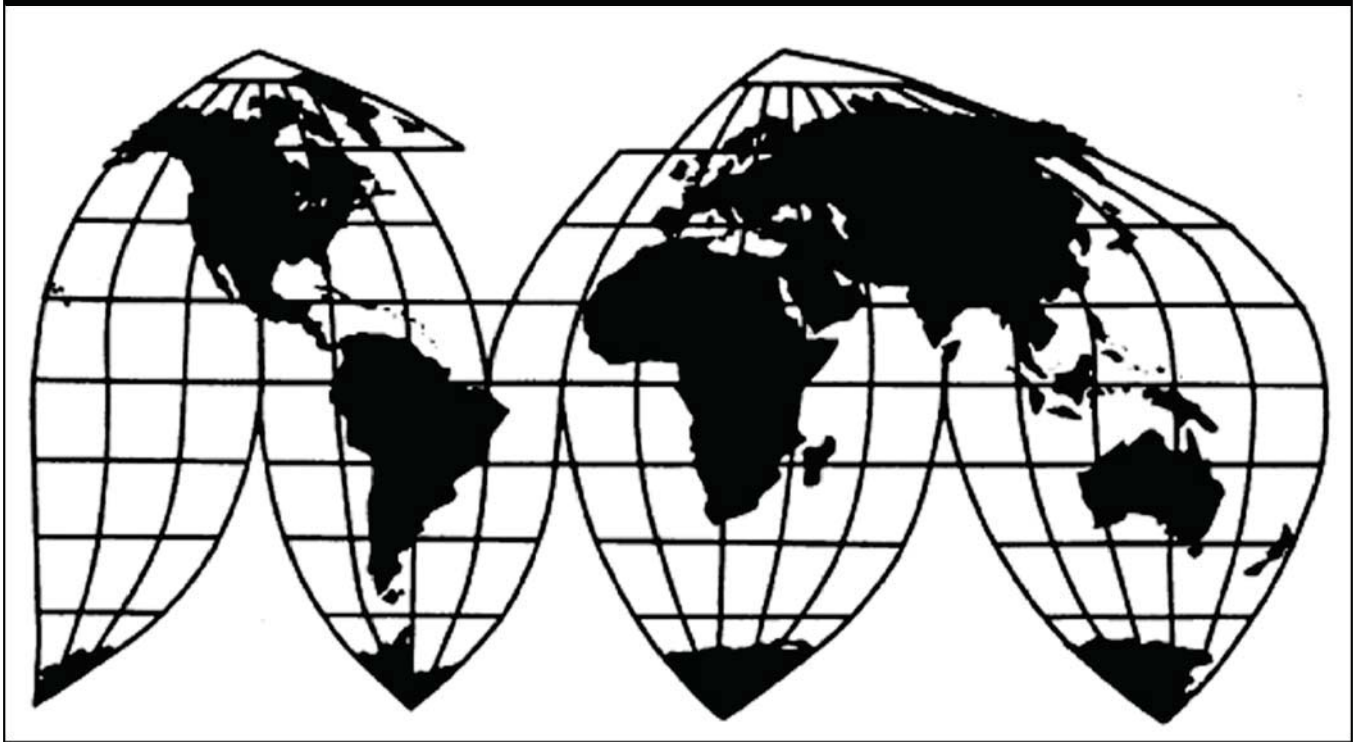
**Certain Cast Steel Railway Wheels,
Processes for Manufacturing or Relating to
Same and Certain Products Containing
Same**

Investigation No. 337-TA-655

Publication 4265

October 2011

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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Washington, DC 20436**

U.S. International Trade Commission

Washington, DC 20436
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In the Matter of

Certain Cast Steel Railway Wheels, Processes for Manufacturing or Relating to Same and Certain Products Containing Same

Investigation No. 337-TA-655



UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

IN THE MATTER OF

**CERTAIN CAST STEEL RAILWAY WHEELS,
PROCESSES FOR MANUFACTURING OR
RELATING TO SAME AND CERTAIN
PRODUCTS CONTAINING SAME**

INV. NO. 337-TA-655

**ISSUANCE OF A LIMITED EXCLUSION ORDER AND CEASE AND DESIST
ORDERS; TERMINATION OF THE INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has issued a limited exclusion order as well as cease and desist orders directed to cast steel railway wheels and products containing same manufactured by or for Respondents using any of the trade secrets asserted in this investigation.

FOR FURTHER INFORMATION CONTACT: Panyin A. Hughes, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3042. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on September 16, 2008, based on a complaint filed on August 14, 2008, by Amsted Industries Incorporated of Chicago, Illinois ("Amsted"). 73 *Fed. Reg.* 53441-42 (Sept. 16, 2008). The complaint alleged violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain cast steel railway wheels and certain products containing same by reason of misappropriation of trade secrets, the threat or effect of which is to substantially injure an industry in the United States. The complaint named four respondents: ~~Tianrui Group Company Limited of China; Tianrui Group Foundry Company Limited of China~~ (collectively "Tianrui"); Standard Car Truck Company, Inc. of Park Ridge, Illinois ("SCT"); and Barber Tianrui Railway Supply, LLC of Park Ridge, Illinois ("Barber").

On October 16, 2009, the Administrative Law Judge (“ALJ”) issued his final initial determination (“ID”) finding a violation of section 337 by respondents. He found that Amsted owns the asserted trade secrets, the ABC Trade Secrets, and that respondents misappropriated the trade secrets via disclosure by former employees of Amsted’s predecessors, the threat or effect of which is to destroy or substantially injure an industry in the United States. On October 29, 2009, the ALJ issued his recommended determination (“RD”) on remedy and bonding. The ALJ recommended that the Commission issue a limited exclusion order as well as cease and desist orders directed to respondents found in violation of section 337. He further recommended that the Commission set a bond of five percent of entered value of accused products imported during the period of Presidential review.

On October 30, 2009, SCT and Barber (“SCT-Barber”) filed a joint petition for review of the final ID. Tianrui filed a petition for review on November 2, 2009, and complainant Amsted filed a contingent petition for review that same day. Amsted filed responses to SCT-Barber’s and Tianrui’s petitions on November 9 and 10, respectively, and SCT-Barber and Tianrui filed their responses to Amsted’s petition on November 10. The Commission investigative attorneys (“IAs”) filed responses to the various petitions for review on November 10. The IAs did not petition for review of the ID.

On December 17, 2009, the Commission determined not to review the ID and requested briefing on remedy, the public interest, and bonding. *74 Fed. Reg.* 68282-83 (Dec. 23, 2009). On December 29, 2009, the parties submitted written submissions on the issues for which the Commission requested further briefing, and submitted replies to the written submissions on January 6, 2010.

Having reviewed the record in this investigation, including the ID and the parties’ written submissions, the Commission has determined that the appropriate remedy is a limited exclusion order lasting a period of ten (10) years as well as cease and desist orders, lasting the same period, directed to Respondents. The limited exclusion order prohibits the entry of cast steel railway wheels and products containing same, manufactured using any of the asserted ABC Trade Secrets by or on behalf of, or imported by or on behalf of, Respondents, or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, for consumption in the United States. The cease and desist orders prohibit Respondents from importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), soliciting U.S. agents or distributors, or aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of cast steel railway wheels and products containing the same manufactured using any of the asserted ABC Trade Secrets.

The Commission further determines that the public interest factors enumerated in section 337(d) and (f) (19 U.S.C. §§ 1337(d), (f)) do not preclude issuance of the limited exclusion order. Finally, the Commission determines that a bond of five percent of the entered value is required to permit temporary importation during the period of Presidential review (19 U.S.C.

§ 1337(j)) of cast steel railway wheels and products containing the same that are subject to the order. The Commission's order and opinion were delivered to the President and to the United States Trade Representative on the day of their issuance.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, and in sections 210.50 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.50.

By order of the Commission.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott". The signature is fluid and cursive, with a large initial "M" and a long, sweeping tail.

Marilyn R. Abbott
Secretary to the Commission

Issued: February 16, 2010

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

IN THE MATTER OF

**CERTAIN CAST STEEL RAILWAY WHEELS,
PROCESSES FOR MANUFACTURING OR
RELATING TO SAME AND CERTAIN
PRODUCTS CONTAINING SAME**

INV. No. 337-TA-655

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Barber Tianrui Railway Supply, LLC of 865 Busse Highway, Park Ridge, Illinois 60068-2359, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), soliciting United States agents or distributors, or aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of covered products in violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337.

I.

Definitions

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Complainant" shall mean Amsted Industries, Incorporated of Two Prudential Plaza, 180 North Stetson Street, Chicago, Illinois, 60601.

(C) “Respondent” means Barber Tianrui Railway Supply, LLC of 865 Busse Highway, Park Ridge, Illinois 60068-2359.

(D) “Person” shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, successors, or assigns.

(E) “United States” shall mean the fifty States, the District of Columbia, and Puerto Rico.

(F) The terms “import” and “importation” refer to importation for entry for consumption under the Customs laws of the United States.

(G) The term “covered products” shall mean cast steel railway wheels manufactured using any of the trade secrets asserted by Complainant in this investigation (the “ABC Trade Secrets”).

II.

Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by the Order. For a period of ten (10) years from the effective date of this Order, Respondent shall not:

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of covered products.

IV.

Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the ABC Trade Secrets licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

V.

Reporting

For purposes of this reporting requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. However, the first report required under this section shall cover the period from the date of issuance of this Order through June 30, 2010.

This reporting requirement shall continue in force for a period of ten years from the date of issuance of this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of (i) covered products that the Respondent has imported and/or (ii) covered products that the Respondent has sold in the United States after importation during the reporting period; and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period. A Respondent filing written submissions must file the original document and two copies with the Office of the Secretary. Any Respondent desiring to submit a document to the Commission in confidence must file the original and a public version of the original with the Office of the Secretary and serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

VI.

Record-keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in

¹ Complainant must file a letter with the Secretary identifying the attorney to receive the reports or bond information. The designated attorney must be on the protective order entered in the investigation.

detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so choose, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form as are required to be retained by subparagraph VI(A) of this Order.

VII.

Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII (A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this

Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect for ten (10) years from the date of issuance of this Order.

VIII.

Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of this Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

XI.

Bonding

The conduct prohibited by Section III of this Order may be continued during the sixty (60) day period in which this Order is under review by the United States Trade Representative as delegated by the President, 70 *Fed Reg* 43251 (July 21, 2005), subject to Respondent posting a bond of in the amount of 5% of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported during the period of Presidential review are subject to the entry bond as set forth in the limited exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by Complainant in connection with the issuance of temporary exclusion orders. *See* Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this order. Upon acceptance of the bond by the Secretary: (a) the Secretary will serve an acceptance letter on all parties; and (b) the Respondent must serve a copy of the bond and any accompanying documentation on Complainant's counsel.²

The bond is to be forfeited in the event that the United States Trade Representative approves, or does not disapprove within the review period, this Order, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final

² See fn. 1.

determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Marilyn R. Abbott
Secretary to the Commission

Issued: February 16, 2010

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

IN THE MATTER OF

**CERTAIN CAST STEEL RAILWAY WHEELS,
PROCESSES FOR MANUFACTURING OR
RELATING TO SAME AND CERTAIN
PRODUCTS CONTAINING SAME**

INV. No. 337-TA-655

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Standard Car Truck Company, Inc. of 865 Busse Highway, Park Ridge, Illinois 60068-2359, Illinois, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), soliciting United States agents or distributors, or aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of covered products in violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337.

I.

Definitions

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Complainant" shall mean Amsted Industries, Incorporated of Two Prudential Plaza, 180 North Stetson Street, Chicago, Illinois, 60601.

(C) “Respondent” means Standard Car Truck Company, Inc. of 865 Busse Highway, Park Ridge, Illinois 60068-2359.

(D) “Person” shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, successors, or assigns.

(E) “United States” shall mean the fifty States, the District of Columbia, and Puerto Rico.

(F) The terms “import” and “importation” refer to importation for entry for consumption under the Customs laws of the United States.

(G) The term “covered products” shall mean cast steel railway wheels manufactured using any of the trade secrets asserted by Complainant in this investigation (the “ABC Trade Secrets”).

II.

Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by the Order. For a period of ten (10) years from the effective date of this Order, Respondent shall not:

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of covered products.

IV.

Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the ABC Trade Secrets licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

V.

Reporting

For purposes of this reporting requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. However, the first report required under this section shall cover the period from the date of issuance of this Order through June 30, 2010.

This reporting requirement shall continue in force for a period of ten years from the date of issuance of this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of (i) covered products that the Respondent has imported and/or (ii) covered products that the Respondent has sold in the United States after importation during the reporting period; and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period. A Respondent filing written submissions must file the original document and two copies with the Office of the Secretary. Any Respondent desiring to submit a document to the Commission in confidence must file the original and a public version of the original with the Office of the Secretary and serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

VI.

Record-keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in

¹ Complainant must file a letter with the Secretary identifying the attorney to receive the reports or bond information. The designated attorney must be on the protective order entered in the investigation.

detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so choose, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form as are required to be retained by subparagraph VI(A) of this Order.

VII.

Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII (A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect for ten (10) years from the date of issuance of this Order.

VIII.

Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of this Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

XI.

Bonding

The conduct prohibited by Section III of this Order may be continued during the sixty (60) day period in which this Order is under review by the United States Trade Representative as delegated by the President, 70 *Fed Reg* 43251 (July 21, 2005), subject to Respondent posting a bond of in the amount of 5% of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported during the period of Presidential review are subject to the entry bond as set forth in the limited exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by Complainant in connection with the issuance of temporary exclusion orders. *See* Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this order. Upon acceptance of the bond by the Secretary: (a) the Secretary will serve an acceptance letter on all parties; and (b) the Respondent must serve a copy of the bond and any accompanying documentation on Complainant's counsel.²

The bond is to be forfeited in the event that the United States Trade Representative approves, or does not disapprove within the review period, this Order, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final

² See fn. 1.

determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott". The signature is fluid and cursive, with the first name being the most prominent.

Marilyn R. Abbott
Secretary to the Commission

Issued: February 16, 2010

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

IN THE MATTER OF

**CERTAIN CAST STEEL RAILWAY WHEELS,
PROCESSES FOR MANUFACTURING OR
RELATING TO SAME AND CERTAIN
PRODUCTS CONTAINING SAME**

INV. No. 337-TA-655

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Tianrui Group Company Limited of 63 East Guangcheng Road, Ruzhou, Henan, 467500, China, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), soliciting United States agents or distributors, or aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of covered products in violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337.

I.

Definitions

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Complainant" shall mean Amsted Industries, Incorporated of Two Prudential Plaza, 180 North Stetson Street, Chicago, Illinois, 60601.

(C) “Respondent” means Tianrui Group Company Limited of 63 East Guangcheng Road, Ruzhou, Henan, 467500, China.

(D) “Person” shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, successors, or assigns.

(E) “United States” shall mean the fifty States, the District of Columbia, and Puerto Rico.

(F) The terms “import” and “importation” refer to importation for entry for consumption under the Customs laws of the United States.

(G) The term “covered products” shall mean cast steel railway wheels manufactured using any of the trade secrets asserted by Complainant in this investigation (the “ABC Trade Secrets”).

II.

Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by the Order. For a period of ten (10) years from the effective date of this Order, Respondent shall not:

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of covered products.

IV.

Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the ABC Trade Secrets licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

V.

Reporting

For purposes of this reporting requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. However, the first report required under this section shall cover the period from the date of issuance of this Order through June 30, 2010.

This reporting requirement shall continue in force for a period of ten years from the date of issuance of this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of (i) covered products that the Respondent has imported and/or (ii) covered products that the Respondent has sold in the United States after importation during the reporting period; and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period. A Respondent filing written submissions must file the original document and two copies with the Office of the Secretary. Any Respondent desiring to submit a document to the Commission in confidence must file the original and a public version of the original with the Office of the Secretary and serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

VI.

Record-keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in

¹ Complainant must file a letter with the Secretary identifying the attorney to receive the reports or bond information. The designated attorney must be on the protective order entered in the investigation.

detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so choose, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form as are required to be retained by subparagraph VI(A) of this Order.

VII.

Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII (A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect for ten (10) years from the date of issuance of this Order.

VIII.

Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of this Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

XI.

Bonding

The conduct prohibited by Section III of this Order may be continued during the sixty (60) day period in which this Order is under review by the United States Trade Representative as delegated by the President, 70 *Fed Reg* 43251 (July 21, 2005), subject to Respondent posting a bond of in the amount of 5% of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported during the period of Presidential review are subject to the entry bond as set forth in the limited exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by Complainant in connection with the issuance of temporary exclusion orders. *See* Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this order. Upon acceptance of the bond by the Secretary: (a) the Secretary will serve an acceptance letter on all parties; and (b) the Respondent must serve a copy of the bond and any accompanying documentation on Complainant's counsel.²

The bond is to be forfeited in the event that the United States Trade Representative approves, or does not disapprove within the review period, this Order, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final

² See fn. 1.

determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott". The signature is fluid and cursive, with the first name being the most prominent.

Marilyn R. Abbott
Secretary to the Commission

Issued: February 16, 2010

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

IN THE MATTER OF

**CERTAIN CAST STEEL RAILWAY WHEELS,
PROCESSES FOR MANUFACTURING OR
RELATING TO SAME AND CERTAIN
PRODUCTS CONTAINING SAME**

INV. No. 337-TA-655

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Tianrui Group Foundry Company Limited of Bus Station South, Linru Town, Ruzhou, Henan, 467541, China, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), soliciting United States agents or distributors, or aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of covered products in violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337.

I.

Definitions

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Complainant" shall mean Amsted Industries, Incorporated of Two Prudential Plaza, 180 North Stetson Street, Chicago, Illinois, 60601.

(C) “Respondent” means Tianrui Group Foundry Company Limited of Bus Station South, Linru Town, Ruzhou, Henan, 467541, China.

(D) “Person” shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, successors, or assigns.

(E) “United States” shall mean the fifty States, the District of Columbia, and Puerto Rico.

(F) The terms “import” and “importation” refer to importation for entry for consumption under the Customs laws of the United States.

(G) The term “covered products” shall mean cast steel railway wheels manufactured using any of the trade secrets asserted by Complainant in this investigation (the “ABC Trade Secrets”).

II.

Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by the Order. For a period of ten (10) years from the effective date of this Order, Respondent shall not:

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of covered products.

IV.

Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the ABC Trade Secrets licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

V.

Reporting

For purposes of this reporting requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. However, the first report required under this section shall cover the period from the date of issuance of this Order through June 30, 2010.

This reporting requirement shall continue in force for a period of ten years from the date of issuance of this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of (i) covered products that the Respondent has imported and/or (ii) covered products that the Respondent has sold in the United States after importation during the reporting period; and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period. A Respondent filing written submissions must file the original document and two copies with the Office of the Secretary. Any Respondent desiring to submit a document to the Commission in confidence must file the original and a public version of the original with the Office of the Secretary and serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

VI.

Record-keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in

¹ Complainant must file a letter with the Secretary identifying the attorney to receive the reports or bond information. The designated attorney must be on the protective order entered in the investigation.

detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so choose, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form as are required to be retained by subparagraph VI(A) of this Order.

VII.

Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII (A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this

Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect for ten (10) years from the date of issuance of this Order.

VIII.

Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of this Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

XI.

Bonding

The conduct prohibited by Section III of this Order may be continued during the sixty (60) day period in which this Order is under review by the United States Trade Representative as delegated by the President, 70 *Fed Reg* 43251 (July 21, 2005), subject to Respondent posting a bond of in the amount of 5% of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported during the period of Presidential review are subject to the entry bond as set forth in the limited exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by Complainant in connection with the issuance of temporary exclusion orders. *See* Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this order. Upon acceptance of the bond by the Secretary: (a) the Secretary will serve an acceptance letter on all parties; and (b) the Respondent must serve a copy of the bond and any accompanying documentation on Complainant's counsel.²

The bond is to be forfeited in the event that the United States Trade Representative approves, or does not disapprove within the review period, this Order, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final

² See fn. 1.

determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott". The signature is fluid and cursive, with a large initial "M" and "A".

Marilyn R. Abbott
Secretary to the Commission

Issued: February 16, 2010

**CERTAIN CAST STEEL RAILWAY WHEELS, CERTAIN
PROCESSES FOR MANUFACTURING OR RELATING TO
SAME AND CERTAIN PRODUCTS CONTAINING SAME**

337-TA-655

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ISSUANCE OF A LIMITED EXCLUSION ORDER AND CEASE AND DESIST ORDERS; TERMINATION OF THE INVESTIGATION** has been served by hand upon the Commission Investigative Attorney, Jeffrey T. Hsu, Esq., and the following parties as indicated, on February 16, 2010



Marilyn R. Abbott, Secretary *SM*
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

On Behalf of Complainant Amstead Industries, Inc.:

Lyle B. Vander Schaaf, Esq.
BRYAN CAVE
1155 F Street, NW
Washington, DC 20004

Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____

**On Behalf of Respondents Tianrui
Group Company Limited; Tianrui Group Foundry
Company Limited; and, Barber Tianrui Railway
Supply:**

Tom M. Schaumberg, Esq.
ADDUCI MASTRIANI & SCHAUMBERG LLP
1200 Seventeenth Street, NW, Fifth Floor
Washington, DC 20006

Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____

**On Behalf of Respondent Standard Car Truck
Company, Inc.:**

Joel M. Freed, Esq.
MCDERMOTT WILL & EMERY LLP
600 13th Street, NW
Washington, DC 20005-3096

Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

IN THE MATTER OF

**CERTAIN CAST STEEL RAILWAY WHEELS,
PROCESSES FOR MANUFACTURING OR
RELATING TO SAME AND CERTAIN
PRODUCTS CONTAINING SAME**

INV. No. 337-TA-655

LIMITED EXCLUSION ORDER

The Commission has determined that there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the unlawful importation, sale for importation and sale after importation by Respondents Standard Car Truck Company, Barber TianRui Railway Supply LLC, TianRui Group Company Limited, and TianRui Group Foundry Company Limited of cast steel railway wheels and products containing same manufactured by or for Respondents using any of the trade secrets (the “ABC Trade Secrets”) asserted in this investigation.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that the appropriate form of relief is a limited exclusion order prohibiting the entry of unlicensed cast steel railway wheels or products containing same manufactured using the ABC Trade Secrets, by or on behalf of Respondents, or their affiliated companies, parents, subsidiaries, licensees, contractors, or other related business entities, or successors or assigns. The Commission has also determined that the appropriate form of relief includes cease and desist orders against Respondents Standard Car Truck Company,

Barber TianRui Railway Supply LLC, TianRui Group Company Limited, and TianRui Group Foundry Company Limited preventing them from importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), or soliciting U.S. agents or distributors for cast steel railway wheels and products containing the same, in violation of section 337.

The Commission has further determined that the public interest factors enumerated in 19 U.S.C. §§ 1337(d) and (f) do not preclude issuance of the limited exclusion order or cease and desist orders, and that the bond shall be in the amount of 5% of the entered value of cast steel railway wheels and products containing same that are subject to this Order during the Presidential review period.

Accordingly, the Commission hereby **ORDERS** that:

1. Cast steel railway wheels and products containing the same that are manufactured using any of the ABC Trade Secrets by or on behalf of, or imported by or on behalf of, Respondents, or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption, for a period of ten (10) years from the effective date of this order, except under license of the owner of the ABC Trade Secrets asserted in this investigation, or as provided by law.

2. Products that are excluded by paragraph 1 of this Order are entitled to entry for
~~consumption into the United States, entry for consumption from a foreign-trade zone, or~~

withdrawal from a warehouse for consumption, under bond in the amount of 5% of the entered value pursuant to subsection (j) of the section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337(j), and the Presidential Memorandum for the United States Trade Representative of July 21, 2005 (70 *Fed. Reg.* 43251), from the day after this Order is received by the United States Trade Representative, until such time as the United States Trade Representative notifies the Commission that this action is approved or disapproved but, in any event, not later than sixty (60) days after the date of receipt of this action.

3. At the discretion of U.S. Customs and Border Protection (“CPB”) and pursuant to procedures it establishes, persons seeking to import cast steel railway wheels and products containing same that are potentially subject to this Order may be required to certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under paragraph 1 of this Order. At its discretion, CBP may require persons who have provided the certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.

4. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to cast steel railway wheels and products containing same that are imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.

5. The Commission may modify this Order in accordance with the procedures described in Rule 210.76 of the Commission Rules of Practice. 19 C.F.R. § 210.76.

6. The Secretary shall serve copies of this Order upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and CBP.

7. Notice of this Order shall be published in the *Federal Register*.

By Order of the Commission.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Marilyn R. Abbott
Secretary to the Commission

Issued: February 16, 2010

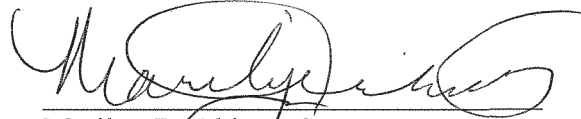
**CERTAIN CAST STEEL RAILWAY WHEELS, CERTAIN
PROCESSES FOR MANUFACTURING OR RELATING TO
SAME AND CERTAIN PRODUCTS CONTAINING SAME**

337-TA-655

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **LIMITED EXCLUSION ORDER** has been served by hand upon the Commission Investigative Attorney, Jeffrey T. Hsu, Esq., and the following parties as indicated, on

FEB 17 2010



Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

On Behalf of Complainant Amstead Industries, Inc.:

Lyle B. Vander Schaaf, Esq.
BRYAN CAVE
1155 F Street, NW
Washington, DC 20004

Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____

**On Behalf of Respondents Tianrui
Group Company Limited; Tianrui Group Foundry
Company Limited; and, Barber Tianrui Railway
Supply:**

Tom M. Schaumberg, Esq.
ADDUCI MASTRIANI & SCHAUMBERG LLP
1200 Seventeenth Street, NW, Fifth Floor
Washington, DC 20006

Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____

**On Behalf of Respondent Standard Car Truck
Company, Inc.:**

Joel M. Freed, Esq.
MCDERMOTT WILL & EMERY LLP
600 13th Street, NW
Washington, DC 20005-3096

Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____

GOVERNMENT AGENCIES:

Edward T. Hand, Chief
Foreign Commerce Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW – Room 11000
Washington, DC 20530
P-202-514-2464

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: _____

U.S. Bureau of Customs and Border Protection
Intellectual Property Rights Branch
Mint Annex Building
799 9th Street, NW -7th floor
Washington, DC 20229-1177
202-325-0100

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: _____

Elizabeth Kraus, Deputy Director
International Antitrust, Office of
International Affairs
Federal Trade Commission
600 Pennsylvania Avenue, Room 498
Washington, DC 20580
P-202-326-2649

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: _____

Richard Lambert, Esq.
Office of Technology Development Services
Dept. of Health & Human Services
National Institutes of Health
6610 Rockledge Drive - Room 2800
MSC 6606
Bethesda, MD 20892
P-301-496-2644

- Via Hand Delivery
 - Via Overnight Mail
 - Via First Class Mail
 - Other: _____
-

PUBLIC VERSION

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436**

IN THE MATTER OF

**CERTAIN CAST STEEL RAILWAY WHEELS,
PROCESSES FOR MANUFACTURING OR
RELATING TO SAME AND CERTAIN
PRODUCTS CONTAINING SAME**

INV. NO. 337-TA-655

COMMISSION OPINION

The Commission has determined that Respondents have violated section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain cast steel railway wheels or products containing same by reason of trade secret misappropriation. *74 Fed. Reg.* 68282-83 (Dec. 23, 2009). The Commission issues herewith, a limited exclusion order lasting a period of ten (10) years as well as cease and desist orders, lasting the same period. The limited exclusion order prohibits the entry of cast steel railway wheels and products containing same, manufactured using any of the asserted ABC Trade Secrets, by or on behalf of, or imported by or on behalf of, Respondents, or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, for consumption in the United States. The cease and desist orders prohibit Respondents from importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), soliciting U.S. agents or distributors, or aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of cast steel railway wheels and products containing the same manufactured using any of the asserted ABC Trade Secrets.

PUBLIC VERSION

BACKGROUND

The Commission instituted this investigation on September 16, 2008, based on a complaint filed on August 14, 2008, by Amsted Industries Incorporated of Chicago, Illinois (“Amsted”). *73 Fed. Reg.* 53441-42 (Sept. 16, 2008). The complaint alleged violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain cast steel railway wheels and certain products containing same by reason of misappropriation of trade secrets, the threat or effect of which is to substantially injure an industry in the United States. The complaint named four respondents: Tianrui Group Company Limited of China; Tianrui Group Foundry Company Limited of China (collectively “Tianrui”); Standard Car Truck Company, Inc. of Park Ridge, Illinois (“SCT”); and Barber Tianrui Railway Supply, LLC of Park Ridge, Illinois (“Barber”).

On October 16, 2009, the Administrative Law Judge (“ALJ”) Charneski issued his final initial determination (“ID”) finding a violation of section 337 by respondents. He found that Amsted owns the asserted ABC Trade Secrets, and that Respondents misappropriated the trade secrets via disclosure by former employees of Amsted’s predecessors, the threat or effect of which is to destroy or substantially injure an industry in the United States.

On October 29, 2009, the ALJ issued his recommended determination (“RD”) on remedy and bonding. The ALJ recommended that the Commission issue a limited exclusion order as well as cease and desist orders directed to Respondents found in violation of section 337. He further recommended that the Commission set a bond of five percent of entered value for accused products imported during the period of Presidential review.

PUBLIC VERSION

On October 30, 2009, SCT and Barber (“SCT-Barber”) filed a joint petition for review of the final ID. Tianrui filed a petition for review on November 2, 2009, and Amsted filed a contingent petition for review that same day. Amsted filed responses to SCT-Barber’s and Tianrui’s petitions on November 9 and 10, respectively, and SCT-Barber and Tianrui filed responses to Amsted’s petition on November 10. The Commission investigative attorneys (“IAs”) filed responses to the various petitions for review on November 10. The IAs did not petition for review of the ID.

On December 17, 2009, the Commission determined not to review the ID and requested briefing on remedy, the public interest, and bonding. *74 Fed. Reg.* 68282-83 (Dec. 23, 2009). On December 29, 2009, the parties submitted written submissions on the issues for which the Commission requested briefing. *See* Office of Unfair Import Investigations’s Initial Written Submission on Remedy, Bonding and the Public Interest; Complainant Amsted’s Brief on Remedy, the Public Interest and Bonding (“Amsted Br”); Respondents Tianrui’s Submission on the Issues of Remedy, Public Interest and Bonding (“Resp Br”). Respondents SCT-Barber filed a short submission joining in Tianrui’s submission. *See* Respondents SCT-Barber’s Submission on the Issues of Remedy, Public Interest and Bonding. On January 6, 2010, the parties submitted replies to the written submissions. *See* Office of Unfair Import Investigations’s Consolidated Reply to Complainant’s and Respondents’ Written Submission on Remedy, Bonding, and the Public Interest; Complainant Amsted’s Response to Respondents’ Submissions on the Issues of Remedy, Public Interest and Bonding; Respondents Tianrui’s Reply Submission on the Issues of Remedy, Public Interest and Bonding; Respondents SCT-Barber’s Reply Submission on the

PUBLIC VERSION

Issues of Remedy, the Public Interest and Bonding.

DISCUSSION

For the reasons discussed below, the Commission finds that the appropriate remedy is a limited exclusion order lasting a period of ten (10) years as well as cease and desist orders, lasting the same period, directed to Respondents. The Commission also finds that the public interest factors set out in section 337(d) and (f) do not preclude issuance of the limited exclusion order or cease and desist orders. The Commission further determines that a five percent bond of entered value is required to permit temporary importation, during the period of Presidential review, of cast steel railway wheels and products containing same manufactured using any of the asserted ABC Trade Secrets.

I. REMEDY

Where a violation of section 337 has been found, the Commission must consider the issues of remedy, the public interest, and bonding. The Commission has “broad discretion in selecting the form, scope, and extent of the remedy.” *Viscofan, S.A. v. U.S. Int’l Trade Comm’n*, 787 F.2d 544, 548 (Fed. Cir. 1986). The Commission may issue an exclusion order excluding the goods of the person(s) found in violation (a limited exclusion order) or, if certain criteria are met, against all infringing goods regardless of the source (a general exclusion order). The Commission also has authority to issue cease and desist orders in addition to or in lieu of exclusion orders. *See* 19 U.S.C. § 1337(f). The Commission generally issues cease and desist orders to respondents who maintain commercially significant inventories of infringing products in the United States. *See, e.g., Certain Laser Bar Code Scanners and Scan Engines, Components*

PUBLIC VERSION

Thereof, and Products Containing Same, Inv. No. 337-TA-551, Comm'n Opinion at 22 (June 14, 2007).

The Commission finds that the appropriate remedy includes a limited exclusion order lasting a period of ten (10) years, prohibiting the entry of infringing cast steel railway wheels and products containing same, manufactured using any of the asserted ABC Trade Secrets by or on behalf of, or imported by or on behalf of, Respondents, or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, for consumption in the United States. The appropriate remedy also includes cease and desist orders, lasting the same period, prohibiting Respondents from importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), soliciting U.S. agents or distributors, or aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of cast steel railway wheels and products containing the same manufactured using any of the asserted ABC Trade Secrets.

Contrary to Amsted's assertion, we determine that the ALJ did not err in his finding that pursuant to his ground rules Amsted waived its right to request a general exclusion order. *See* RD at 6. The ALJ's ground rules provide in relevant part that "[a]ny contentions not set forth in detail as required herein shall be deemed abandoned or withdrawn, except for contentions of which a party is not aware and could not be aware in the exercise of reasonable diligence at the time of filing the prehearing statement." Order No. 2. Amsted relies on general statements it made in its Complaint and other filings stating that it sought to exclude all products found to incorporate its misappropriated trade secrets as meeting the ALJ's ground rules. Amsted Br at

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15-16. The ALJ disagreed and found that the statements Amsted points to are ambiguous and do not set forth in detail that Amsted seeks a general exclusion order. RD at 6. We agree with the ALJ that the statements Amsted relies on are general statements referencing remedies pursuant to section 337(d). The statements do not set forth in detail that Amsted seeks a general exclusion order as required by the ground rules.

In addition, we share the ALJ's view that in any event, Amsted failed to present enough evidence to sustain issuance of a general exclusion order. RD at 6. Amsted insists that a general exclusion order is necessary to prevent circumvention of a limited exclusion order directed to products of Respondents.¹ Amsted Br at 8-9. However, the evidence Amsted presents is only its belief that Respondents will circumvent the exclusion order by shipping wheels to customers outside the United States for mounting onto undercarriages or railcars and imported into the United States, and its assertion that one of Respondents' customers has already done so. Amsted Br at 9. This evidence is not enough. As the ALJ found, the record evidence fails to show that any of the respondents would circumvent a limited exclusion order by shipping wheels to a third party to disguise their origin upon entry into the United States. RD at 6. Nevertheless, the limited exclusion order we are issuing is designed to prevent circumvention by certain third

¹ The Commission's authority to order exclusion of articles from the United States is restricted to a limited exclusion order unless "(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing goods." *Id.* at 5 (citing *Certain Ground Fault Circuit Interrupters and Products Containing Same*, Inv. No. 337-TA-615, Comm'n Opinion at 24 (Mar. 26, 2009)); 19 U.S.C. § 337(d)(2). Amsted did not present any evidence to satisfy the second prong of the test and appears to rely on the first prong of the test to meet its burden. *See* RD at 6 n.4.

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parties. Specifically, the limited exclusion order prohibits affiliate companies and companies related to Respondents from engaging in conduct that Respondents are prohibited from engaging in. In including “affiliates and related companies in the limited exclusion order,” the Commission has “eliminated one avenue by which the prohibition contained in this exclusion order [limited exclusion order] could be circumvented: employing a third party or an affiliate, which did not participate in the investigation, to import and sell the infringing merchandise in the U.S.” *See Certain Headboxes and Paper Making Machine Forming Sections for the Continuous Production of Paper and Components Thereof*, Inv. No. 337-TA-82, USITC Pub. 1197 (Nov. 1981) at 10. Thus, we believe that the limited exclusion order will adequately protect Amsted’s interest.²

The Commission has based the duration of limited exclusion orders in trade secrets investigations on a “reasonable research and development period,” or an “independent development time” for the trade secrets at issue. *See Certain Apparatus for the Continuous Production of Copper Rod*, Inv. No. 337-TA-52, Comm’n Op. at 67 (Nov. 1979); *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, Comm’n Decision Not to Review Initial Determination Finding Violation (“*Sausage Casings*”) at 19 (Dec. 1984)).

² We note that if Amsted was seriously concerned about Respondents circumventing a limited exclusion order by shipping wheels to customers outside the United States for mounting onto undercarriages or railcars and importing them into the United States it should have included those customers as respondents in the investigation, particularly since Amsted identifies only three such customers: [

]. Amsted Br at 9-10.

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Respondents take issue with the RD's recommendation to issue one exclusion order covering all the 128 trade secrets and argue that the "Commission's longstanding practice, when crafting remedies to address the misappropriation of trade secrets, is to issue trade secret-specific exclusion orders of limited duration." Resp Br at 2-3. Respondents mis-describe the Commission's practice. In investigations where trade secret misappropriation has been found, the Commission has not required a determination of the length of time it would take to develop each misappropriated trade secret in order to ascertain the appropriate length of an exclusion order. For example, in *Sausage Casings* the Commission stated that "trade secret aspects are not independent of the non-trade secret aspects of the technology involved. Therefore, we have determined to consider a single independent development time for the six trade secrets found by the ALJ to have been misappropriated." *Sausage Casings* at 18-19. The Federal Circuit affirmed the Commission's determination and explained that:

In setting the length of the order at 10 years, the Commission correctly recognized that "the duration of relief in a case of misappropriation of trade secrets should be the period of time it would have taken respondents independently to develop the technology using lawful means." The Commission concluded that in the circumstances of this case the basis for determining the development time was the time it would have taken Viscofan to create the manufacturing processes involving the misappropriated trade secrets and not, as Viscofan urged, the time it would have required Viscofan to discover each particular trade secret independently and without regard to the total process.

Viscofan, 787 F.2d at 549. Respondents misappropriated all of the asserted 128 trade secrets. Thus, the 10-year duration of the exclusion order is appropriately based a single independent development time for all 128 trade secrets.

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Respondents also argue that the 10-year duration is too long and that the record evidence shows that it would take them only a year to independently develop the trade secrets. Resp Br at 2-3, 11. Respondents, however, rely on the supposed expertise of Tianrui's employee, Mr. Liu Guanfu, in manufacturing cast steel railway wheels to support their position. *See id.* at 10-12. Although Mr. Liu is now employed by Tianrui, we note that he is also one of the key former DACC [Amsted's predecessor in interest] employees whose hiring by Tianrui contributed to the trade secret misappropriation that led to the complaint filed by Amsted in this investigation. Our reasoning in *Sausage Casings*, adopted by the Federal Circuit remains instructive:

To now conclude that Viscofan could have developed alternative technology for the misappropriated trade secrets in a relatively short time would be to give it the benefit of having had the misappropriated trade secrets for a period of years as a basis from which to work. We believe that this would be a wholly inequitable result.

Viscofan, at 549. The record evidence shows that it would take 10 years to independently develop the asserted misappropriated trade secrets in this investigation. Coughlin Tr. 203-04; Kleeschulte Tr. 439-446, 470, 563-64, 589; Worries Tr. 73-74. Accordingly, we issue the limited exclusion order to last a period of 10 years.

With respect to cease and desist orders, the record evidence shows that Respondents maintain commercially significant inventories of the wheels in the United States.³ *See CX-*

³ We share the ALJ's view that "[t]he issuance of cease and desist orders against foreign respondents is particularly important in this investigation, where one of the domestic respondents Barber, is a joint venture set up by a foreign respondent TianRui, and a domestic respondent, SCT, for the purpose of selling the accused cast steel railway wheels." RD at 11 (observing that "[t]he fact that a respondent is a foreign entity does not necessarily prevent a cease and desist order from issuing against it. The Commission has personal jurisdiction over all respondents in

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1099C; JX-3C (Pak Dep. Tr.) at 465, 544, 547-48, 550-51; CX-2205C.1; CX-2206.4; CX-2209C.1; CX-2217C.1; CX-1099C; CX-2620C; CX-2621C. Accordingly, we issue cease and desist orders of 10-year duration directed to each of the respondents.^{4 5}

II. THE PUBLIC INTEREST

Section 337(d) and (f) of the Tariff Act of 1930, as amended, directs the Commission to consider certain public interest factors before issuing a remedy. These public interest factors include the effect of any remedial order on the “public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.” 19 U.S.C. §§ 1337(d), (f). We note that generally, the public interest favors the protection of U.S. intellectual property rights by excluding infringing imports. *See Certain Ink Jet Print Cartridges and Components Thereof*, Inv. No. 337-TA-446, Comm’n Opinion, USITC Pub. No. 3549 (Oct. 2002) at 14; *Certain Two-Handle Centerset*

this investigation.” *Id.* at 11 n.11(citing ID at 11-12; *Certain Abrasive Products Made Using a Process for Powder Performs, and Products Containing Same*, Inv. No. 337-TA-449, Comm’s Notice (May 15, 2002). 67 Fed. Reg. 34728 (May 15, 2002).).

⁴ Amsted requests that the cease and desist orders should direct Respondents to return or otherwise purge themselves of documents containing, based on, or derived from the asserted ABC Trade Secrets. Amsted Br at 20-21. We decline to include such language in the cease and desist orders.

⁵ Amsted asks the Commission to sanction Respondents, as part of its briefing on remedy, for litigation misconduct and extend the duration of the limited exclusion order by five years. Amsted Br at 41. We believe that Amsted’s request is inappropriate. Commission rules require that an accused party must be timely given the opportunity to withdraw any allegedly false, frivolous, or misleading submission before a motion for sanctions may be filed. 19 C.F.R. § 210.4(d)(1)(i). Amsted failed to provide Respondents with such an opportunity. Moreover, a motion for sanctions must be separate from other motions or requests. *Id.* In any event, the ALJ determined that the issue of Respondents’ litigation misconduct was moot and the Commission did not review the ALJ’s determination in that regard. ID at 40.

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Faucets and Escutcheons, and Components Thereof, Inv. No. 337-TA-422, Comm'n Op. at 9 (July 2000).

Respondents argue that the public interest will be harmed because Tianrui is a source of cast steel railway wheels that competes with Complainant's domestically produced cast steel railway wheel and that without such competition, Complainant will continue to exert a dominant position in the market. Resp Br at 27-32. We find that there has been no showing that excluding Respondents' products from the United States market would adversely impact competitive conditions in the United States. In particular, the record indicates that there are other types of railway wheels, such as forged wheels, that provide competition for cast steel railway wheels, and thus United States demand for steel railway wheels can be met by Amsted and its legitimate competitors. *See* Putnam, Tr. at 2158, 2176-77, 2199. Moreover, nothing prevents Respondents from competing with Amsted without using the misappropriated trade secrets. We note that while legitimate competition should be encouraged, the important public interest in protecting intellectual property rights will be served by a limited exclusion order and cease and desist orders directed to these Respondents who chose to unfairly compete in the United States market by misappropriating Amsted's trade secrets.

III. BOND

During the 60-day period of Presidential review, imported articles otherwise subject to remedial orders are entitled to conditional entry under bond. 19 U.S.C. § 1337(j)(3). The amount of the bond is specified by the Commission and must be an amount sufficient to protect the complainant from any injury. *Id.*; 19 C.F.R. § 210.50(a)(3). The Commission frequently sets the

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bond based upon a reasonable royalty. *Certain Microsphere Adhesives, Process For Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Opinion at 24, USITC Pub. No. 2949 (January 1996). When reliable price information is available, the Commission has often set the bond based on the difference in sales prices between the domestic product and the imported, infringing product. *Id.* In cases where the Commission does not have sufficient evidence upon which to base a determination of the appropriate amount of the bond, the Commission has set a 100 percent bond. *See Certain Sortation Systems, Parts Thereof, and Products Containing Same*, Inv. No. 337-TA-460, Comm'n Opinion at 21 (March 2003). However, Complainant bears the burden of establishing the need for a bond amount in the first place. *Certain Rubber Antidegradants, Components Thereof, and Prods. Containing Same*, Inv. No. 337-TA-533, Comm'n Op. at 39-40 (July 21, 2006).

The Commission sets a bond of five percent of the entered value of wheels manufactured by Respondents using any of the misappropriated trade secrets imported during the period of Presidential review. The record evidence includes a [] between Amsted's wheels and Respondents' wheels of [] as well as a []. However, the evidence of [] is based on a license that Amsted has with a South African manufacturer [] and, thus, it is unclear whether that same [] would apply to []

[]. Putnam Tr. 2165-2167. In contrast, an internal email of a cast railway wheel customer of both Amsted and Respondents, [], shows that Respondents' per

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wheel price is [] than Amsted's per wheel price. CX-2221C ([] email); Putnam Tr. 2195-2196; JX-4C ([] Dep. Tr.) at 99-101. Where reliable [] information is available, the Commission's practice is to set a bond based on the []. Accordingly, we set a bond of five percent of entered value for products manufactured by Respondents using any of the misappropriated trade secrets imported during the period of Presidential review.

CONCLUSION

For the reasons set forth above, the Commission determines that the appropriate remedy is a limited exclusion order lasting a period of ten (10) years, prohibiting the entry of cast steel railway wheels manufactured by Respondents using any of the misappropriated trade secrets for consumption in the United States as well as cease and desist orders, lasting the same period. The Commission finds that the public interest factors set out in section 337(d) and (f) do not preclude issuance of a limited exclusion order or cease and desist orders. The Commission sets a bond of five percent of entered value for wheels manufactured by Respondents using any of the misappropriated trade secrets imported during the period of Presidential review.

By order of the Commission.



Marilyn R. Abbott
Secretary to the Commission

Issued: March 19, 2010

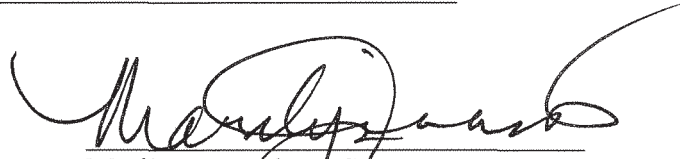
CERTAIN CAST STEEL RAILWAY WHEELS, CERTAIN PROCESSES FOR MANUFACTURING OR RELATING TO SAME AND CERTAIN PRODUCTS CONTAINING SAME

337-TA-655

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, Jeffrey T. Hsu, Esq., and the following parties as indicated, on

MAR 19 2010



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PUBLIC VERSION

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

**CERTAIN CAST STEEL RAILWAY
WHEELS, CERTAIN PROCESSES FOR
MANUFACTURING OR RELATING TO
SAME AND CERTAIN PRODUCTS
CONTAINING SAME**

Inv. No. 337-TA-655

**RECOMMENDED DETERMINATION
ON REMEDY AND BONDING
Administrative Law Judge Carl C. Charneski**

Pursuant to the notice of investigation, 73 Fed. Reg. 53441 (2008), this is the Recommended Determination in the matter of *Certain Cast Steel Railway Wheels, Certain Processes for Manufacturing or Relating to Same and Certain Products Containing Same*, United States International Trade Commission Investigation No. 337-TA-655. See 19 C.F.R. § 210.42(a)(1)(ii).

For the reasons stated herein, it is recommended that a limited exclusion order issue with respect to any respondent found to be in violation of section 337. It is further recommended that cease and desist orders issue as to respondents found to be in violation of section 337. Additionally, it is recommended that if the Commission issues an exclusion order as a result of this investigation, a [] bond should be required for respondents' importations during the Presidential review period.

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I. Procedural Background

The Commission's Rules provide that subsequent to an initial determination on the question of violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, the administrative law judge shall issue a recommended determination ("RD") containing findings of fact and recommendations concerning: (1) the appropriate remedy in the event that the Commission finds a violation of section 337; and (2) the amount of bond to be posted by respondents during Presidential review of Commission action under section 337(j). *See* 19 C.F.R. § 210.42(a)(1)(ii).

On October 16, 2009, the undersigned issued the initial determination ("ID") in this investigation, finding that a violation of section 337 has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain cast steel railway wheels or products containing same by reason of trade secret misappropriation.

The complainant is Amsted Industries Incorporated ("Amsted" or "complainant") of Chicago, Illinois. 73 Fed. Reg. 53441 (2008). The respondents are: Tianrui Group Company Limited ("TianRui") of Ruzhou, Henan, China; Tianrui Group Foundry Company Limited ("TianRui Foundry") of Ruzhou, Henan, China; Standard Car Truck Company, Inc. ("SCT") of Park Ridge, Illinois; and Barber Tianrui Railway Supply ("Barber") of Park Ridge, Illinois (collectively, "respondents"). *Id.* The Commission Investigative Staff ("Staff") of the Office of Unfair Import Investigations is also a party in this investigation. *Id.*

II. Remedy

A. Summary Of The Parties' Arguments

Complainant argues that the Commission should issue a general exclusion order that would “prevent the importation into the United States of all Tianrui wheels and all products to or of which any such Tianrui wheel is attached, mounted or a part (*e.g.*, axles, trucks, undercarriages and railcars).” In the alternative, it is argued that a limited exclusion order should issue. Amsted Br. at 187-90. Further, complainant argues that any exclusion order which does issue should not be limited in its duration, or alternately, should remain in effect for at least 10 years. *See Id.* at 191-94.¹

Complainant also requests that the Commission issue a cease and desist order, apparently against all respondents, to prevent them from engaging in activities such as importing and selling the accused wheels, as well as from disclosing ABC Trade Secrets, *e.g.*, to the AAR for certifications to sell wheels, or in the course of other unfair methods of competition. *See Id.* at 196-98. Finally, complainant argues that bond during the Presidential review period should be set at no less than [] of entered value. *See Id.* at 198.

Respondents argue that complainant’s request for a general exclusion order is untimely and unwarranted. *See Resps. Reply* at 87-89. Further, they argue that any limited exclusion order should be tailored to the specific trade secrets as to which misappropriation has been found, and only to a period of three years or less. They also assert that a certification provision should allow them to indicate which railway wheels do not use any misappropriated trade secrets.

¹ Complainant also argues that the period of exclusion should be extended by five years because []. *See Amsted Br.* at 194-96. This argument was rejected in the initial determination. *See ID* at 39-40 & n.28.

Finally, respondents argue that any Presidential review period bond should not exceed [.] *See Resp. Br. at 144-46.*²

The Staff concurs with respondents that complainant has waived its right to seek a general exclusion order because it neither asserted, nor set forth in detail, relevant contentions in advance of the hearing. *See Staff Br. at 112; Staff Reply at 48-49 (citing Ground Rule 4(d) (concerning prehearing statements))*. The Staff also argues that the evidence supports the entry of a limited exclusion order, rather than a general exclusion order, and that following the Federal Circuit's decision in *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340 (Fed. Cir. 2008), a limited exclusion order may cover respondents' downstream products, but not those of third parties. It is argued that the duration of any limited exclusion order should be at least eight years, but not more than 10 years. *See Staff Br. at 112-16*.

Initially, the Staff opposed the entry of cease and desist orders. *See Id.* at 116-17. However, upon the showing made in complainant's brief of the existence of respondents' domestic inventories, [] the Staff now supports the entry of cease and desist orders prohibiting the selling, advertising, promoting, shipping, distributing or otherwise transferring any TianRui wheels manufactured abroad using the ABC Process. It appears that the Staff would have such orders cover the domestic respondents (*i.e.*, SCT and Barber). *See Staff Reply at 51-52*.

Finally, the Staff proposes that the bond during the Presidential review period should be in the amount of [.] *See Staff Br. at 117-18*.

² [

]

B. Limited Exclusion Order

1. Legal Framework Of Exclusion Orders

The Commission has broad discretion in selecting the form, scope, and extent of the remedy in a section 337 proceeding. *Viscofan, S.A. v. United States Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986). A limited exclusion order directed to respondents' infringing products is among the remedies that the Commission may impose. *See* 19 U.S.C. § 1337(d). The Commission's authority to order the exclusion of articles from the United States is restricted to a limited exclusion order "unless '(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing goods.'" *Certain Ground Fault Circuit Interrupters and Products Containing Same*, Inv. No. 337-TA-615, Comm'n Op. at 24 (Mar. 26, 2009) ("*GFCIs*") (quoting 19 U.S.C. § 1337(d)(2)).³

2. Discussion And Recommendation

a. Complainant Is Not Entitled To The Issuance Of A General Exclusion Order

The respondents and Staff are correct in their assertions that complainant has waived the opportunity to request the issuance of a general exclusion order. Complainant's reply does not contest their arguments on this point. In fact, an examination of complainant's prehearing statement shows that, at best, it was written in ambiguous terms, without specifically stating that complainant seeks a general exclusion order. *See* Compl. Prehearing Statement at 114. Thus, the respondents and the Staff were not given adequate prior notice that they would need to

³ In determining whether to issue an exclusion order or a cease and desist order, the Commission must consider statutory public interest factors. *GFCIs*, Comm'n Op. at 24.

address the issues relating to a general exclusion order. *See* Ground Rule 4(d) (Order No. 2) (“Any contentions not set forth in detail as required herein shall be deemed abandoned or withdrawn, except for contentions of which a party is not aware and could not be aware in the exercise of reasonable diligence at the time of filing the prehearing statement.”).

In any event, even if this argument were timely raised, the evidence does not support the issuance of a general exclusion order.⁴

Complainant argues that a limited exclusion order could be circumvented if TianRui wheels were shipped to third-party customers in foreign countries, and the third-parties were to mount the wheels onto undercarriages or railcars that were then imported into the United States. The examples provided by complainant, however, involve only TianRui customers, specifically [] *See* Amsted Br. at 187-90; ID, section VI (injury).

Complainant has not provided any evidence that TianRui or any other respondents would circumvent a limited exclusion order by shipping wheels to a third party to disguise their origin upon entry into the United States. Rather, complainant seeks to prevent respondents’ customers from importing their own downstream products. Thus, complainant essentially requests a general exclusion order to prevent the importation of third-party downstream products in much the same way struck down by the Federal Circuit in the *Kyocera* opinion. *See Kyocera*, 545 F.3d

⁴ Again, while complainant has made ambiguous arguments concerning the question of an exclusion order, it appears that complainant attempts to justify its request for a general exclusion order solely in view of section 337(d)(2)(A) (“necessary to prevent circumvention” of a limited exclusion order) and not upon the criteria of section 337(d)(2)(B) (“a pattern of violation” and difficulty in identifying the source of infringing products). *See* Amsted Br. at 187-90. Complainant’s brief makes no attempt to show that the criteria of section 337(d)(2)(B) are met. *See Id.* Indeed, one would not expect it to be difficult to identify the source of a finished product such as a railway wheel in view of the relatively small number of manufacturers that complainant has referred to in the record.

at 1358; *see also* n.5, below.

Consequently, even if complainant had not waived the opportunity to seek a general exclusion order, it would have failed to show that the statutory requirements for a general exclusion order are met.

b. A Limited Exclusion Order Should Issue

There is no dispute that if respondents are found to have misappropriated the asserted trade secrets, *i.e.*, the “ABC Trade Secrets,” complainant would be entitled to the issuance of a limited exclusion order that covers all of respondents’ cast steel railways wheels and products containing the same that are the result of respondents’ misappropriation.⁵ As indicated above, respondents have argued that such an order should be tailored to the specific trade secrets as to which misappropriation has been found. In this investigation, all asserted trade secrets have been misappropriated. *See* ID, sections IV (the trade secrets and their misappropriation) & VII (conclusions of law).⁶

⁵ The Federal Circuit has affirmed a limited exclusion order that covered the downstream products of a respondent (*i.e.*, the “adjudged violator of section 337”), rather than those of a third party. *See Kyocera*, 545 F.3d at 1357-58.

⁶ As indicated, *supra*, respondents have also requested that a limited exclusion order contain a certification provision. An exclusion order may contain a provision that permits entities, whose products are potentially subject to exclusion, to certify, pursuant to procedures to be specified by U.S. Customs and Border Protection, that they are familiar with the terms of the order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under the order. *See Certain Semiconductor Chips with Minimized Chip Package Size or Products Containing Same*, Inv. No. 337-TA-605, Comm’n Op., § II.D.2. (July 29, 2009).

While the Commission may deem it appropriate to include such a provision in any limited exclusion order that issues as a result of this investigation, based upon the evidence of record, including the widespread misappropriation of complainant’s trade secrets, there is no current circumstance under which such a provision could be used by respondents.

A question remains as to the duration of a limited exclusion order. Complainant argues that trade secrets may be protected in perpetuity. *See* Amsted Br. at 191. However, prior limited exclusion orders issued by the Commission in trade secrets investigations have been based on a “reasonable research and development period,” or an “independent development time.” *See Certain Apparatus for the Continuous Production of Copper Rod*, Inv. No. 337-TA-52, Comm’n Op. at 67 (Nov. 1979); *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, Commission Decision Not to Review Initial Determination Finding Violation at 19 (Dec. 1984). In this instance, the record supports a duration of 10 years for any limited exclusion order.

In that regard, David Kleeschulte began work for one of the prior owners of the ABC Process (which incorporates the asserted trade secrets) in 1968, worked for each successive owner, and is now complainant Amsted’s Managing Director of International Business.⁷ He also helped to transfer the ABC Process to DACC, a company in which complainant is a joint venturer. *See* Kleeschulte Tr. 439-446, 470. Kleeschulte testified that it would take a party who had not previously manufactured railway wheels ten to fifteen years independently to develop a cast steel railway wheel manufacturing process. *See* Kleeschulte Tr. 563-564. Kleeschulte also testified that American Brake Shoe (later known as Abex), a company which had over 50 years of experience making cast items, and ten years of experience making railway wheels, needed at least ten years to develop the process. Kleeschulte Tr. 564, 589.⁸

⁷ A description of the parties and key non-parties is contained in the ID, section I.C.2.

⁸ Kleeschulte and John Coughlin (a 22-year employee of Abex who now consults with complainant) both testified that it took American Brake Shoe at least five years to develop the
(continued...)

Respondents argue that any limited exclusion order should remain in effect for three years or less. Such a short period of time is unsupported by the evidence relating to the development of the trade secrets at issue, as well as the value of the trade secrets (discussed in the ID), including respondents' [] misappropriation of them. The testimony of respondents' expert witness on this question did not relate to the production of cast steel railway wheels such as those at issue in this investigation. *See* Packer Tr. 2940-2941 ("I explained this last time we talked about the castings here for the mortar shells. It took us three weeks to make the molds, make the cores, make castings and submit them for approval by the ordinance department.")⁹

Accordingly, it is recommended that any limited exclusion order that issues in this investigation remain in effect for 10 years.

C. Cease And Desist Orders

Section 337 provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a cease and desist order as a remedy for violation of section 337. *See* 19 U.S.C. § 1337(f)(1). The Commission "generally issues a cease and desist order only when a respondent maintains a commercially significant inventory of infringing products in the United States." *GFCLs*, Comm'n Op. at 24. Complainant and the Staff argue in favor of the

⁸ (...continued)
initial ABC process. *See* Kleeschulte Tr. 439, 564, 589; Coughlin Tr. 201-204. After the process had been developed, it took at least five years of additional work to take the process from the research phase to the commercial phase. *See* Kleeschulte Tr. 564, 589; Worries Tr. 73-74.

⁹ [

]

issuance of cease and desist orders in this investigation. Respondents offer no argument in opposition.

The record evidence supports the issuance of cease and desist orders. In that regard, [

.]

Indeed, the parties have stipulated that TianRui has imported wheels into the United States through SCT and Barber. [

] The record evidence, detailed in the initial determination, shows that respondents have already embarked upon extensive sales and marketing campaigns in the United States. It is inconceivable that respondents could engage in such importations, sales, and other commercial activities without maintaining significant domestic inventories. *See* JX-1C, ¶¶ 81-84; *see also* ID, section VI (injury).

In view of the evidence showing the need for such orders, [

] it is recommended that the Commission issue cease and desist orders directed toward each respondent that will prohibit them from selling, advertising, promoting, shipping, distributing, or otherwise transferring within the United States, any TianRui wheels manufactured abroad using the ABC Process. The issuance of cease and desist orders against foreign respondents is particularly important in this investigation, where one of the domestic respondents, Barber,¹⁰ in a joint venture set up by a foreign respondent, TianRui, and a domestic respondent, SCT, for the purpose of selling the accused cast steel railway wheels.¹¹

D. Bond

The administrative law judge and the Commission must determine the amount of bond to be required of a respondent, pursuant to section 337(j)(3), during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. The purpose of the bond is to protect the complainant from any injury.

19 U.S.C. § 1337(j)(3); 19 C.F.R. §§ 210.42(a)(1)(ii) & 210.50(a)(3).

When reliable price information is available, the Commission has often set the bond by

¹⁰ Barber is a Delaware limited liability company with its principal place of business in Park Ridge, Illinois. It is a joint venture that was formed by TianRui and SCT in 2007. JX-1C, ¶ 75; CX-2618.

¹¹ The fact that a respondent is a foreign entity does not necessarily prevent a cease and desist order from issuing against it. The Commission has personal jurisdiction over all respondents in this investigation. *See* ID at 11-12; *see also Certain Abrasive Products Made Using a Process for Powder Preforms, and Products Containing Same*, Inv. No. 337-TA-449, 67 Fed. Reg. 34728, Comm'n Notice (May 15, 2002) (issuance of limited exclusion order, and cease and desist order against a Taiwan respondent) (vacated on other grounds 69 Fed. Reg. 35675 (2004)).

eliminating the differential between the domestic product and the imported, infringing product. *See Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. at 24, USITC Pub. 2949 (1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm'n Op. at 41-43, USITC Pub. 2670 (1993). A 100% bond has been required when no effective alternative existed. *See Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (a 100% bond imposed when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimis* and without adequate support in the record).

In this investigation, there is evidence of both a [] as well as a current royalty rate (*i.e.*, []). An importation bond based on either percentage would be relatively [].

The evidence concerning the []

¹² As discussed in detail in the initial determination, Griffin Wheels are sold by complainant, and are the subject of direct competition by respondents' wheels (which are made through misappropriation of the trade secrets at issue). *See ID*, section V (domestic industry).

¹³ []

[

] Thus, the imposition of a [] bond on importations of accused wheels during the Presidential review period would prevent injury to complainant.

The royalty rate of [], proposed by respondents and the Staff, was used in some conservative calculations made by complainant's expert on injury, and is ultimately derived from the license that complainant has with a South African manufacturer, Scaw. *See* Resps. Br. at 146; Putnam Tr. 2165-2166. It is not, however, clear that such a rate is reasonable vis-a-vis respondents, or importations into the United States, because Scaw does not compete against complainant in the United States, and thus is not taking sales away from complainant in its home market. It is, therefore, difficult to discern what sort of royalty complainant could reasonably ask of respondents if it decided to license TianRui wheels for sale in the United States. *See* Putnam Tr. 2167.

In any event, an importation bond based on a reasonable royalty rate is traditionally an alternate approach taken by the Commission when price differential evidence is not available. As discussed above, [

] and thus reliance on a royalty rate is not necessary.

Accordingly, it is recommended that respondents be required to post a bond equal to [] of the entered value of any accused wheels that they seek to import during the Presidential review period.


III. Conclusions And Recommended Determination

In accordance with the discussion of the issues contained herein, it is the RECOMMENDED DETERMINATION ("RD") of the undersigned that in the event the Commission determines that one or more respondents have committed a violation of section 337, the Commission should issue a limited exclusion order. It is further recommended that the Commission issue cease and desist orders directed toward all respondents to the extent that each is found to be in violation. In addition, if the Commission imposes a remedy that prohibits importation, respondents' importations during the Presidential review period should be subject to a bond in the amount of [] of their entered value.

The Secretary shall serve a confidential version of this RD upon counsel who are signatories to the Protective Order issued in this investigation (Order No. 1), and upon the Commission investigative attorney.

To expedite service of the public version, counsel for each party shall file by no later than November 4, 2009, a copy of this RD with those sections considered by the party to be confidential bracketed in red, or if confidential treatment is not requested for any portion of this RD, a statement to that effect.

SO ORDERED.


Carl C. Charneski
Administrative Law Judge


Issued: October 29, 2009

**CERTAIN CAST STEEL RAILWAY WHEELS, CERTAIN PROCESSES FOR
MANUFACTURING OR RELATING TO SAME AND CERTAIN PRODUCTS
CONTAINING SAME**

INV. NO. 337-TA-655

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **RECOMMENDED DETERMINATION** has been served by hand upon the Commission Investigative Attorney, Jeffrey T. Hsu, Esq. and Aarti Shah, Esq., and the following parties as indicated, on MAR 09 2010.



Marilyn R. Abbott, Secretary
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**FOR RESPONDENT STANDARD CAR
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**CERTAIN CAST STEEL RAILWAY WHEELS, CERTAIN PROCESSES FOR
MANUFACTURING OR RELATING TO SAME AND CERTAIN PRODUCTS
CONTAINING SAME**

INV. NO. 337-TA-655

<p>FOR RESPONDENTS BARBER TIANRUI RAILWAY SUPPLY, LLC., TIANRUI GROUP CO., LIMITED AND TIANRUI GROUP FOUNDRY CO. LIMITED:</p> <p>Tom M. Schaumberg, Esq. ADDUCI, MASTRIANI & SCHAUMBERG, LLP 1200 Seventeenth St., N.W. Fifth Floor Washington, D.C. 20036</p>	<p><input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Overnight Mail <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____</p>
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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington D.C. 20436

In the Matter of)

CERTAIN CAST RAILWAY WHEELS, CERTAIN)
PROCESSES FOR MANUFACTURING OR)
RELATING TO SAME AND CERTAIN PRODUCTS)
CONTAINING SAME)

Inv. No. 337-TA-655

**NOTICE OF COMMISSION DETERMINATION NOT TO REVIEW A FINAL INITIAL
DETERMINATION FINDING A VIOLATION OF SECTION 337; REQUEST FOR
WRITTEN SUBMISSIONS REGARDING REMEDY, BONDING, AND THE
PUBLIC INTEREST**

AGENCY: U.S. International Trade Commission

ACTION: Notice

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review a final initial determination (“ID”) of the presiding administrative law judge (“ALJ”) finding a violation of section 337 in the above-captioned investigation, and is requesting written submissions regarding remedy, bonding, and the public interest.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., telephone 202-708-2310, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, D.C. 20436. Copies of all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission’s electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on September 16, 2008, based on a complaint filed on August 14, 2008, by Amsted Industries Incorporated (“Amsted”) of Chicago, Illinois. *73 Fed. Reg.* 53441-42 (Sept. 16, 2008). The complaint alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain cast steel railway

wheels and certain products containing same by reason of misappropriation of trade secrets, the threat or effect of which is to substantially injure an industry in the United States. The complaint named four respondents: Tianrui Group Company Limited of China; Tianrui Group Foundry Company Limited of China (collectively “Tianrui”); Standard Car Truck Company (“SCT”), Inc. of Park Ridge, Illinois; and Barber Tianrui Railway Supply, LLC (“Barber”) of Park Ridge, Illinois.

On October 16, 2009, the ALJ issued his final ID finding a violation of section 337 by respondents. He also issued his recommendation on remedy and bonding during the period of Presidential review. On October 30, 2009, SCT and Barber (“SCT-Barber”) filed a joint petition for review of the final ID. Tianrui filed a petition for review and complainant Amsted filed a contingent petition for review on November 2, 2009. Amsted filed responses to SCT-Barber’s and Tianrui’s petitions on November 9 and 10, respectively, and SCT-Barber and Tianrui filed their responses on November 10. The Commission investigative attorneys filed responses to the three petitions on November 10. The Commission has determined not to review the subject ID.

In connection with the final disposition of this investigation, the Commission may issue an order that results in the exclusion of the subject articles from entry into the United States. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

When the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

When the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission’s action. *See* section 337(j), 19 U.S.C. § 1337(j) and the Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). During this period, the subject articles are entitled to enter the United States under bond, in an amount determined by the Commission. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding, and such submissions should address the recommended determination by the ALJ on remedy and bonding. The complainant and the IA are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the HTSUS numbers under which the accused articles are imported. The written submissions and proposed remedial orders must be filed no later than close of business on December 29, 2009. Reply submissions must be filed no later than the close of business on January 6, 2010. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R. § 210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, and in sections 210.42-46 of the Commission's Rules of Practice and Procedure, 19 C.F.R. §§ 210.42-46.

By order of the Commission.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott". The signature is fluid and cursive, with a large initial "M" and "A".

Marilyn R. Abbott
Secretary to the Commission

Issued: December 17, 2009

**CERTAIN CAST STEEL RAILWAY WHEELS, CERTAIN
PROCESSES FOR MANUFACTURING OR RELATING TO
SAME AND CERTAIN PRODUCTS CONTAINING SAME**

337-TA-655

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DETERMINATION NOT TO REVIEW A FINAL INITIAL DETERMINATION FINDING A VIOLATION OF SECTION 337; REQUEST FOR WRITTEN SUBMISSIONS REGARDING REMEDY, BONDING, AND THE PUBLIC INTEREST** has been served by hand upon the Commission Investigative Attorney, Jeffrey T. Hsu, Esq., and the following parties as indicated, on December 17, 2009



Marilyn R. Abbott, Secretary *JNC*
U.S. International Trade Commission
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Company Limited; and, Barber Tianrui Railway
Supply:**

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PUBLIC VERSION

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

**CERTAIN CAST STEEL RAILWAY
WHEELS, CERTAIN PROCESSES FOR
MANUFACTURING OR RELATING TO
SAME AND CERTAIN PRODUCTS
CONTAINING SAME**

Inv. No. 337-TA-655

**INITIAL DETERMINATION
Administrative Law Judge Carl C. Charneski**

Pursuant to the notice of investigation, 73 Fed. Reg. 53441 (2008), this is the Initial Determination in the matter of *Certain Cast Steel Railway Wheels, Certain Processes for Manufacturing or Relating to Same and Certain Products Containing Same*, United States International Trade Commission Investigation No. 337-TA-655. *See* 19 C.F.R. § 210.42(a).

It is held that a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain cast steel railway wheels or products containing same by reason of trade secret misappropriation.

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The following abbreviations may be used in this Initial Determination:

- ALJ - Administrative Law Judge
- ALJX - Administrative Law Judge Exhibit
- CDX - Complainant's Demonstrative Exhibit
- CPX - Complainant's Physical Exhibit
- CX - Complainant's Exhibit
- Dep. - Deposition
- EDIS - Electronic Document Imaging System
- FF - Finding(s) of Fact
- JPX - Joint Physical Exhibit
- JX - Joint Exhibit
- PCL - Proposed Conclusion of Law (CPCL, RPCL or SPCL)
- PFF - Proposed FF (CPFF, RPFF or SPFF)
- RDX - Respondents' Demonstrative Exhibit
- RPX - Respondents' Physical Exhibit
- RX - Respondents' Exhibit
- SX - Commission Investigative Staff Exhibit
- Tr. - Transcript.

I. Background

A. Institution and Procedural History of This Investigation

By publication of a notice in the *Federal Register* on September 16, 2008, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, the Commission instituted this investigation to determine:

[W]hether there is a violation of subsection (a)(1)(A) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain cast steel railway wheels or certain products containing same by reason of misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States.

73 Fed. Reg. 53441 (2008).

The complainant is: Amsted Industries Incorporated (“Amsted” or “complainant”) of Chicago, Illinois. *Id.* The respondents are: Tianrui Group Company Limited (“TianRui”) of Ruzhou, Henan, China; Tianrui Group Foundry Company Limited (“TianRui Foundry”) of Ruzhou, Henan, China; Standard Car Truck Company, Inc. (“SCT”) of Park Ridge, Illinois; and Barber Tianrui Railway Supply (“Barber”) of Park Ridge, Illinois (collectively, “respondents”).¹ The Commission Investigative Staff (“Staff”) of the Office of Unfair Import Investigations is a party in this investigation. *Id.*

A ten-day evidentiary hearing commenced on August 17, 2009, and concluded on August 28, 2009. Complainant, Staff and all respondents were represented at the hearing.

Posthearing briefs and proposed findings, as well as reply briefs, have been filed by Amsted, respondents and the Staff. The issues are ripe for determination.

¹ The Tianrui respondents in China have referred to themselves collectively as “TianRui,” and may be referred to as such herein.

B. Technological Background

To make cast steel railway wheels, a manufacturer needs molten steel to pour into wheel molds.² Solid steel is normally converted to a liquid state in electric arc furnaces. In this industry, such furnaces usually have a capacity of 20 to 25 tons. There are different ways of making the wheel molds that will receive the liquid steel. Kleeschulte Tr. 757-759.

One way to make a mold is to use graphite that is specially contoured with a pattern so that it is shaped like the plate and hub of a wheel. [

] Kleeschulte Tr. 759.

The bottom of the molds, also called “drags,” are said to float or flow along drag lines. “Copes,” which will be placed above the drags during the pouring of the liquid steel, travel along

² The parties have stipulated that “cast” means “to pour molten metal into a mold to produce an object of desired shape and dimensions”; that “casting” means “a metal object of desired shape and dimensions that is produced by pouring molten metal into a mold and allowing the molten metal to solidify within the mold”; and that “mold” means “a structure to receive molten metal to form a casting.” *See* JX-1C (stipulations), ¶ 1. By contrast, “forge” means “to work metal into a desired shape by impact or pressure.” *See Id.*

lines above the drags.³ [

] The copes are centered above the drags, and then closed on top of them. [

] Kleeschulte

Tr. 759-760.

The drags and copes, attached to each other, advance to a clamping station or pour head, where the mold is poured from the bottom of a vessel called a pour ladle. The liquid steel in the pour ladle was obtained from another vessel called a teapot ladle (which has a tap for filling the pour ladles). The liquid steel from an arc furnace is placed in the teapot ladle at a pouring station. Kleeschulte Tr. 760.

Once the molds have been poured, they are moved away so that other molds can be poured. [

] Kleeschulte Tr. 760-761.

[

] Kleeschulte Tr. 761.

[

³ The parties have stipulated that a “drag” is “the bottom half of a mold”; and that a “cope” is “the top half of a mold.” See JX-1C, ¶ 1.

] Kleeschulte Tr. 761-762.

[

]

Kleeschulte Tr. 763.

C. The Parties and Key Non-Parties

The testimony and other evidence adduced in this investigation make reference to the complainant and four interconnected respondents, as well as to numerous non-parties (*i.e.*, third parties), which in many cases are related to each other or to one or more party in this investigation. Each of the parties and non-parties is alleged to have been involved in the development, use, licensing or misappropriation of the alleged trade secrets. Accordingly, brief descriptions of the named parties and certain non-parties (the latter, in alphabetical order) are found below.

1. The Parties

Amsted Industries Incorporated is a Delaware corporation with its principal place of

⁴ The parties have stipulated that a “riser” is “a reservoir that feeds molten metal to a casting during solidification of the casting.” *See* JX-1C, ¶ 1.

business in Chicago, Illinois. JX-1C, ¶¶ 12, 13.⁵ Amsted is now an employee-owned corporation, and it is a diversified manufacturer of products for railroads, the construction and building markets, and general industry. *Id.*, ¶ 14. Amsted operates three Griffin Wheel foundries in the United States (Keokuk, Iowa; Groveport, Ohio; and Kansas City, Kansas) (described below), and each uses the Griffin Wheel Process to manufacture cast steel railway wheels. Worries Tr. 68. In fact, Amsted claims that there are only two processes for the manufacture of cast steel railway wheels – the Griffin Wheel Process and the ABC Process⁶ – and that it owns both of them. *See* Worries Tr. 75-76, 79, 115-116; Coughlin Tr. 279.

TianRui Group Company Limited is a Chinese limited liability company, with its principal place of business in Ruzhou, Henan Province, China. TianRui has entered into the Barber joint venture (described below) to import into the United States cast steel railway wheels. JX-1C, ¶¶ 64, 75, 80-84.

TianRui Group Foundry Company Limited is a Chinese limited liability company, with its principal place of business in Ruzhou, Henan Province, China. JX-1C, ¶ 65. TianRui owns a percentage of the TianRui Foundry. *Id.*, ¶ 66. TianRui Foundry owns and operates a cast steel railway wheel foundry in Ruzhou that has produced and is capable of producing 36-inch and 33-inch diameter cast steel railway wheels. JX-1C at ¶¶ 68, 70. TianRui Foundry received “conditional” certification from the American Association of Railroads (the “AAR”) for its 36-inch and 33-inch diameter cast steel railway wheels in 2008. JX-1C, ¶ 81; SX-1C.

⁵ Prior to 1962, Amsted was known as **American Steel Foundries**. JX-1C, ¶33.

⁶ The ABC Process is sometimes called the “ACT Process” (for the Advanced Casting Technique) or the “Southern Process.” *See* Jones Tr. 1444-1445; Coughlin Tr. 202.

Standard Car Truck Company, Inc. is a Delaware corporation with its principal place of business in Park Ridge, Illinois. JX-1C, ¶ 75. SCT describes itself as a world leader in freight car truck designs, stabilizer systems, railroad freight car trucks, and locomotive components. *See* CX-2618. SCT has entered into a joint venture with TianRui to import into, and market and sell in, the United States TianRui cast steel railway wheels. JX-1C, ¶76; CX-2618; CX-1372C; CX-1610C.

Barber TianRui Railway Supply, LLC is a Delaware limited liability company with its principal place of business in Park Ridge, Illinois. CX-2618. Barber is a joint venture that was formed by TianRui and SCT in 2007. JX-1C, ¶ 75; CX-2618; CX-2025C; CX-399C; CX-1197C; CX-1375C; CX-1377C. Barber has imported into the United States, has sold and is selling, and intends to continue to market in the United States TianRui cast steel railway wheels, including 36-inch and 33-inch diameter wheels already approved by the AAR. JX-1C, ¶¶ 81-84.

2. Key Non-Parties

ABC Rail Products China Investment Corporation is a Delaware corporation, and was a wholly-owned subsidiary of ABC Corporation. As ABC Corporation and its successors have been purchased, gone bankrupt or merged (as reflected in some of the descriptions below), so has the ownership of ABC Rail Products China Investment Corporation. At present, it is a subsidiary of Amsted. *See* CX-21C (license agreement); Kleeschulte Tr. 550, 554; Amsted Br. at 59 (Amsted describes ABC Rail Products China Investment Corporation as its wholly-owned subsidiary).

ABC Rail Products Corporation (“ABC Corporation”), in 1987, bought the railway products division of Abex (described below), thereby acquiring manufacturing facilities in

Calera, Alabama. Kleeschulte Tr. 439-440. ABC Corporation owned ABC Rail Products China Corporation at the time that the latter became a joint venturer in DACC (described below). *See* JX-1C, ¶¶ 43, 55; Kleeschulte Tr. 550.

ABC-NACO, Inc. (“ABC-NACO”) was the product of a 1999 merger between ABC Corporation and NACO. ABC-NACO went into bankruptcy in 2001.

American Brake Shoe operated a facility in Mahwah, New Jersey (frequently referred to in this litigation as “**Mahwah**”). In 1968, American Brake Show became **Abex**. Efforts were made at Mahwah in the late 1940s to use graphite molds and pressure pouring to make cast steel railway wheels. *See* Kleeschulte Tr. 439; Packer Tr. 2853, 2861-2865. Abex operated a facility in Quemahoning, near Johnstown, Pennsylvania from approximately 1979 through 1981 (and during this investigation, it has been frequently referred to as “**Quemahoning**”). Kleeschulte Tr. 630-631; Smitherman Tr. 772.

Amsted Rail Company, Inc. was formed on November 16, 2007, and is a wholly-owned subsidiary of Amsted.

Association of American Railroads is headquartered in Washington, D.C., and describes itself as an association “committed to keeping the railroads of North America safe, fast, efficient, clean, and technologically advanced.” The AAR has a subsidiary called **Technology Center, Inc.** (or “TICI”) in Pueblo, Colorado. JX-1C, ¶¶ 2-5. The AAR has a series of requirements for cast steel railway wheels. For example, CH-36 is an AAR designation for a cast steel railway wheel that has a 36” or metric equivalent diameter and meets of other dimensional requirements. M-107/M-208 is the AAR general specification for railway wheels, and is entitled “Wheels, Carbon Steel.” M-1003 is the AAR “Specification For Quality Assurance.” *Id.*, ¶¶

6-11.

Datong ABC Castings Company Limited (“DACC”) is located in Datong, China. It is a joint venture formed in 1996 by ABC Rail Products China Investment Corporation and **Datong Locomotive Works** (“DLW”). It is licensed to use the ABC Process to manufacture cast steel railway wheels. DACC is certified by the AAR to manufacture cast steel railway wheels for the U.S. market. JX-1C, ¶ 52; Kleeschulte Tr. 444; Liu Tr. 3200.

Griffin Wheel Company, Inc. (“Griffin Wheel”) became part of Amsted Rail (a wholly-owned subsidiary of Amsted, as described above) in October, 2008, and has three, operating domestic manufacturing facilities (discussed above), *i.e.*, Kansas City, Keokuk and Groveport (which is also known as the Columbus, Ohio facility). Griffin Wheel’s Kansas City facility has been an AAR-approved railway wheel supplier since August, 1958, although it did not operate from 1986 through August, 1994. The Keokuk facility has been an AAR-supplier since June, 1977; and the Groveport facility since November, 1986. JX-1C, ¶¶ 17-22.

Meridian Rail Services Corporation, Meridian Rail Information Systems Corporation and Meridian Rail Calera Corporation (collectively and individually referred to in this investigation as “Meridian Rail”), in 2002, purchased the assets of ABC-NACO out of bankruptcy. *See* Kleeschulte Tr. 440, 469. On April 2, 2003, various Meridian Rail-related companies were purchased by Amsted and ASF-Keystone, Inc (an Amsted subsidiary). *See* CX-216C (ASF-Keystone and Amsted agreement to purchase Meridian Rail Products Corp., Meridian Rail Information Systems Corp. and Meridian Rail Acquisition Corp.). Also on that date, Amsted purchased certain asserts from various Meridian Rail-related companies, including Meridian Rail Calera Corp. *See* CX-13C (“Asset Purchase Agreement” among Amsted,

Meridian Rail Services Corp., Meridian Rail Information Systems Corp. and Meridian Rail Calera Corp.); Kleeschulte Tr. 440; Worries Tr. 167, 172.

Scaw Metals is located in South Africa. It is a licensee of the technology at issue. *See* CX-18C (Scaw license); Worries Tr. 85-86, 181.

Westinghouse Air Brake Technologies Corporation (often referred to as **Wabec**) acquired SCT on September 12, 2008. JX-1C, ¶ 85.

Xinyang Amsted Tonghe Wheels Company Limited (“**Tonghe**”) is a joint venture formed by ABC Rail Products China Investment Corporation, DACC, Zhejiang Zhenghe Holding Company Limited, China Railway Northern Locomotive and Rolling Stock Group Company Limited (the former two companies being referred to in this investigation as “CNR”). Tonghe is located in Xinyang, Henan Province, China. *See* JX-1C, ¶¶ 55-58; CX-19C (joint venture agreement). ABC Rail Products China Investment Corporation was a subsidiary of Amsted at the time that it entered in to the Tonghe just venture. Kleeschulte Tr. 550. Tonghe manufactures cast steel railway wheels, and since March 27, 2009, has been an AAR-approved supplier of certain wheels. JX-1C, ¶¶ 61-63. On February 23, 2006, Tonghe and ABC Rail Products China Investment Corporation entered into their “Cast Steel Wheels Proprietary Technology Manufacturing Agreement” (which has been referred to as the “Tonghe License”). *Id.*, ¶¶ 59-60; CX-21C (Tonghe License).⁷

⁷ [91. [

] *See* Worries Tr. 64, 85,

Reply at 10.

] *See* Resps.

D. The Accused Products and Importation

The accused products are cast steel railway wheels made by TianRui in China, which are sold for importation into the United States, imported, or sold after importation. *See* Amsted Br. at 145; Fu Tr. 2097 (all TianRui wheels shipped to the United States were made in a TianRui foundry in China).

In fact, the parties have stipulated that TianRui has imported wheels into the United States through its related companies, SCT and Barber. In particular, it has been stipulated: “SCT and Barber have imported into the United States, specifically, the port of Houston, Texas, Tianrui wheels”; “SCT and Barber have sold within the United States, after importation into the United States, Tianrui wheels”; “Tianrui wheels that SCT and Barber have sold to Gunderson have been imported into the United States”; and “Tianrui wheels that SCT and Barber have sold to Montreal, Maine & Atlantic Railway were imported into the United States.” JX-1C, ¶¶ 81-84.

In addition, the evidence shows that TianRui has shipped a small number of wheels to the United States for the purpose of seeking AAR approval. In particular, TianRui has at least shipped wheels meeting the AAR’s CH-36 specifications. *See* Fu Tr. 2097-2102.

Accordingly, the importation or sale requirement of section 337(a)(1)(A) is satisfied.⁸

II. Jurisdiction and Standing

A. Personal, *In Rem*, and Subject Matter Jurisdiction

All parties have appeared, and have presented evidence and arguments on the merits in this investigation. No party has disputed the Commission’s personal jurisdiction. Accordingly,

⁸ *See* 73 Fed. Reg. 53441 (investigation concerning “the importation into the United States, the sale for importation, or the sale within the United States after importation of” accused products).

it is found that the Commission has personal jurisdiction over all parties in this investigation.

Further, no party has disputed the Commission's *in rem* jurisdiction over the accused products. Indeed, as found above, accused products been imported. Accordingly, it is found that the Commission has *in rem* jurisdiction over the accused products.

Finally, respondents argue that Amsted has failed to present a sufficient case to prevail in this investigation. Yet, no question has been raised concerning the Commission's jurisdiction over an investigation based on allegations of trade secret misappropriation as set forth in the notice of investigation. *See* Staff Br. at 6; *see also* 19 U.S.C. § 1337(a)(1)(A) (unfair methods of competition and unfair acts in the importation of articles into the United States). Accordingly, it is found that the Commission has subject matter jurisdiction over this investigation.

B. Complainant's Standing

Respondents argue that "there is no evidence that Amsted owns the asserted trade secrets," and that "Amsted alone is not in a position to assert the claimed trade secrets." Thus, respondents submit, "Amsted had no standing to bring this action, and the investigation should be decided in favor of Respondents." This argument that Amsted does not own the asserted trade secrets and that it lacks standing to bring the present action is rejected.

The central argument advanced by respondents is that "[s]ome of the 'process' or 'technology' used at the DACC plant, if owned by anyone, is owned by ABC Rail Products China Investment Corp. . . . and the rest of it is owned by . . . DACC . . . , but none of it is owned by Amsted." [

] Resps. Br. at 2, 115-124 (citing CX-21C

(Tonghe license)); Resps. Reply at 5-15.

Amsted argues that Abex originally owned the asserted trade secrets (called the ABC Trade Secrets by Amsted and the Staff) until 1987, when ABC Corporation acquired Abex's rail division, including the Calera facility and all related technology. It is argued that ownership transferred to ABC-NACO (as a result of the merger with NACO), and then to Meridian Rail, when it bought certain ABC-NACO assets out of bankruptcy. Amsted argues that it now owns the ABC Trade Secrets because it purchased assets of Meridian Rail, including trade secrets as specifically enumerated in the Asset Purchase Agreement of April 2, 2003. Amsted argues that no one before has questioned its ownership of the asserted trade secrets; and that respondents read too much into the statements made in the Tonghe license because there is no evidence that Amsted ever transferred ownership to another company. *See* Amsted Br. at 58-61; Amsted Reply at 3-11.

The Staff argues that Amsted has satisfied its burden of proof that it owns the ABC Process and the asserted ABC Trade Secrets. The Staff also argues that inasmuch as respondents did not raise this issue in their prehearing statement (*i.e.*, that any asserted trade secrets are owned by ABC Rail Products China Investment Corporation), it has been waived. In addition, the Staff relies on the chain of ownership culminating in Amsted's 2003 acquisition of Meridian Rail assets, and the fact that there is no record of any entity ever challenging Amsted's ownership of the trade secrets. *See* Staff Br. at 8-9; Staff Reply at 38-41.

The Staff's assertion that respondents failed to set forth in their prehearing statement their argument relating to ABC Rail Products China Investment Corporation was not contradicted or

otherwise addressed by respondents in their reply.⁹ The Staff's argument is also supported by an examination of respondents' prehearing statement. While in several portions of their prehearing statement, respondents argue that Amsted has failed to prove (or presumably would fail to prove at hearing) its ownership of the alleged trade secrets, those arguments are based on the premise that no trade secrets ever existed, or that if they existed they were not conveyed to Amsted or its predecessors. *See* Resps. Prehearing Statement at 1-2, 7-8, 18-19, 25-27. Nowhere in respondents' prehearing statement is it argued that ABC Rail Products China Investment Corporation is the owner of the ABC Trade Secrets.

Moreover, the difference between what respondents argued in their prehearing statement and what they argue in their posthearing brief is significant. The significance can be readily appreciated by examining respondents' posthearing brief in which they purport to construe specific portions of licenses and other agreements involving ABC Rail Products China Investment Corporation (such as the DACC and Tonghe licenses) without any citation to testimony or other evidence to support their argument. They simply criticize the testimony of certain Amsted's witnesses concerning Amsted's claim of ownership. *See* Resps. Br. at 117-19;

⁹ With respect to prehearing statements, the Ground Rules in this investigation require, among other things:

A statement of the issues to be considered at the hearing that sets forth *with particularity* a party's contentions on each of the proposed issues, including citations to legal authorities in support thereof. Any contentions not set forth in detail as required herein shall be deemed abandoned or withdrawn, except for contentions of which a party is not aware and could not be aware in the exercise of reasonable diligence at the time of filing the prehearing statement.

Ground Rule 4.d (Order No. 2).

see also Resps. Reply at 6-11 (where respondents weave an even newer argument based almost exclusively on attorney argument and citations to sections of various agreements).¹⁰

Furthermore, even if respondents had not waived this argument, Amsted has nonetheless established its ownership of the asserted trade secrets. Contrary to some of respondents' arguments, Amsted does not assert any innovations that may have been made by DACC. Rather, as discussed in detail below in section IV (The Trade Secrets), Amsted argues that each of the trade secrets asserted in this investigation are the what it terms the ABC Trade Secrets, whose development started with Abex, and culminated in the manual used at ABC Corporation's facility in Calera, Alabama. Amsted further argues that ownership of the trade secrets can be traced from Abex, ultimately to Amsted; and that there is no evidence that Amsted has given up ownership to any other company. *See* Amsted Br. at 59-61; Amsted Reply at 9 n.5 ("The ABC Trade Secrets at issue are not such [] but are based on or derived from the Calera Manual.").

Amsted established that Abex owned the ABC Trade Secrets until 1987, when Abex's rail division was acquired by ABC Corporation, which later merged with NACO to become ABC-NACO. *See* Coughlin Tr. 203-208, 217; Kleeschulte Tr. 440-441, 467-468.¹¹ Meridian Rail then acquired the ABC Trade Secrets when it purchased certain ABC-NACO assets out of

¹⁰ At least one of the documents relied upon by respondents is among the documents that, according to respondents' prehearing statement, must be construed according to Chinese law. *See* Resps. Prehearing Statement at 11-15; CX-17C (DACC license), ¶ 12.01 (People's Republic of China law applicable); *see also* CX-21C (Tonghe license), ¶ 12.01 (People's Republic of China law applicable).

¹¹ Some of Abex's work is reflected in subject matter that Abex decided to make public in U.S. Patent No. 3,202,919 ("the Beetle patent") and U.S. Patent No. 3,433,293 ("the Ponzar patent"). *See* Skinner Tr. 3007-3013.

bankruptcy. *See* JX-1C, ¶ 200; Kleeschulte Tr. 439-441, 469, 647.

Amsted acquired the trade secrets from Meridian Rail in 2003. *Wories* Tr. 78-81. The Asset Purchase Agreement of April 2, 2003, transfers to Amsted the intellectual property of Meridian Rail Information Systems Corp. and Meridian Rail Calera Corp., [] *See* CX-13C, Section 1.1(c).

There is no evidence that ABC Corporation transferred ownership of its trade secrets to its subsidiary ABC Rail Products China Investment Corporation before the latter licensed DACC in 1996. Nor is there any evidence that Amsted transferred ownership of its trade secrets to its subsidiary ABC Rail Products China Investment Corporation before the latter licensed Tonghe in 2006.¹² Nevertheless, as discussed below, the plain language of both agreements only strengthens Amsted's argument that ABC Corporation once owned the ABC Trade Secrets, and that now Amsted owns the trade secrets.

In particular, the DACC license states that [

] *See*

CX-17C at 1. Similarly, the Tonghe license states that [

¹² How ABC Rail Products China Investment Corporation was able to license DACC and Tonghe is perhaps best answered under Chinese law inasmuch as both license agreements are, according to their terms, to be construed under the laws of China.

] See CX-21C at 1-2.

Accordingly, it is found that Amsted has established that it owns the trade secrets asserted in this investigation, and that it has standing as the complainant.

III. General Principles of Applicable Law

A. Choice of Law

In earlier section 337 investigations based on allegations of trade secret misappropriation, the Commission has looked to general principles of tort or commercial law to determine whether a violation has occurred. See *Certain Apparatus for the Continuous Production of Copper Rod*, Inv. No. 337-TA-52, Comm'n Op. at 42 (1979) ("*Copper Rod I*"); *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, Commission Decision Not to Review Initial Determination Finding Violation at 51-53 (Dec. 1984) (*Sausage Casings*) (citing the Restatement of the Law of Torts, § 757). However, the Federal Circuit has since held that trade secret misappropriation is a matter of state law. *Leggett & Platt, Inc. v. Hickory Springs Mfg. Co.*, 285 F.3d 1353, 1360 (Fed. Cir. 2002) (applying the trade secret misappropriation law of Illinois).

Here, complainant Amsted and two of the respondents, SCT and Barber, have their principal place of business in Illinois. JX-1C, ¶¶ 12, 75, 77. Thus, it is Illinois law that governs.¹³ Indeed, the parties have already looked to Illinois law in this investigation. See

¹³ In any event, as discussed *supra*, the Illinois law relating to trade secrets does not differ substantially from the law applied in previous Commission trade secret investigations. Selection of Illinois law is also consistent with Section 145 of the Restatement (Second) of the Conflict of Laws (applying factors of: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, (continued...)

Amsted Br. at 8-10 (relying on the Illinois Trade Secrets Act (which may be referred to as “ITSA”)); Resps. Br. at 11-12 (relying substantially on ITSA); Staff Br. at 18-21 (choice of law analysis).

B. Legal Requirements of a Trade Secret

The Illinois Trade Secrets Act, also referred to as the “ITSA,” provides in relevant part that:

“Trade secret” means information, including but not limited to, technical or non-technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers, that:

(1) is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use; and

(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality.

765 Ill. Comp. Stat. § 1065/2(d) (2009); see *Delta Med. Sys. v. Mid-America Med. Sys., Inc.*, 772 N.E.2d 768, 780 (Ill. App. Ct. 2002).¹⁴

¹³(...continued)
between the parties is centered).

¹⁴ The Commission has similarly found that misappropriation of trade secrets is cognizable as an unfair act under Section 337, provided that each of the following elements is established:

1. a trade secret exists that is not in the public domain;
2. the complainant possesses ownership of the trade secret or a requisite proprietary interest therein;
3. the complainant disclosed the trade secret to the respondent while in a confidential relationship or the respondent

(continued...)

The Illinois trade secret statute focuses on the secrecy of the claimed information, and it divides the secrecy inquiry into two parts: (1) whether the industry has knowledge of the putative trade secret, and (2) whether the owner of the putative trade secret has made reasonable affirmative efforts to keep the information secret. *See Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 721-22 (7th Cir. 2003).

Both the Commission and Illinois courts have referred to six factors set forth in the comments to Restatement of Torts § 757 to determine whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [complainant's] business;
- (2) the extent to which it is known by employees and others involved in [complainant's] business;
- (3) the extent of measures taken by [complainant] to guard the secrecy of the information;
- (4) the value of the information to [complainant] and to [its] competitors;
- (5) the amount of effort or money expended by [complainant] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Sausage Casings, Comm'n Op. at 52-53; *Learning Curve Toys*, 342 F.3d at 722 ("Illinois courts

¹⁴(...continued)

wrongfully took the trade secret by unfair means; and

4. the respondent has used or disclosed the trade secret causing injury to the complainant.

Copper Rod I, Comm'n Op. at 42.

frequently refer to six common law factors (which are derived from § 757 of the Restatement (First) of Torts) to aid their analysis of whether a trade secret exists”). Some of the factors may not be relevant to a case’s particular set of circumstances. *See Id.* at 722 (finding that Illinois courts use the factors as instructive guidelines and not as six prongs that a plaintiff must satisfy).

While matters of general knowledge in an industry are not eligible for trade secret protection, a specific embodiment of general concepts or a combination of elements, some or all of which may be known in the industry may be protectable as a trade secret. *See 3M v. Pribyl*, 259 F.3d 587, 595-596 (7th Cir. 2001) (affirming trial court’s denial of judgment for defendants as a matter of law) (“These manuals and processes, even if comprised solely of materials available in the public domain, have been created by combining those materials into a unified system which is not readily ascertainable by other means.”).¹⁵

A trade secret is information that can provide economic value because the information is not generally known or clearly understood by persons in an industry. *George S. May Int’l Co. v. Int’l Profit Assocs.*, 628 N.E.2d 647, 653 (Ill. App. Ct. 1993).

Illinois law does not require complete secrecy. *See ILG Indus., Inc. v. Scott*, 273 N.E.2d 393, 395-976 (Ill. 1971) (finding that neither the limited distribution of partial technical drawings to customers nor the ability to reverse engineer the product destroyed the trade secret). The ITSA does, however, require that the information be sufficiently secret for it to impart economic value to its holder. 765 Ill. Comp. Stat. § 1065/2(d)(1).

¹⁵ There is no requirement that a trade secret be novel or non-obvious, as there is with a patent claim. *Learning Curve Toys*, 342 F.3d at 724.

C. Legal Standards for Determining Misappropriation of a Trade Secret

Under Illinois law, misappropriation of a trade secret consists of:

(1) acquisition of a trade secret of a person by another person who knows or has reason to know that the trade secret was acquired by improper means;^[16] or

(2) disclosure or use of a trade secret by a person without express or implied consent by another person who:

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of disclosure or use, knew or had reason to know that knowledge of the trade secret was:

(i) derived from or through a person who utilized improper means to acquire it;

(ii) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(iii) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

765 Ill. Comp. Stat. § 1065/2(b).

¹⁶ “Improper means” includes “theft, bribery, misrepresentation, breach or inducement of a breach of a confidential relationship or other duty to maintain secrecy or limit use, or espionage through electronic or other means.” 765 Ill. Comp. Stat. § 1065/2(a). “Reverse engineering or independent development shall not be considered improper means.” *Id.*

A claim of trade secret misappropriation is broad enough to encompass modifications or improvements to a product or process, when such modifications or improvements are derived from the asserted trade secrets. As the Seventh Circuit explained:

We observed in *In re Innovative Constr. Sys., Inc.*, 793 F.2d 875, 887 (7th Cir. 1986), for example, that “the user of another’s trade secret is liable even if he uses it with modifications or improvements upon it effected by his own efforts, so long as the substance of the process used by the actor is derived from the other’s secret.” Although that decision involved Wisconsin law, the law of Illinois is in accord. We have observed before, in fact, that if trade secret law were not flexible enough to encompass modified or even new products that are substantially derived from the trade secret of another, the protections that law provides would be hollow indeed.

Mangren Research and Dev. Corp. v. National Chemical Co., Inc., 87 F.3d 937, 944 (7th Cir. 1996) (citations omitted).

IV. The Trade Secrets and Their Misappropriation

A. Identification of the Trade Secrets

During the discovery phase of this investigation, Amsted produced a list of 260 alleged trade secrets that it asserted were misappropriated by respondents TianRui, TianRui Foundry, SCT, and Barber. *See* CX-160C. That list was prepared by David Kleeschulte, who worked for Abex beginning in 1968, and then for each of its successors, including Amsted. He is now Amsted’s Managing Director of International Business. *See* Kleeschulte Tr. 439-440, 470. Kleeschulte was also instrumental in transferring ABC Process information to the DACC joint venture. Kleeschulte Tr. 443-446.

In order to prepare the list of asserted trade secrets, Kleeschulte primarily consulted the English version of the DACC Procedure Book. The DACC Procedure Book was originally written in Chinese, and was based on a translation of the Calera Manual. Kleeschulte described

the DACC Procedure Book, as “basically the repeat of the Calera Manual, which outlines all the practices and the procedures and technical requirements of the different raw materials incoming, mixing, specifications and so forth, for the protection of ABC process to manufacture wheels.”

Inasmuch as some of the alleged trade secrets at issue pertain to the layout of a foundry to implement the ABC Process, he also consulted layout drawings from ABC Rail. *See* Kleeschulte Tr. 459, 476-477, 480-481, 602.

By the time of the hearing, complainant had reduced the number of alleged trade secrets asserted in this investigation to 128. Complainant has grouped the asserted trade secrets into 12 categories. *See* Kleeschulte Tr. 470-471; CDX-19C. Categories 1 through 11 relate to process steps that are part of the ABC Process, and are found in the Calera Manual and DACC Procedure Book. ABC Trade Secret Category 12 relates to the foundry layout used to implement the ABC Process. The Trade Secret categories and their enumerated trade secrets are, as follows:

1. []:] (ABC Trade Secret Nos. 107, 111, 116, 117, 118, 119, 120, 122, 123).
2. []:] (ABC Trade Secret Nos. 57, 59, 60, 61, 62, 69, 70).
3. []:] (ABC Trade Secret Nos. 20, 21, 23, 24, 25, 63, 64, 65, 66, 67, 68, 71).
4. []:] (ABC Trade Secret Nos. 134, 140, 141, 144, 145, 147, 148).
5. []:] (ABC Trade Secret Nos. 75, 88, 89, 90, 91, 92, 93, 94, 95, 103).
6. []:] (ABC Trade Secret Nos. 2, 4, 9, 39, 41, 43, 49, 54, 55).
7. []:] (ABC Trade Secret Nos. 26, 72, 228, 234).
8. []:] (ABC Trade Secret Nos. 27, 73, 130, 131, 132, 133, 229, 235).

9. []: (ABC Trade Secret Nos. 56, 106, 244).
10. []: (ABC Trade Secret Nos. 240, 241, 242, 243, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259).
11. []: (ABC Trade Secret Nos. 105, 237, 239).
12. Foundry Layout: (ABC Trade Secret Nos. 161, 162, 163, 164, 165, 166, 167, 168, 169, 172, 173, 174, 175, 176, 177, 180, 181, 182, 183, 184, 185, 186, 188, 189, 190, 191, 196, 197, 198, 199, 200, 201, 202, 204, 205, 212, 213).

B. The ABC Trade Secrets Are Not Generally Known

As quoted above, the Illinois Trade Secrets Act requires that a trade secret must not be “generally known to other persons who can obtain economic value from its disclosure or use.” *Accord May Int’l Co.*, 628 N.E.2d at 653. As detailed below, reasonable steps have been taken by Amsted and its predecessors to keep the asserted trade secrets confidential. There also is evidence that the ABC Trade Secrets are not generally known, even in the industry.

Respondents argue that Amsted offered no evidence that the asserted trade secrets are not generally known in the industry. *See* Resps. Br. at 14. In fact, they incorrectly argue that “Amsted’s casting expert, Dr. Conley, offered no opinion about whether the claimed trade secrets were generally known in the foundry industry,” and that “[h]e just compared pages of manuals to see if they looked alike.” *Id.* at 15.

Contrary to respondents’ assertion, Dr. Conley did testify that the asserted ABC Trade Secrets were not generally known. He testified that although his task was not to compute a numerical value for ABC Trade Secrets, in his opinion, “they are valuable for not being generally known. But I am not trying to quantify that value.” *See* Conley Tr. 1391. Earlier in his

testimony, Dr. Conley had also offered the opinion that the asserted ABC Trade Secrets in Category 10, [,] are not “generally known.” Conley Tr. 1361-1362 (“I mean, people know that you can [] That’s not generally known.”).

Moreover, the record contains an assessment from a third party with detailed, personal knowledge of cast steel railway wheels and their manufacture. Ronald Jones provides consulting services to Technology Transportation Center, Inc. (a AAR subsidiary), mainly in the area of wheels and axles. Jones is the only AAR inspector for cast steel railway wheels. He is familiar with many aspects of the ABC process and the facilities in which the process has been used. During the course of his career, he has inspected the Calera, DACC, Scaw and TianRui foundries. *See* Jones Tr. 1437-1440. Ronald Jones testified, as follows:

Q. Do you think the ABC Process is generally well known?

A. It is not generally well known.

Jones Tr. 1469-1470.

The testimony of respondents’ expert on this topic, Dr. Skinner, is problematic for them. He testified repeatedly that the trade secrets asserted in this investigation were known to a foundry man, or simply added nothing new. *See, e.g.,* Skinner Tr. 3048, 3074. Yet, Dr. Skinner also testified that he had never completely read the Calera Manual or DACC Procedure Book before rendering his opinions. He read only parts of them. In fact, respondents’ expert was of the opinion that he did not need to know what was in an entire manual, or book, in order to know

that individual claimed secrets were not secrets. *See* Skinner Tr. 3016-3017, 3166-3167.¹⁷

Thus, Dr. Skinner's opinions concerned individual trade secrets in isolation. In some cases, it was clear that he was not attempting to relate the claimed secrets to each other or to the production of cast steel railway wheels. *See, e.g.*, Skinner Tr. 3018. Accordingly, Dr. Skinner's testimony on this point is not entitled to any weight. Similarly, another of respondents' experts, Dr. Packer, testified as to the claimed secrets in isolation, offering no opinion as to whether there is any relationship among the trade secrets. *See* Packer Tr. 2932-2933. Thus, Dr. Packer's testimony likewise is not entitled to any weight.

Amsted did adduce evidence through the testimony of Dr. Conley and Ronald Jones that the ABC Trade Secrets are not generally known. Further, as discussed below, the ABC Trade Secrets are the result of many years of work. Thus, they have been the subject of numerous efforts to keep them secret, and are also the subject of lucrative license agreements.

C. Efforts to Maintain Secrecy

1. Early Development and the Calera Manual

The ABC Process, first developed by Abex, afforded several improvements in the way that cast steel railway wheels were made, resulting in a stronger, lighter wheel. John Coughlin, a 22-year employee of Abex who now consults with Amsted on the Scaw facility, testified that his assignments included work at Abex's Mahwah experimental foundry and research facility. He

¹⁷ Even a specific embodiment of general concepts or a combination of elements, some or all of which may be known in the industry, may be protectable as a trade secret. *See 3M v. Pribyl*, 259 F.3d at 595-596 ("A trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret.").

participated in the research and development of the ABC Process, and would eventually take over as head of research and development for the process. Coughlin testified that Abex always treated the ABC Process as confidential. When he first began to work on the process, Coughlin was told by the supervisor of the then-principal developer of the process that the process was to be kept confidential. He was told that for that reason only limited patent protection would be sought. Accordingly, the process manuals that were being developed were kept by only specified individuals whose names were kept on a list, and who were issued numbered copies. In fact, the manuals were kept out of the general file system at the research center. *See* Coughlin Tr. 201-203, 212-216.

The evidence shows that all of the owners of the ABC Process – Abex, ABC Rail Products, and ABC-NACO – have understood that the Calera Manual must be kept confidential. For example, John Kleeschulte (discussed above) and Les Smitherman¹⁸ both testified that they were not aware of any instances in which the Calera Manual was publicly disclosed. *See* Kleeschulte Tr. 493; Smitherman Tr. 493. Smitherman further testified that there was a limited number of copies of the Calera Manual (at most nine), and that there were access controls for the manual at the Calera Foundry in Alabama. Smitherman Tr. 782-783.

Amsted's witnesses readily admitted that certain information contained in the Calera Manual was disclosed to employees and outside vendors as a necessary part of the complex industrial process for manufacturing cast steel railway wheels. Yet, providing limited amounts of information from the Calera Manual to third-party vendors does not necessarily disqualify that

¹⁸ Smitherman has worked in the railway industry 40 years, beginning at Abex's Calera facility, and moving to Amsted after ABC-NACO entered into bankruptcy. *See* Smitherman Tr. 771.

information from trade secret protection. *ILG Indus.*, 273 N.E.2d at 396 (“[t]he disclosure of protected information to a customer or supplier does not necessarily destroy the information’s confidentiality”); *Learning Curve Toys*, 342 F.3d at 724 (“A trade secret does not lose its character by being confidentially disclosed to agents or servants, without whose assistance it could not be made of any value.”). In this regard, Kleeschulte, Coughlin, and Smitherman all testified that they expected vendors to the Calera Foundry to treat the information disclosed to them as confidential, and provided only the information required. *See Coughlin Tr.* 258 (“minimum necessary to deal with the issue at hand”); *Kleeschulte Tr.* 486-487 (vendors informed at least orally that information was to be kept confidential) (“specific information for specific area”); *Smitherman Tr.* 805-806.

The facilities where the ABC Process was developed, and where it still is used, have all been secure facilities, with sign-in and sign-out procedures and controlled access. Coughlin testified that there was a sign-in log at the Calera Foundry, and that later there was a gate with a guard. *See Coughlin Tr.* 219. The Quemahoning facility was also secure. *See Coughlin Tr.* 270-271.¹⁹

¹⁹ Coughlin testified:

Q. Were there any security measures at all at the Quemahoning facility?

A. Yes.

Q. What were those measures?

A. It was pretty nearly ready to start up the first time I went there, and there was complete perimeter fence and guard booth on that fence at which one had to sign in and get a tag, like this tag. Once

(continued...)

Smitherman similarly testified that there were sign-in and sign-out procedures for visitors to the Calera Foundry, and also that a gate was installed and guards were posted. Visitors could not wander freely through the Calera facility, and from the first day that he joined management, Smitherman was instructed not to allow photography. *See* Smitherman Tr. 772, 784-787, 790. While Phillips testified that certain vendors might have entered the Calera foundry without following the procedures described by Coughlin and Smitherman, those vendors were well known to the Calera Foundry and trusted by Phillips. *See* Phillips Tr. 2067-2070.

Moreover, none of the evidence introduced at trial suggests that any visitors to the Calera Foundry could have obtained the Calera Manual due to its carefully controlled access and restricted distribution. *See* Coughlin Tr. 261-263, 302-303. Indeed, the fact witnesses who testified at the hearing in respondents' case-in-chief, specifically Bobby Joe Phillips and Vaughn Makary, admitted that they were not personally aware of any instance in which the Calera Manual was publicly disclosed.²⁰ Indeed, Phillips testified that although he had worked at the

¹⁹(...continued)

things got going a little more, actual picture identification tags were issued. That was the first time I ever had a picture identification tag within the corporation.

So, you know, you had to sign in there. You had to be expected. Every time I came, I was coming with management people anyway, so it was pretty easy to get in.

Coughlin Tr. 270-271.

²⁰ Makary's involvement with the Calera Foundry was for a limited time, beginning around 1998, shortly before the merger between ABC Corporation and NACO. He ultimately held the position of CEO of ABC-NACO, until he left the company in approximately 2001. *See* Makary Tr. 2530, 2544-2545, 2556, 2595. Makary testified that before the merger, ABC Corporation did not disclose the ABC Process to him. *See* Makary Tr. 2580-2581. Makary did not offer any testimony to suggest that he was aware of any instance in which the Calera Manual
(continued...)

Calera Foundry from 1958 until 1999, the first time he even saw a copy of the manual was in 1997, in his position as shift superintendent. *See Phillips Tr. 2079-2080.*²¹ Phillips' testimony at trial that information in the Calera Manual was not treated as confidential contradicted his deposition testimony in which he confirmed he was told not to broadcast the information to the public or to a competitor. *See Phillips Tr. 2080-2081.*²²

The record evidence establishes that Amsted and the previous owners of the ABC Trade Secrets took reasonable steps to protect the secrecy of the ABC Process and the Calera facility in general. As discussed below, subsequent licensees of the process have done likewise.

2. DACC and Tonghe

In establishing the DACC joint venture, the parties agreed that DACC will keep confidential the non-publicly disclosed proprietary ABC Technology provided to it. *See CX-17C* (¶ 6.01); *Kleeschulte Tr. 457.*²³ The Calera Manual was placed into archives at the DACC

²⁰(...continued)
itself was disclosed publicly.

²¹ Phillips started at the Calera Foundry as a molder, became a foreman, and in the early 1990s, became a shift superintendent. During a shift, he was in charge of 100 to 125 employees. *See Phillips Tr. 2051-2054.*

²² While Phillips took a copy of the Calera Manual home with him when the plant was being closed, he also testified that he never told anyone, including Smitherman his supervisor, that he had done so, nor did he show it to anyone. In fact, this event appears inadvertent, inasmuch as Phillips did not show the copy to anyone, and did not even remember he had a copy at home until his wife recently threw it out. *See Phillips Tr. 2081-2082.* Smitherman testified that Phillips would not have been allowed to take a copy of the Calera Manual home, and that he would have been shocked to have learned Phillips had done that. *See Smitherman Tr. 808.*

²³ The Scaw License contains provisions relating to confidential information and how it should be handled, which are similar to those contained in the other licenses for the ABC Process. *See Worries Tr. 92.* At Scaw, the trade secrets are recorded in the Scaw Quality Control
(continued...)

Foundry and cannot be copied. Kleeschulte Tr. 561; CX-343C. Further, the DACC Procedure Book is stamped “controlled copy” and access to it is carefully controlled so that it is kept confidential. *See* Zuo Tr. 794-796; CX-406C. The DACC Procedure Book is under the control of the process control department, and any copies of it would be numbered and signed. Kleeschulte Tr. 560-561.

In keeping with its contractual obligations to keep the ABC Technology confidential, the employees of DACC were informed through the written employee code of conduct that information pertaining thereto was proprietary and to be maintained as confidential. *See* Zuo Tr. 929; CX-765C (DACC Code of Conduct, 1998 version); CX-584C (DACC Code of Conduct, 2004 version). The DACC code of conduct includes a provision notifying all employees of their duty not to disclose confidential information publicly or to third parties. *Id.* Dr. Zuo testified that when he dealt with suppliers to DACC he told them that they could not release any information regarding DACC materials to any third party and that they had a duty to keep such information confidential. Zuo Tr. 934-935.²⁴ This was also a requirement from the management of DACC. In addition, the DACC facility is a secure and gated facility. Zuo Tr. 925-927. Within the facility, computers with key documents are password-protected, and are not connected to the DACC intranet or the Internet. *See* Zuo Tr. 926-928.

One area in which DACC arguably did not exercise a high level of security is in having

²³(...continued)

Manual, which is kept by the head of the metallurgical department with copies going only to department heads and the manager of the wheel product line. *See* Kleeschulte Tr. 562-563.

²⁴ David Zuo is currently the president of Tonghe, and also the director of the international manufacturing department of Griffin Wheel. From 1998 through 2006, he worked at DACC, eventually as its director of technology. *See* Zuo Tr. 917-920.

all employees sign a confidentiality agreement. *See* Zuo Tr. 718-719. While this extra layer of protection was corporate policy, as discussed above, employees were already informed that as a condition of employment they were not to disclose confidential information. Moreover, by the time that employees began to leave DACC to work for TianRui (discussed further below), all of them except for Xie Renyi had signed confidentiality agreements with DACC. JX-1C, ¶¶ 91, 92, 104, 105, 113, 114, 125, 126, 137, 138, 149, 150, 161, 162, 173, 174 . The role that Xie Renyi may have played in TianRui's misappropriation is discussed below.

The record evidence shows that at the time TianRui began its efforts to hire DACC employees familiar with the DACC Procedure Book, DACC's measures to protect the confidentiality of the ABC Technology and the asserted ABC Trade Secrets were reasonable under the circumstances.²⁵ Further, it is not an adequate defense to assert that the complainant did not take adequate security measures if the security lapse was not the cause of the misappropriation. *Syntex Ophthalmics, Inc. v. Novicky*, 214 U.S.P.Q. 272, 277 (N.D. Ill. 1982). Even assuming that there was any lapse in the measures taken at DACC to protect the ABC Technology, that lapse did not facilitate, or otherwise lead to, TianRui's misappropriation of the ABC Process.

The steps that Tonghe has taken to maintain the ABC Technology that it licensed in 2006 as confidential are similar to those taken at DACC. For example, pursuant to the license agreement for Tonghe, the licensee also has an obligation to keep the ABC Technology

²⁵ In *Arcor, Inc. v. Haas*, 842 N.E.2d 265, 270-271 (Ill. App. Ct. 2005), for example, the court found a confidentiality agreement, the keeping of copies in a secure room, and limiting access to information on a need-to-know basis or to only key individuals, were sufficient indicia of confidentiality to justify trade secret protection. Each of those indicia are also present here.

confidential. CX-21C (*see* Section 6); Zuo Tr. 933. Dr. Zuo also testified that when he dealt with vendors and suppliers to Tonghe and told them that they could not release any information regarding materials to any third party and that they had a duty to keep such information confidential. Zuo Tr. 934-935. In addition, from the outset, Tonghe has required its employees to sign confidentiality agreements. Zuo Tr. 979-980. Tonghe also has an employee handbook that sets forth employee obligations regarding proprietary information. Zuo Tr. 979-980. The Tonghe facility is a secure facility with restricted access. Smitherman Tr. 801-814. Furthermore, many of the key documents relating to the ABC Process are kept on password-protected computers. Zuo Tr. 933.

Similarly, the layout drawings of the DACC and Tonghe facilities, which are the subject of Category 12 of the ABC Trade Secrets (*i.e.*, ABC Trade Secrets Nos. 161, 162, 163, 164, 165, 166, 167, 168, 169, 172, 173, 174, 175, 176, 177, 180, 181, 182, 183, 184, 185, 186, 188, 189, 190, 191, 196, 197, 198, 199, 200, 201, 202, 204, 205, 212, 213) are based on drawings specifically made for the DACC or Tonghe foundries.²⁶

Each of the drawings has a legend on it that states:

SECRET AND CONFIDENTIAL

This information is Proprietary ABC Technology and may not be disclosed in whole or in part to any third party whether orally or in written form.

²⁶ John Bassano left Abex in 1979, and formed a firm with three other engineers. He was hired in 1993 to design the layout of the DACC Foundry. From approximately 1993 through 1996, during which time he made trips to China, Bassano helped prepare approximately 49 layout drawings for the DACC facility. Bassano Tr. 1548-1549; Kleeschulte Tr. 498-499; CX-106C.

Only one copy of the DACC layout drawings was made. After the foundry was completed, the drawings were put into the DACC archives. Kleeschulte Tr. 562.

CX-106C.

The Tonghe drawings relating to the mold line were electronic documents, which have been maintained on secure computers at Tonghe. Zuo Tr. 926-928, 933; CX-637C; CX-648C.

D. Value of the Trade Secrets

The usefulness of ABC Trade Secrets to the manufacture of a cast steel railway wheel is discussed below with respect to individual, enumerated trade secrets. In addition, the evidence shows that the asserted ABC Trade Secrets, taken as a whole, have demonstrated value in both a qualitative and quantitative sense.

In order to obtain AAR approval to sell cast steel railway wheels in the North American market, including the United States, adequate quality assurance systems must be in place for the foundry. The Calera Manual and the DACC Procedure Book set forth specifications that ensure the quality of cast steel railway wheels manufactured using the ABC Process. *See* Coughlin Tr. 230-231, 259-260, 294-95. Thus, the specifications set forth in the DACC Procedure Book and Calera Manual, which include the asserted ABC Trade Secrets, are valuable in that they are intended to ensure the quality of the cast steel railway wheels manufactured using the ABC Process.

There is also quantitative evidence that the asserted ABC Trade Secrets have value in the form of the three manufacturing licenses to Scaw, DACC, and Tonghe. Each of the licenses, which include royalty payment provisions, demonstrates that the asserted ABC Trade Secrets have monetary value. *See* CX-17C; CX-18C; CX-21C. The evidence further shows that, based on these three licenses, the ABC Technology and the ABC Trade Secrets have substantial economic value to Amsted that can be conservatively estimated at [

] See Putnam Tr. 2160-2169

(referring to CDX-33C.10), 2305.

E. General Discussion of Respondents' Misappropriation

1. Respondents Admittedly Use the ABC Process

Respondents' manufacturing process is based on the same materials, parameters, and foundry layout that Amsted claims as trade secrets. Their own expert on casting, foundry practice, and foundry layout, Dr. Skinner, when faced with the multiple examples of direct copying of information from DACC's process (which reflects the licensed ABC Trade Secrets), concluded that TianRui is using the trade secrets. Skinner Tr. 2990, 3115. He testified, as follows:

Q. Now, you agree, Dr. Skinner, that TianRui Foundry is using asserted trade secrets but you disagree that asserted trade secrets are secret, right?

A. I agree, yes, that there are similarities in plan, similarities in the way they do things and they do make wheels.

Q. But I would like an answer to my question. You would agree that TianRui Foundry is using asserted trade secrets and your only contention is that those trade secrets are not secret?

A. That's right.

Skinner Tr. 3115-3116.

The similarities between the accused process and that of Amsted licensees to the manufacturing process employed by TianRui Foundry is no mere coincidence. The evidence shows that TianRui had access to the ABC Trade Secrets through former DACC employees and that it misappropriated those trade secrets.²⁷

2. TianRui Had Access to Former DACC Employees and Documents

As discussed above, in June 2005, TianRui initiated a meeting with Amsted's Griffin Wheel, and an August 23, 2005 meeting took place between the companies. *See* Oliver Tr. 822-823, 866, 867-870, 880. The persons at that August 23 meeting included Fu Shunli, who was then Tianrui Foundry's General Manager; Tianrui Foundry's Shen Xiao Li, and Griffin Wheel's John Oliver. *See* JX-1C, ¶ 182; CX-2629; Oliver Tr. 865-870. That meeting was not fruitful, and Amsted expressed no interest in working with TianRui. *See* Oliver Tr. 870.

Following that meeting, specifically during the period of November 2005 through April 2007, Tianrui recruited and hired nine persons who had been or were employees of DACC, often with significant pay increases. *See* JX-1C, ¶¶ 43-53, 86-180; Zuo Tr. 916, 917-918, 953-954; Liu Tr. 3208-3209, 3218, 3219, 3193-3194. Those nine former DACC employees had worked in various departments at DACC, and had access to ABC Trade Secrets. JX-1C, ¶¶ 90, 93-94, 102-103, 115-116, 127-128, 139-140, 151-152, 163-64, 175-176; CX-230C; CX-231C; Kleeschulte Tr. 452-459, 474-476, 477-486, 577-578. The evidence introduced at trial demonstrates that two of nine former DACC employees hired by TianRui, Liu Guanfu and Xie Renyi, were trained in the ABC Process for manufacturing cast steel railway wheels, and

²⁷ *Leggett & Platt, Inc. v. Hickory Springs Mfg. Co.*, 285 F.3d 1353 (Fed. Cir. 2002) (“access and similarity – may support a trade secret misappropriation claim”) (citing *Sokol Crystal Prods., Inc. v. DSC Communications Corp.*, 15 F.3d 1427, 1429 (7th Cir. 1994)).

received their training in the ABC Process at the Calera Foundry in Calera, Alabama. *See* Kleeschulte Tr. 449-450.

Moreover, while at DACC Liu Guanfu and Xie Renyi had access to the DACC Procedure Book, which contains the process-related ABC Trade Secrets asserted here, and the DACC Foundry layout drawings that are the basis of the asserted layout-drawing-based ABC Trade Secrets. *See* Kleeschulte Tr. 474-476. Further, Wu Shunqi, Deng Xiaogang, Jiao Yongkang and Ren Haizhu, who also left employment at DACC for TianRui, similarly had access to certain portions of the DACC Procedure Book while employed at DACC, and were trained in the ABC Process. *See* Zuo Tr. 953-956.

The access that TianRui had to ABC Trade Secrets through former DACC employees is confirmed by the admission of Fu Shunli, Tianrui Foundry's Chairman and General Manager admitted that DACC process documents were found on the computers of TianRui employees. *See* Fu Tr. 1915-1916, 2027, 2125. Such documents are numerous. *See* CX-1158C (TRE 0013334-37); CX-1159C (TRE 0013341-42); CX-1160C (TRE 0013432-33); CX-1164C (TRE 0013441-43); CX-1166C (TRE 0013871); CX-1170C (TRE 0013916-17); CX-1191C (TRE 0037549-99); CX-1202C.

Since their departure from DACC for TianRui, at least forty-nine Tianrui specifications related to cast steel railway wheels have been prepared, audited or approved by one or more former DACC employees, namely Xie, Jiao, Deng, Wu, Zhu, Zhou and Ren. *See* JX-1C, ¶¶ 97, 108, 120, 132, 144, 156, 168, 180; CX-819C; CX-837C; CX-844C; CX-851C; Zuo Tr. 953-955. Eight of those former DACC employees still work at TianRui. *See* JX-1C, ¶¶ 95-96, 106-107, 117-119, 129-131, 141-143, 153-155, 165-167, 177-179.

In addition, much more than a preponderance of the evidence demonstrates that former Tonghe employee Zhu Youlin worked at TianRui for approximately one year under the fictitious name “Zhu Wei.” *See* Zuo Tr. 961-968. TianRui has produced many documents on which “Zhu Wei” was signed as “the compiler.” *See* CX-819C (TR 0127896-952); CX-837C (TR 0127953-64); CX-1118C (RZ4-ZXGC-03); CX-1152C (RZ4- ZXGF-05); CX-1154C (RZ4-ZXGF-09); CX-1127C (RZ4-ZXGC-20); CX-1130C (RZ4-ZXGC-27). That timing coincides with the work history of Zhu Youlin, who worked for Tonghe from November 2006 until August 2007, but returned to Tonghe in July 2008. *See* Zuo Tr. 967-968. Most significantly, Zhu Youlin’s Chinese employee identification number is the same as Zhu Wei’s. *See* CX-2613C; Zuo Tr. 963. Further, the names of “Zhu Wei’s” parents are the same as the names of Zhu Youlin’s parents, and Zhu Wei and Zhu Youlin’s university (Luoyang Institute), year of graduation (1989), and area of studies (*i.e.*, major) (foundry technology) are the same. *See* CX-1097C; CX-2610C; CDX-28C; CDX-29C. After being questioned about his activities from August 2007 through July 2008, Zhu Youlin resigned from Tonghe, and his whereabouts are unknown to the company. *See* Zuo Tr. 968-969.

3. TianRui Attempted to Conceal Its Misappropriation

In addition, the record contains evidence of a broader attempt by TianRui to conceal its misappropriation of the ABC technology obtained through former DACC employees. In August 2007, former DACC employee and current TianRui employee, Deng, wrote a memorandum, the relevant (translated) portion of which reads:

[

]

CX-1188C (TRE 0028055).

Also, in his initial expert report, respondents' expert Dr. Han relied on a document that he contended, and which TianRui represented to him, came from a third party sand vendor named Fuluquan Silica Sand Trade Co., Ltd. ("Fuluquan"). *See* Han Tr. 2809-2810; CX-2653C. While the information in the document is identical to the [] specification in asserted ABC Trade Secret No. 57, the evidence shows that Fuluquan did not in fact provide CX-2653C to TianRui. Rather, the sand specification was sent to Fuluquan by TianRui, which then produced a copy of the document in discovery whose date and origin are obscured. *See* Guo Tr. 3242-3250; *compare* CX-2652C (copy of Fuluquan's original) *with* CX-2653C (version produced by TianRui).

This incident is the basis for Amsted's request of sanctions in the form of findings adverse to respondents, attorney fees and an extended general exclusion order. *See* Amsted Br. at 194-196. Amsted contends that TianRui "fabricated, *i.e.*, substantially and materially altered" the Fuluquan document (CX-2653C). Amsted Br. at 183. The Staff has also moved for evidentiary sanctions against respondents for the alleged alteration of this sand specification document. *See* Motion No. 655-40.

While the charges leveled by Amsted and the Staff are indeed serious, given the ultimate holding of trade secret misappropriation in this investigation, and given the fact that the purportedly altered Fuluquan sand specification document received no weight, it is the view of this court that for purposes of this investigation the issue is moot.²⁸

4. Lack of Evidence of Independent Development

TianRui's hiring of DACC employees, even under an assumed name, and the discovery of DACC documents on Tianrui computers belies respondents' claims that TianRui independently developed its process which, as admitted by respondents' expert, actually practices claimed ABC Trade Secrets. Yet, aside from those facts, as Amsted's expert Dr. Conley testified, TianRui should have been able to produce numerous examples of testing or development data produced if TianRui it had independently developed its cast steel railway wheel manufacturing process. *See* Conley Tr. 1078-1079, 1333-1337.

For example, in developing the information claimed in ABC Trade Secret Category 10, the information in the asserted trade secrets was developed through the collection of certain charts. *See* Kleeschulte Tr. 539-541. Although TianRui's parameters for [] cast steel railway wheels is very similar to what is set forth in the DACC Procedure Book and in the Category 10 trade secrets, TianRui has not produced comparable testing data.

Instead, the record shows that not only are many of TianRui's technical specifications for the manufacturing of cast steel railway wheels direct copies of the asserted ABC Trade Secrets,

²⁸ Accordingly, for this reason the Staff's motion for sanctions (Motion No. 655-40) is denied. Also, Amsted has not made a specific case for attorney fees, or shown that the conduct in question is relevant in determining whether to issue a general exclusion order or the length of its duration.

but in many cases the former DACC employees, and a former Tonghe employee, played a direct role in determining the TianRui specifications, and even signed the relevant technical documents. *See* Conley Tr. 1108; CX-851C (document signed by Xie Renyi); CX-819C (TR 0127896-952); CX-837C (TR 0127953-64); CX-1118C (RZ4-ZXGC-03); CX-1152C (RZ4- ZXGF-05); CX-1154C (RZ4-ZXGF-09); CX-1127C (RZ4-ZXGC-20); CX-1130C (RZ4-ZXGC-27).

In sum, there is overwhelming direct and circumstantial evidence that TianRui obtained its manufacturing process for cast steel railway wheel through the misappropriation of ABC Trade Secrets.

F. Analysis of the Individual Trade Secrets and Their Misappropriation

Category 1 - []: (ABC Trade Secret Nos. 107, 111, 116, 117, 118, 119, 120, 122, 123)

ABC Trade Secret No. 107 specifies the following:

[

]

CX-160C.

This trade secret is set forth in the DACC Procedure Book and the Calera Manual. CX-406C.58-.59; CX-345C.484-.485. (It previously has been found that reasonable efforts were made to maintain the secrecy of these trade secrets. *See* section IV.C, *supra*).

A comparison of this trade secret to TianRui's "Technological operation rules for [,]" shows similarities at a detailed level, literally

down to the millimeter, that demonstrate direct copying by TianRui. *See* CX-830C.²⁹ Set forth below are portions of the text from ABC Trade Secret No. 107, and portions of text from TianRui’s corresponding specification.

ABC Trade Secret No. 107 (CX-160C)	TianRui’s “Technological operation rules [] (CX-830C).
[]	[]
[]	[]
[]	[]

Thus, not only are the steps similar, but so is their sequence. This is strong evidence of misappropriation.

Respondents’ expert, Dr. Skinner, opined that ABC Trade Secret No. 107 was publicly

²⁹ Fu Shunli of TianRui testified that CX-830C is used by TianRui. Fu Tr. 2102-2105 (concerning several specifications used at TianRui, including that contained in CX-830C).

disclosed in a video by DACC. *See* Skinner Tr. 3048-3050. Dr. Skinner is wrong. The video shows only a bare overview of the [] which is far from the level of detail in the asserted trade secret. For example, the video does not show [] which are examples of the specifics set forth in the trade secret and in the DACC Procedure Book. *See* CX-406C.58-.59.

Respondents have also contended that asserted ABC Trade Secret No. 107, and each of the trade secrets in Category 1, are merely general [] procedures. *See* Skinner Tr. 3050. However, as seen in the chart above, both the ABC Trade Secret and TianRui's own specification include details that make them more than general procedures. Indeed, as pointed out by the Staff, if these procedures were well known and general, then there would have been no reason for TianRui to specify its own procedures, or for TianRui to have copied its procedure from the DACC Procedure Book. *See* Staff Br. at 52.

Similarly, the TianRui manufacturing process shows that TianRui copied the remaining ABC Trade Secrets in Category 1, and moreover used complainant's secret [] technology to develop the TianRui technical specifications.

For example, ABC Trade Secret No. 111 relates to [] JX-1C, ¶ 1; CX-160C.31-.32; Kleeschulte Tr. 507-508, 513. TianRui technical specification RZ4-ZXGC-21 (Technical Operation Rules for [] is identical in certain respects, and otherwise substantially derived from, ABC Trade Secret No. 111. *See* CX-831C.5; CX-1128C; CX-1144C.4-.5; Conley Tr. 1289-1291. TianRui uses and has used technical specification RZ4-ZXGC-21 (*i.e.*, CX-831C.5) in connection with manufacturing cast steel railway wheels (*i.e.*, CSRWs). JX-1C, ¶¶ 68, 70;

CX-831C.5; Fu Tr. 2021-2022.

ABC Trade Secret No. 116 relates to [] CX-160C.33-.35; Kleeschulte Tr. 507-508, 513. ABC Trade Secret Nos. 117, 118, 119 and 120 are all dependent on ABC Trade Secret No. 116. TianRui's technical specification RZ4-ZXGC-27 (Technical Operation Rules for []) is identical in certain respects, and otherwise substantially derived from, ABC Trade Secret Nos. 116, 117, 118, 119 and 120. *See* CX-833C.4-.5; CX-1130C; CX-1224C; Conley Tr. 1289-1296. Additionally, TianRui has used and uses CX-833, which includes technical specification RZ4-ZXGC-27, in connection with manufacturing TianRui wheels. Fu Tr. 2043; CX-2492CA.3. TianRui uses and has used technical specification RZ4-ZXGC-27 (*i.e.*, CX-833C.4-.5) in connection with manufacturing its wheels. *See* JX-1C, ¶¶ 68, 70; CX-833C.4-.5; Fu Tr. 2021-2022.

ABC Trade Secret No. 122 relates to [] *See* CX-160C.36-.37; Kleeschulte Tr. 507-508, 514. TianRui's technical specification RZ4-ZXGC-29 (Technical Operation Rules for []) is identical in certain respects, and otherwise substantially derived from, ABC Trade Secret No. 122. *See* CX-834C.3; CX-1131C; CX-1148C.3; Conley Tr. 1289-1293, 1296.

ABC Trade Secret No. 123 relates to [] *See* CX-160C.37-.38; Kleeschulte Tr. 507-508, 514-515. TianRui's technical specification RZ4-ZXGC-02 (Technical Operation Rules for []) when combined with certain information from TianRui's technical specification No. RZ4-ZXXX-02 (Wheel Production Information), is in certain respects identical to, and otherwise substantially derived from, ABC Trade Secret

No. 123. See CX-820C.4-.5; CX-1117C.2; CX-1134C.4; CX-843C.4-.5; CX-1105C; Conley Tr. 1289-1290, 1293-1294, 1296. TianRui uses and has used technical specifications RZ4-ZXGC-02 (i.e., CX-820C.4-.5) and RZ4-ZXXX-02 (i.e., CX-1105C) in connection with manufacturing its wheels. JX-1C, ¶¶ 68, 70; CX-820C.4-.5; CX-1105C; Fu Tr. 2021-2022.

Category 2 - [60, 61, 62, 69, 70)

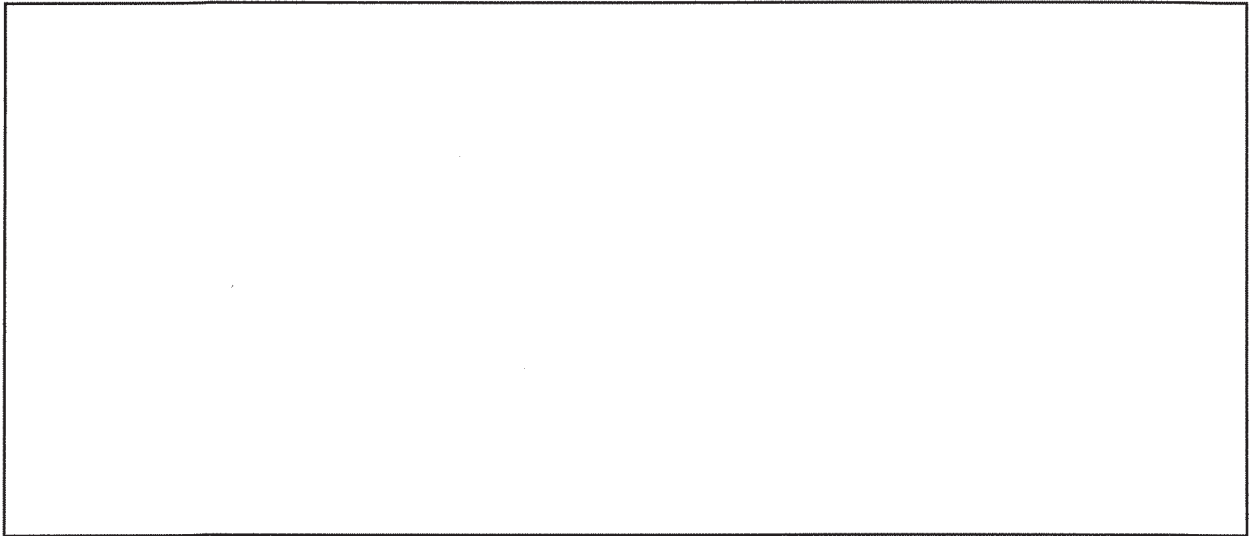
:] (ABC Trade Secret Nos. 57, 59,

ABC Trade Secret No. 57 specifies [

] for the ABC

Process. It provides:

[]



CX-160C.

These [] are set forth in the DACC Procedure Book. Compare CX-160C.18 with CX-406.307; see also CX-343C.336 & CX-345C.619. The evidence shows that this information is used to test the raw materials used in

the cast steel railway manufacturing process, and that the appropriate [

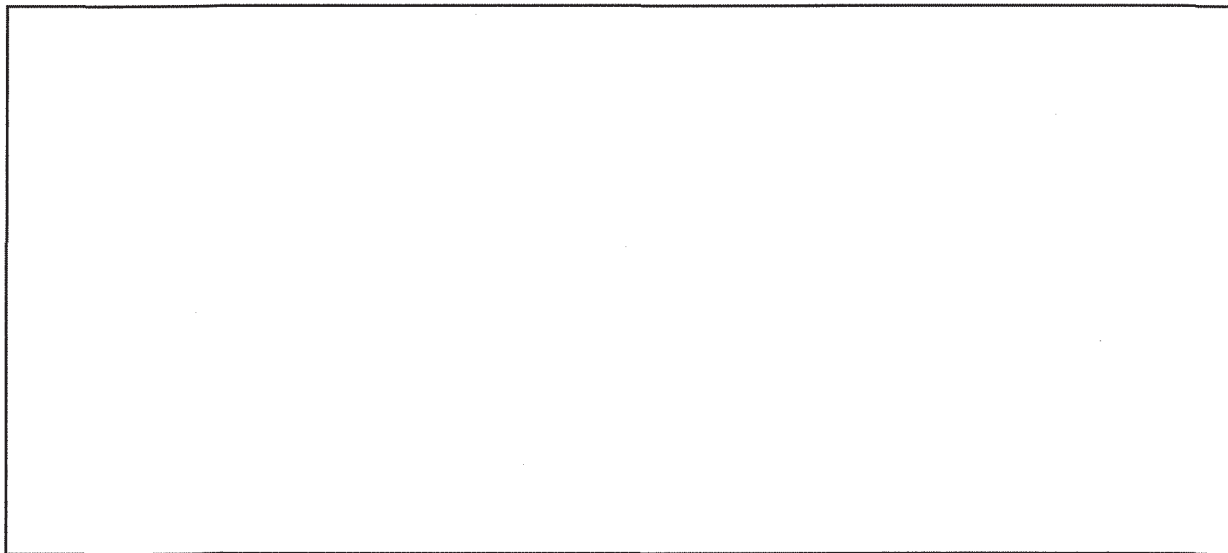
] in making any type of cast steel product, including cast steel railway wheels, directly affects the quality of the product. Conley Tr. 1352-1353.

TianRui has produced documents that it allegedly used to develop its [

] specifications, and those documents contain information that is identical to the information set forth in ABC Trade Secret No. 57, even to the point of reproducing an error found in the DACC Procedure Book. This fact alone is compelling evidence of trade secret misappropriation.

For example, the table above, which is derived from the DACC Procedure Book, contains an error in the second row, where [

.] The following is a table from a TianRui material specification for raw mold sand:



CX-1153C (from TianRui's WQPM1-7 Material Specifications, []).

The second row of TianRui's table, [] includes the very same error found in the asserted trade secret and the DACC Procedure Book [

] Not only is the reproduction of the error by TianRui conclusive evidence of its copying and use of ABC Trade Secret No. 57, but the reproduction of the identical values [] throughout is further evidence of copying.

Respondents' expert (Dr. Skinner) argued that the information contained in ABC Trade Secret No. 57 does not disclose anything new, and that it could have been independently developed. Skinner Tr. 3051-3057. Although respondents' expert independently found documents that disclose [] that may be similar in some regards to the table found in this trade secret, Dr. Skinner admitted the following:

Q. Just a simple question then. There is nothing in your reports and there is nothing that you have been able to locate that sets forth ABC trade secret number 57, right?

A. Not in its entirety. Not over those [] but certainly there is a wealth of information from every [] supplier in the world, basically, on [] and I don't know that they give [] out. That's something that would be decided somewhere along the line and basically it is of little or no value except to fill out a book, as I said before, for some kind of quality certification.

Skinner Tr. 3139-3140.

Thus, there has been no public disclosure of [] at DACC. Furthermore, while respondents have raised the defense of independent development, there is no competent evidence showing that TianRui independently developed the identical [] that is set forth in the DACC Procedure Book.

Indeed, TianRui identified Ping Xianghong as the person in charge of research and development of its cast steel railway wheel project. *See* Fu Tr. 1977-1978. However, neither

Ping nor any other witness from TianRui offered testimony regarding TianRui's development of the [] charts. Moreover, although Dr. Skinner, in an exhaustive search done in the context of litigation, found documents on his own that he believes are similar to ABC Trade Secret No. 57, neither he nor any other TianRui witness testified that TianRui had the same documents, let alone used those documents, as part of a research and development effort.³⁰

The other asserted ABC Trade Secrets in Category 2 (Nos. 59, 60, 61, 62, 69, and 70) have also been misappropriated by the respondents. For example, ABC Trade Secret No. 59 specifies the [] used in the ABC Process. *See* CX-160C; CX-406C. Like the [] TianRui's [] chart is substantially similar to this trade secret. *See* CDX-31C.34, which compares CX-406C (the DACC Procedure Book), to TianRui's [] specification (CX-1153C). Again, TianRui documents disclose exactly the same criteria set forth in ABC Trade Secret No. 60 for the [] although TianRui appears to have recently changed those specifications. CDX-31.36 (comparing CX-160C to CX-1153C (TianRui's [] specification)). Similarly, the same parameters for the [] set forth in ABC Trade Secret Nos. 61, 62, 69, and 70 can also be found in TianRui's documents (*e.g.*, CX-1153C).

In addition, to the extent that the asserted trade secrets in Category 2 constitute steps or part of the procedures directed to practicing the ABC Process, they also qualify for trade secret protection because the testimony at trial demonstrates that the steps in the ABC Process are

³⁰ Ping Xianghong testified that he did not know Dr. Skinner, and that Dr. Skinner did not attempt to determine whether TianRui was even aware of such documents. *See* Ping Tr. 2480.

interconnected. See Coughlin Tr. 230-231.³¹ See *3M v. Pribyl*, 259 F.3d at 595-596 (discussed

³¹ With specific reference to the [] Coughlin testified:

Q. Are all the steps in the ABC process interconnected in some way?

A. Yes.

Q. How so?

A. Every step -- they are all monitored every way. Both the requirements under the M-1003 and other requirements for quality, but the uniformity in production requires that almost every step be done the same way or to a very restricted set of parameters.

And this turns out to be very time dependent once you get to the molding line. The entire molding line is very time dependent. And it is made more complicated by the fact that it is an automated molding line, so there is only so much space available between each set of steps.

So if the layout of that molding line is very dependent on how many molds you are going to put through it and how fast you are going to run them, so what is your production going to be? How long do you have to be between this step and that step? So, you know, it is very interconnected, a lot of timing problems.

Q. And I believe you testified earlier that one of the things that was part of the further development efforts was the []

A. [] has been improved many times over the years, yes.

Q. And is [] an important part of the ABC process?

A. It is probably one of the most critical items, maybe -- probably is the most critical item. You probably could use a variety of other things elsewhere with less effect on final product.

Q. And, in fact, did Abex actually have on its staff as employees []?

(continued...)

above, regarding a combination of components).

Category 3 - [] (ABC Trade Secret Nos. 20, 21, 23, 24, 25, 63, 64, 65, 66, 67, 68, 71)

ABC Trade Secret Nos. 20 and 24 specify the [

] for cast steel railway wheels in the ABC Process. They provide:

[

]

CX-160C.

The evidence shows that TianRui's [] specifications for [] are identical to those set forth in ABC Trade Secret Nos. 20 and 21. *Compare* CX-406C (DACC Procedure Book, which discloses [

] with CX-839C (TianRui [] which are the same as the

³¹(...continued)

A. Oh, yes.

Q. And were they at all involved in the ABC process development?

A. Oh, yes, yes, there were [] Abex had a full time [] in Mahwah. For at least the first 16 or 18 years that I was with the company. And there were two different ones. When one left the company, another one was hired.

Coughlin Tr. 230-232.

DACC Procedure Book and ABC Trade Secret Nos. 20 and 21).

The use of an identical range by TianRui in its [] specifications is compelling evidence that TianRui copied the specifications from DACC. To conclude otherwise would require a determination that two foundries conducting independent research and development would obtain results that are identical to [] See Conley Tr. 1110-1126, 1142-1143, 1308-1309. This is especially unlikely in the case of TianRui, which did not show independent development, but which has acquired DACC and Tonghe employees and documents.

Asserted ABC Trade Secret No. 24 specifies certain characteristics of the [] used in the [] of the ABC Process, and TianRui once again uses the identical information in its cast steel railway wheel manufacturing process. ABC Trade Secret No. 24 specifies the [] It provides:

[

CX-160C. Notably, in the DACC Procedure Book, set forth on the left below, there is no [] CX-406C. Similarly, TianRui's [] specifications contain the same omission of [] in identical fashion to the obviously inadvertent omission shown in the DACC Procedure Book. CX-839C.

DACC Procedure Manual (CX-406C)	TianRui Specification (CX-839C)

The evidence demonstrates that TianRui copied the [] from DACC, and used it in its cast steel railway wheel manufacturing process, or used it to derive a [] or both.

Respondents identified Ping Xianghong as the person in charge of research and development of its cast steel railway wheel project. *See* Fu Tr. 1977. However, he did not offer any testimony regarding research and development into the appropriate []

[] Furthermore, Dr. Skinner relied on a number of documents that he discovered on his own, which in his opinion disclose ABC Trade Secret Nos. 20, 21, and 24. Yet, Dr. Skinner admitted that none of the documents he found after an exhaustive search performed during the course of the litigation, disclosed the [] set forth in these trade secrets. *See* Skinner Tr. 3133-3134, 3173. Furthermore, there is no evidence

that TianRui had the same documents that Dr. Skinner relied on, let alone used those documents in any research and development effort on [] it may have conducted.

Certain of the other asserted ABC Trade Secrets, in particular ABC Trade Secret Nos. 63, 64, 65, 66, and 67, further relate to [] used in the ABC Process, and incorporate the identical criteria for [] as that prescribed in ABC Trade Secret Nos. 20 and 21, except that they are combined with additional elements. *See* CX-160C. Thus, for the same reasons that ABC Trade Secret Nos. 20 and 21 qualify as trade secrets and have been misappropriated, ABC Trade Secrets Nos. 63, 64, 65, 66, and 67 have also been misappropriated by the respondents.

The information set forth in Trade Secrets Nos. 23, 25, 63, 64, 65, 66, 67, 68, 71 qualify for trade secret protection to the extent they constitute steps or part of the procedures directed to practicing the ABC Process. The testimony at trial demonstrates that the steps in the ABC Process are interconnected. *See* Coughlin Tr. 230-231.

Category 4 - [] (ABC Trade Secret Nos. 134, 140, 141, 144, 145, 147, 148)

ABC Trade Secret 140 recites:

[

]

CX-160C.

The evidence demonstrates that TianRui’s [] with the same materials in exactly the same proportions, and uses very similar timing and preparation procedures, as ABC Trade Secret No. 140. For example, at trial, Dr. Conley compared this trade secret to TianRui records and procedures [] that it has used in casting steel railway wheels. *See* Conley Tr. 1250-1252; CX-787C (TRI03930-31); CX-828C (“Technological Operation Rules for []

The materials, and the ratios of those materials described in ABC Trade Secret No. 140 and in TianRui's records, are identical.

ABC Trade Secret No. 140 (CX-160)	TianRui's Records for [] (CX-787C (TRI03930-31))
[]	[]

While the absolute numbers in ABC Trade Secret No. 140 and CX-787C for the TianRui [] are not the same, the ratios are. In effect, TianRui's records show that they were [] with an identical composition and ratios between their components, but that the [] than those specified in the DACC Procedure Book. Similarly, in terms of the [] TianRui uses essentially the same procedures, [] as those specified in the DACC Procedure Book. *See Conley Tr.*

1250-1252; CDX-31.68-.71. Relatively minor adjustments are easily made in the foundry.³²

To the extent ABC Trade Secret Nos. 141, 144, and 145 depend from ABC Trade Secret No. 140, they also have been misappropriated by TianRui. With respect to the ABC Trade Secret Nos. 134, 147, and 148, they have been misappropriated because they constitute steps or part of the procedures directed to the overall practice of the ABC Process.

³² Dr. Skinner testified as follows:

Q. It appears to me the ratios are a little bit different in trade secret 140 than they are in RX-323, correct?

A. Yes, they are.

Q. Did you take into account that difference in proportions in forming your opinion?

A. Yes. The general proportions that I said are like [

] And the amount, the real recipe is something you will develop in use. Each foundry is going to be slightly different. They are going to have [] for instance. They are going to have a different environment. It is going to be warmer or colder or dryer or wetter or whatever and it is all going to affect slightly how you []

Q. Does the foundryman know to adjust the composition to account for environment and equipment?

A. Sure. I mean, even when you buy [], basically that's what you do. You just do [

]

Skinner Tr. at 3077-3078.

Category 5 - [93, 94, 95, 103)

]: (ABC Trade Secret Nos. 75, 88, 89, 90, 91, 92,

ABC Trade Secret No. 93 specifies the following:

[

]

CX-160C.

At least a preponderance of the evidence demonstrates that TianRui is using the same criteria [] as that used by DACC. For example, TianRui's [] composition [] which is the same composition specified by ABC Trade Secret No. 93. *See* CX-1154C (TRE00000626) (TianRui's RZ4-ZXGF-09 Specification); CX-406C (AM0046016-AM0046042); CDX-31.76; Kleeschulte Tr. 508-509, 522-523.

During the hearing, respondents' expert identified a publicly available document that purportedly discloses the composition [] *See* RDX-100C.59; RX-286. Yet, the composition [] which falls outside the range specified in ABC Trade Secret No. 93. This reference therefore does not disclose the range specified in ABC Trade Secret No. 93. Furthermore, the document, which appears to be [] does not relate to [] but instead is describing [] used in foundries. *See* RX-286 at 471.

ABC Trade Secret Nos. 89, 90, 91, 94, and 95 incorporate the same limitation of [] as set forth

in ABC Trade Secret No. 93, usually in combination with additional limitations. CX-160C.

Thus, the information set forth in trade secrets 89, 90, 91, 94, and 95 has also been misappropriated.

Category 6 - [] (ABC Trade Secret Nos. 2, 4, 9, 39, 41, 43, 49, 54, 55)

The evidence establishes that respondents have misappropriated ABC Trade Secret No. 39, which relates to [

] See CX-160C.11; CX-157C; Kleeschulte Tr. 509, 523-25, 751-52; Conley Tr. 1152.³³

ABC Trade Secret Nos. 2, 4, 41, and 43 relate to [

] See CX-160C.2, .12; Kleeschulte Tr. 509. ABC Trade Secret Nos. 9 and 49 relate to [

] See CX-160C.3, .14; Kleeschulte Tr. 509. ABC Trade Secret Nos. 54 and 55 relate to [

] See CX-160C.14-.17; Kleeschulte Tr. 509, 525-526.

The process that Tianrui uses to manufacture cast steel railway wheels includes all the features of ABC Trade Secret No. 39, including [

] See Conley Tr. 1151-1159, 1310; CX-2459CA.2-3;

³³ ABC Trade Secret No. 39 is an independent trade secret upon which ABC Trade Secret Nos. 41, 43, 49, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 234 and 235 depend. See CX-160C.12, .14-.24, .69-.70.; Conley Tr. 1219.

CDX-31C.25, .28. Similarly, the evidence shows that the TianRui process also uses ABC Trade Secret Nos. 2, 4, 9, 41, 43, 49, 54, and 55. *See* CX-1756C; CX-1004C; Conley Tr. 1151-1159, 1305, 1397-98, 1399-1403, 1408-1410, 1430-1431; *see also* CDX-31C.28, .90 (illustrating testimony).

Category 7 - [] (ABC Trade Secret Nos. 26, 72, 228, 234)

These four ABC Trade Secrets are an aggregation of information [

] Some of the information claimed in these trade secrets, [

] are already set forth as distinct trade secrets. *See, e.g.*, Category 10 []

infra. As previously discussed, such compilations of information qualify as trade secrets because they are part of a unified process. Further, the evidence shows that respondents have clearly copied certain individual trade secrets.

TianRui technical specification RZ4-ZXXX-02 (Wheel Production Information) is identical in certain respects to, and otherwise substantially derived from, ABC Trade Secret Nos. 26, 72, 228, 234. The format of technical specification RZ4-ZXXX-02 is the same as the format of the tables in ABC Trade Secret Nos. 26, 72, 228 and 234. *See* CX-1105C; Conley Tr. 1287-1288; CDX-31C. 87 (illustrating testimony). The differences between technical specification RZ4-ZXXX-02 and ABC Trade Secret Nos. 26, 72, 228, and 234 do not change the fact that technical specification RZ4-ZXXX-02 has been copied and substantially derived from ABC Trade Secret Nos. 26, 72, 228, and 234. *See* Conley Tr. 1279-1289, 1305-1306.

Category 8 - [
133, 229, 235)

] (ABC Trade Secret Nos. 27, 73, 130, 131, 132,

TianRui misappropriated the ABC Trade Secrets relating to [] procedures in order to develop its manufacturing process. This fact is clearly illustrated by comparing TianRui's technical specification with ABC Trade Secret Nos. 27 and 73.

ABC Trade Secrets Nos. 27 and 73, recited below, specify [

]

[

]

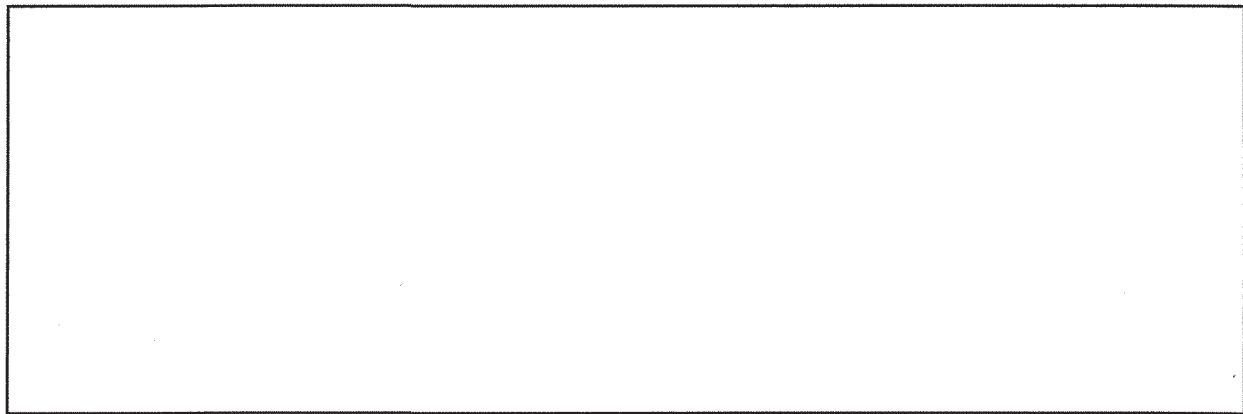
The [] chart for CH-36 wheels set forth the DACC Procedure Book (CX-406C) is the same [] chart referred to in ABC Trade Secret Nos. 27 and 73.

The evidence demonstrates that [

] and thus is directly related

to the quality of the cast steel railway wheels produced using the ABC Process. *See* Conley Tr. 1148-1148. Finally, with regard to factor 6 (ease or difficulty of proper acquisition or development by the respondent), the evidence shows that [] would be very difficult to duplicate through independent development. *See* Conley Tr. 1359.

The TianRui specification for [] is a copy of at least a portion of [] set forth in ABC Trade Secret Nos. 27 and 73.



CX-842C; Conley, Tr. at 1147-1148.

TianRui's use of [] reveals that it copied, and is using, information it obtained from DACC to manufacture cast steel railway wheels that comply with AAR specification CH-36. Further, there is a lack of evidence to show that TianRui conducted extensive experiments, and coincidentally and independently obtained

the same experimental data.

Respondents' expert witnesses, Dr. Skinner and Dr. Packer, testified that the [] chart set forth in ABC Trade Secret No. 27 does not disclose anything new to a foundryman. *See* Packer Tr. 2928-2929. However, during his deposition, Dr. Skinner's testimony was different and he admitted the following:

Question: And is ABC trade secret number 27 publicly known?

Answer: *Not specific numbers.* Certainly people can calculate [

]

Question: So ABC trade secret number is not publicly known, correct?

Answer: *The specific numbers listed there are not publicly known.*

Skinner Tr. 3136 (emphasis added).

Furthermore, the argument concerning the concept of a hypothetical "foundryman" hinges on how one defines such person. Yet, Dr. Packer did not define the background and experience of his hypothetical "foundryman," upon whom he often relied as a basis for opining that the asserted ABC Trade Secrets are not trade secrets at all. *See* Packer Tr. 2928-2929.

Category 9 - [] (ABC Trade Secret Nos. 56, 106, 244)

The evidence shows that TianRui misappropriated the ABC Trade Secrets related to [] in order to derive its technical specifications.

As explained by Amsted employee, John Kleeschulte, ABC Trade Secret No. 244 is important to the ABC Process because [

] Kleeschulte Tr. 534; *see* Conley Tr. 1235 [

] The record shows that TianRui misappropriated the trade secrets set forth in Category 9.

Specifically, Tianrui Foundry's technical specification RZ4-RCLGC-03 states that the

[

] *See* CX-845C.4, ¶ 3; Conley Tr. 1235-1236; *see also*

CDX-31C.56 (illustrating testimony).

Category 10 - [] (ABC Trade Secret Nos. 240, 241, 242, 243, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259)

The record shows that TianRui misappropriated the ABC Trade Secrets related to [] in order to write its technical specifications. This fact is clearly illustrated by comparing the four ABC Trade Secrets discussed below to TianRui's specifications.

ABC Trade Secret No. 241 states that [

] Similarly, as seen in TianRui's technical specification RZ4-RCLWW-01, TianRui allows [] This establishes that TianRui has copied ABC Trade Secret No. 241. *See* CX-160C.74; CX-847C.2; Conley Tr. 1226-1235; Fu Tr. 2104.

ABC Trade Secret Nos. 243, 250, and 251 relate to [

] *See* Kleeschulte Tr. 510-11, 538, 686. As shown in TianRui's technical specification RZ4-RCLGC-03, TianRui [

or

] This specification shows copying of
ABC Trade Secret Nos. 243, 250 and 251. *See* CX-845C; Conley Tr. 1226-1227, 1230-1233,
1235-1236, 1307; *see also* CDX-31C.56.

Category 11 - [] (ABC Trade Secret Nos. 105, 237, 239)

ABC Trade Secret No. 105 specifies [

] This trade secret provides:

[

]

CX-160C.29; Kleeschulte Tr. 546.

Although the use of [] techniques for quality control in the casting of steel railway wheels is well known, the specific table used at DACC and other licensees is unique to the ABC Process. The testimony establishes that Coughlin developed the table set forth in this trade secret. *See* Coughlin Tr. 251-252.

This information was available in both the Calera and DACC foundry requirements; it was treated as confidential and not made available to unauthorized personnel. *See* Kleeschulte Tr. 493; Smitherman Tr. 493.

The evidence shows that the [] specifications and [] criteria used by TianRui are nearly identical to the [] specifications set forth in ABC Trade Secret No. 105, with only minor differences. The table incorporated into ABC Trade Secret No. 105 corrects an ambiguity found in the table in the DACC Procedure Book. CX-406C. However, the same ambiguity found in the DACC Procedure Book also appears in TianRui's table, which is also set forth below:

DACC Specification (CX-406C)	TianRui Specification - <i>See</i> CX-851C (TR128013)

Indeed, the [] specification in the DACC Procedure Book and that used by TianRui contain the same errors in [] For example, in both the DACC table and the TianRui table above, a wheel having [

]

The identical nature of TianRui Foundry's [] specifications table above (TR 128013) and the [] specifications in the DACC Procedure Book is probative evidence that TianRui copied this portion of the DACC Procedure Book and thus misappropriated ABC Trade Secret No. 105, either by using it as its own [] specification, or using it to derive the [] specification that it does use. Not coincidentally, the TianRui [] specification was developed

by two of the former DACC employees, Zhou Nianshui and Xie Renyi. *See* Conley Tr. 1108; CX-851C; *see also* CDX-31C.7 (illustrating testimony).

During the hearing, respondents' witnesses testified that these sorts of [] procedures do not contain any useful information. *See* Packer Tr. 2936-2937; Skinner Tr. 3099 ("The [] claims are of little value in the production of the wheels"). Those opinions are directly contradicted by the fact that TianRui relied on these specifications in its efforts to obtain AAR certification. *See* CX-2345C (document containing TianRui's [] specifications); CX-2145C (document containing TianRui's [] specifications); Conley, Tr. 1108-1110.³⁴

TianRui had access to the ABC [] Trade Secrets, and misappropriated them to derive its own [] specifications.

Category 12 - Foundry Layout: (ABC Trade Secret Nos. 161, 162, 163, 164, 165, 166, 167, 168, 169, 172, 173, 174, 175, 176, 177, 180, 181, 182, 183, 184, 185, 186, 188, 189, 190, 191, 196, 197, 198, 199, 200, 201, 202, 204, 205, 212, 213)

The evidence adduced at the hearing shows that the requirements of the ABC Process have played an important role in determining the physical configuration, or layout, of the foundry in which it is practiced.³⁵ In the case of the Calera facility, for example, the proper layout was the result of a process of evolution, one that later benefitted the layout of the DACC foundry. Coughlin Tr. 230-231; Bassano Tr. 1560-1561. As indicated above in section IV.C, Amsted

³⁴ The Packer and Skinner opinions ironically raise the question of why TianRui would perform such [] procedures, if they have no utility, other than the fact that TianRui is copying the procedures of DACC.

³⁵ For example, the proper layout [

] *See* Bassano Tr. 1661-1662.

created the layout drawings for the DACC foundry and these drawings were kept confidential. Yet, during the course of their employment at DACC, employees who would later leave to work at TianRui had access to the DACC facility layouts. *See Kleeschulte Tr. 474-476.*

The similarities in the layouts of the DACC and TianRui foundries were noticed before this investigation commenced, as seen in the testimony of Coughlin and Jones, both of whom were familiar with the ABC Process and the DACC Foundry, and who inspected the TianRui Foundry in connection with the AAR certification process.

Coughlin had worked for Abex in Mahwah, New Jersey, starting around 1967. He specifically worked on the ABC Process and is familiar with it. *Coughlin Tr. 289-290.* In 2008, Coughlin visited the TianRui Foundry in China to assist the foundry in preparing for an inspection by AAR and at that time observed the ABC Process layout. *Coughlin Tr. 245-246.*

Coughlin testified:

Q. And what was your sense about the process that TianRui Foundry was using to manufacture steel cast railway wheels?

A. It appeared to be the same process ABC had used.

Q. The ABC process?

A. ABC process.

Q. Was there anything specific about the layout that stood out in your mind at TianRui Foundry's cast steel railway wheel manufacturing facility?

A. It looked like it would fit the normal layout for Calera or Datong.

Coughlin Tr. 245-246.

Ronald Jones, who helped inspect the TianRui Foundry on behalf of AAR, also testified

that he found many similarities between the DACC and the TianRui foundries, and that TianRui was using the ABC Process. He testified: “Well, everything I saw indicated to me that after two cast wheel processes, the pressure point process and the ABC process, this was clearly the ABC process.” *See* Jones Tr. 1448-1449 (“cast steel wheels are manufactured using [

] as in the ABC process” written in his file).

In particular, ABC Trade Secret Nos. 163, 164, and 165 have been misappropriated by TianRui. Those trade secrets consist of:

[

]

Remarkably, the TianRui foundry has the same [] as that found in the DACC layout drawings. TianRui has the same [

] as shown in the DACC layout drawings. [

] See Bassano Tr. 1587-1591.

Significantly, the [] occurs to [] in DACC's building. The same [] appears in the TianRui Foundry, even though there [] This coincidence is telling. See Bassano Tr. 1591-1592; CDX-32C.4A; CX-780C (TR974230); CX-781C (TR97828).

The layout drawings claimed in ABC Trade Secret Nos. 168 and 169 set forth unique []

.] See Bassano Tr. 1669.

[]

] See

Bassano Tr. 672-673. []

] See Bassano Tr. 1673. []

] See Bassano Tr. 1674-1675; CDX-32C.10A; CX-780C. In view of these similarities, there is at least a preponderance of evidence that ABC Trade Secret Nos. 168 and 169 have been copied and used in the TianRui Foundry.

The drawing set forth in ABC Secret Nos. 172 and 173 depicts []

] The TianRui layout drawing (CDX-32C.12A is CX-780C) displays a similar

arrangement [] *See* Bassano Tr. 1679-1680. In fact, the layout identified on CDX-32C.12A for the TianRui Foundry incorporates the same important features of the ABC layout. Thus, the unique [] found in trade secret Nos. 172 and 173 has been copied, and it is in use in the TianRui Foundry. *Id.*

ABC Trade Secret Nos. 176 and 177 and the corresponding layout drawings depict [

[] *See* Bassano Tr. 1682-168. The layout drawings for the TianRui facility bear many similarities to the DACC layouts in ABC Trade Secret Nos. 176 and 177. Like the DACC layouts, the TianRui layouts depict [

[] *See* Bassano Tr. 1687-1689. These features constitute further evidence that TianRui copied the DACC layout drawings. *See* Bassano Tr. 1687-1689.

The layout drawings claimed in ABC Trade Secret Nos. 180 and 181 depict the layout of [

[]
See Bassano Tr. 1689-1692; CDX-32C.17A & CX-106C (illustrating testimony).

The layout drawing CDX-32C.18A for TianRui incorporates [] that effectively reproduces the [] shown in the DACC layout drawings that are

incorporated into ABC Trade Secret Nos. 180 and 181. *See* CDX-32C.18A & CX-780C;
Bassano Tr. 1692-1693. TianRui's layout drawing shows that [

] *See* Bassano Tr. 1693-1695. The evidence shows that
respondents copied Trade Secret Nos. 180 and 181 in the layout of the TianRui foundry.

ABC Trade Secret Nos. 196 and 197 are drawings of the [

] The same arrangement was present in the Calera, Datong, TianRui, and Tonghe
facilities. *See* Bassano Tr. 1695-1699; CX-106C.

The corresponding TianRui drawing (CX-781C) demonstrates that TianRui's[

] are configured in the same orientation as in ABC Trade Secret No. 196.
The layout in CX-781C incorporates the key features of the [] identified in
ABC Trade Secret No. 196. *See* Bassano Tr. 1699-1701. Thus the evidence shows that ABC

Trade Secret Nos. 196 and 197 have been copied, and are in use at the TianRui facility.

The layout drawings in ABC Trade Secret No. 198 show [

.]

Bassano testified that the [] referred to in ABC Trade Secret No. 198 is unique to the ABC process. Bassano Tr. 1701-1708; *see* CX-106C.

The corresponding TianRui layout drawing (CX-781C) shows many of the very same features, including [

] The TianRui layout shown depicted in CX-781C incorporates the important features of the layout in ABC Trade Secret No. 198, demonstrating that it has been copied and is in use at TianRui. Bassano Tr. 1708-1710.

As indicated throughout this discussion of respondents' misappropriation of the ABC Trade Secrets, TianRui is using the ABC Process. The evidence establishes that its foundry layout was copied from the DACC drawings.

V. Domestic Industry

As indicated in the notice of investigation, a violation of section 337(a)(1)(A) shall be deemed to have occurred only if the threat or effect of respondents' misappropriation is to destroy or substantially injure an industry in the United States. *See* 73 Fed. Reg. 53441 (2008).

It is found that a domestic industry exists.³⁶

Amsted argues that the domestic industry requirement is satisfied by its significant domestic production of cast steel railway wheels, even through its foundries in the United States do not use the ABC Trade Secrets, *i.e.*, the trade secrets asserted against respondents. Amsted argues that respondents have obtained approval for wheels to be used on United States railways, and that respondents' imported wheels target the domestic industry. *See* Amsted Br. at 146-55; Amsted Reply at 11-24.

Respondents argue that Amsted's domestic manufacturing cannot constitute the required domestic industry because it does not use the alleged trade secrets asserted in this investigation. *See* Resps. Br. at 4-10, 127-28; Resps. Reply at 1-4.

The Staff argues that Amsted's domestic manufacture of cast steel railway wheels is substantial, and satisfies the statutory requirement of a domestic industry. *See* Staff Br. at 98-100; Staff Reply Br. at 1-11.

Throughout their briefing, the parties have referred to the *Sausage Casings* investigation because it likely contains the most thorough exposition of issues yet to be delivered by the Commission with respect to trade secret misappropriation and section 337. In that investigation, the Commission held that “[w]hen the unfair acts or methods of competition alleged under § 337 are based on the misappropriation of trade secrets, the domestic industry is defined as consisting of that portion of complainant's domestic operations devoted to utilization of the confidential and proprietary technology at issue which is the target of the unfair acts or practices.” *Sausage Casings*, Initial Determination (unreviewed) at 341-43.

³⁶ The question of injury is addressed in section VI.

Respondents begin their argument based on the above holding in *Sausage Casings* and argue that the Griffin Wheel operations cannot constitute a domestic industry. *See* Resps. Br. at 4-5. The Staff takes a diametrically opposed view, arguing that the Commission's holding in *Sausage Casings* should be read as limited to the facts of that investigation, *i.e.*, a case in which the evidence demonstrated that the asserted non-statutory intellectual property rights were practiced domestically by the complainant, with no need to conduct further inquiry. *See* Staff Reply at 6.

The Commission has a long history that predates the *Sausage Casings* investigation, and which extends beyond it, of looking to “the realities of the marketplace,” when determining the domestic industry in a trade secrets investigation or other investigation based on unfair acts other than traditional forms of intellectual property (such as patents). *See Copper Rod*, Comm'n Op. at 55 (trade secrets); *see also Certain Nut Jewelry and Parts Thereof*, Inv. No. 337-TA-229, Comm'n Op. at 16-17 (Nov. 1986) (“Inasmuch as this investigation does not involve intellectual property rights, the ALJ concluded that the appropriate definition of the U.S. industry is the domestic facilities of complainant devoted to the production and sale of products that are ‘the target of the unfair acts and practices’”).

Since the *Sausage Casings* investigation, the statute was amended in 1988 to create section 337(a)(1)(B), (C), (D) and (E), which cover certain enumerated intellectual property, and which “apply only if an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being

established.” See 19 U.S.C. § 1337(a)(2).³⁷ Yet, the statute was also amended to create section 337(a)(1)(A), the provision under which this investigation was instituted, and which contains no such requirement.³⁸ See 19 U.S.C. § 1337(a)(1)(A).³⁹

³⁷ Subparagraphs (B), (C), (D) and (E) of paragraph (a)(1) of section 337 declare unlawful:

(B) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that—

(i) infringe a valid and enforceable United States patent or a valid and enforceable United States copyright registered under title 17; or

(ii) are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.

(C) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that infringe a valid and enforceable United States trademark registered under the Trademark Act of 1946 [15 U.S.C. 1051 et seq.].

(D) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of a semiconductor chip product in a manner that constitutes infringement of a mask work registered under chapter 9 of title 17.

(E) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consigner, of an article that constitutes infringement of the exclusive rights in a design protected under chapter 13 of title 17.

19 U.S.C. § 1337 (B), (C), (D) & (E).

³⁸ See *Certain Ink Markers and Packaging Thereof*, Inv. No. 337-TA-522, Order No. 30 (continued...)

There is a logical symmetry in the 1988 statutory amendment. While injury need no longer be shown in an investigation based on an asserted patent, trademark or copyright, the complainant must prove a domestic industry related to the asserted intellectual property right. Such a specific domestic industry showing need not be made in an investigation instituted under section (a)(1)(A), yet, the complainant must still prove that there is a domestic industry subject to injury.

Respondents would have the Commission read the domestic industry requirement of a patent case instituted pursuant to section (a)(1)(B) into section (a)(1)(A), when there is no basis

³⁸(...continued)

at 55, USITC Pub. 3971 (Oct. 28, 2005) (“[T]he administrative law judge finds that investigations prior to the Omnibus Trade & Competitiveness Act of 1988 (1988 Act) and when injury to a domestic industry had to be established for all unfair acts, including statutory intellectual property based cases, are helpful in determining how to define the industry for the acts relating to the trade dress in issue.”) (citing *Certain Woodworking Machines*, Inv. No. 337-TA-174 Comm’n Op. at 22, USITC Pub. 1979 (May 1987)).

³⁹ Subparagraph (a)(1)(A) of paragraph (a)(1) of section 337 declares unlawful:

(A) Unfair methods of competition and unfair acts in the importation of articles (other than articles provided for in subparagraphs (B), (C), (D), and (E)) into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is—

(i) to destroy or substantially injure an industry in the United States;

(ii) to prevent the establishment of such an industry;
or

(iii) to restrain or monopolize trade and commerce in the United States.

19 U.S.C. § 1337(a)(1)(A).

in the statute for doing so. There is nothing in the statute to authorize a so-called “technical prong” to be applied to section (a)(1)(A). There is no authorization for singling out trade secrets investigations to make them subject to such a requirement, when the statute does not enumerate trade secrets in section (a)(1)(B), along with patents and other specified forms of intellectual property.⁴⁰ Tellingly, respondents do not suggest that if their approach were adopted, and Amsted were required to make the same domestic industry showing as a complainant in a patent-based investigation, that likewise Amsted should be relieved of the burden of showing injury or threat of injury.

What Amsted must do under section (a)(1)(A), is to show that a domestic industry exists that is subject to injury or destruction as a result of respondents’ unfair acts. As indicated above, some have referred to this as a “target” of the alleged unfair acts. As discussed below, Amsted has satisfied that requirement.

Amsted’s cast steel railway wheel business in the United States consists of its wholly-owned subsidiary Griffin Wheel. *See* Worries Tr. 68; JX-1C, ¶17. Amsted operates three plants in the United States that use the Griffin Wheel process to manufacture cast steel railway wheels, *i.e.*, in Kansas City, Kansas; Keokuk, Iowa; and Groveport, Ohio. Worries Tr. 68; JX-1C, ¶18. As of 2007, the estimated worth of these facilities was [] JX-1C, ¶¶ 23-25.

The plants are devoted to the manufacture of cast steel railway wheels, and the square footage of each of these plants is [] square feet. Carter Tr. 1511; JX-1C, ¶¶ 20-22.

Amsted also performs research and development relating to the manufacturing of cast steel

⁴⁰ As seen in the plain language of section (a)(1)(A), restraint of trade and monopolization may constitute prohibited unfair acts thereunder. It is unclear how the domestic industry requirement proposed by respondents could be applied in such cases.

railway wheels at these three facilities. Worries Tr. 121. Griffin Wheel has [] employees in the United States working on the manufacture, research, and development of cast steel railway wheels. Worries Tr. 68, 119; Carter Tr. 1510.

Griffin Wheel's annual sales of cast steel railway wheels in the United States varies between [] wheels. Worries Tr. 69; JX-1C, ¶ 208. Griffin's annual production capacity in North America for cast steel railway wheels is []. JX-1C, ¶ 216. [] percent of the wheels manufactured by Griffin meet the AAR standards CH-36 or CJ-33 wheels, and thus the annual production of CH-36 and CJ-33 wheels varies between [] Worries Tr. 124.

The evidence demonstrates that Amsted has a domestic industry in the manufacture of cast steel railway wheels, and that it is substantial. Further, as discussed immediately below, the domestic industry is subject to injury as a result of respondents' misappropriation of trade secrets.

VI. Injury

In determining whether unfair acts have the effect of substantially injuring the domestic industry, "the Commission has considered a broad range of indicia, including the volume of imports and their degree of penetration, lost sales, underselling by respondents, reduction in complainants' profits or employment levels, and declining production, profitability and sales." *Certain Electric Power Tools, Battery Cartridges and Battery Chargers*, Inv. No. 337-TA-284, Unreviewed Initial Determination at 246, USITC Pub. No. 2389 (1991) ("*Electric Power Tools*").

The injury requirement may also be met "[w]hen an assessment of the market in the

presence of the accused imported products demonstrates relevant conditions or circumstances from which probable future injury can be inferred.” *Electric Power Tools*, Initial Determination at 248. Such circumstances may include foreign cost advantages and production capacity, the ability of the imported product to undersell the domestic product, or substantial foreign manufacturing capacity combined with the respondent’s intention to penetrate the United States market. *See Certain Air Impact Wrenches*, Inv. No. 337-TA-311, Unreviewed Initial Determination at 139 (May 6, 1991). The legislative history of section 337 indicates that “[w]here unfair methods and acts have resulted in conceivable loss of sales, a tendency to substantially injure such industry has been established.” *See Electric Power Tools*, Initial Determination at 248-49.

Amsted argues that there has been substantial injury, and that there is a threat of substantial injury, to the domestic industry. It specifically argues that as a result of their misappropriation of the ABC Trade Secrets, respondents have had an unfair head start into the United States market, and have put Amsted, through its wholly-owned Griffin Wheel subsidiary, in the position of having to compete with a foreign business run according to Amsted’s own trade secrets. Amsted submits that respondents have both substantial foreign manufacturing capacity, and the intention to penetrate the United States market. It further submits that imported TianRui wheels can undersell Amsted’s Griffin wheels thereby putting downward pressure on the established firm’s prices. *See Amsted Br.* at 155-68; *Amsted Reply* at 85-91.

Respondents argue that Amsted has failed to demonstrate injury or the threat of injury. They assert that the Griffin Wheel is already exceptionally profitable, and that Amsted benefits from [] They also assert that any new entrant must

obtain AAR approval, and even then, overseas companies face the additional problem of shipping large volumes of heavy wheels at a high cost.⁴¹ In addition, respondents argue that sales of TianRui wheels have been minimal. *See* Resps. Br. at 127-35; Resps. Reply at 82-86.

The Staff argues that unrebutted evidence shows that respondents' sales of their cast steel railway wheels within the United States have both substantially injured, and threaten to cause substantial injury to, Amsted's domestic industry.⁴² Staff Br. at 100-05; Staff Reply at 41-48.

Cast steel railway wheels comprise a submarket for railway wheels separate from forged wheels. The cast steel wheels are a premium, higher-end product. Carter Tr. 1489. Compared to forged railway wheels, cast steel wheels are easier to mount, have lower failure rates, and have better balance. Worries Tr. 110-111, 160; Oliver Tr. 839-840.

There is no known customer preference, or functional difference, between cast steel railway wheels manufactured by the Griffin Wheel Process and those manufactured by the ABC Process. *See* Worries Tr. 116-117; Oliver Tr. 883. Amsted and TianRui both manufacture AAR-approved CH-36 and CJ-33 cast steel railway wheels. JX-1C at ¶¶ 31, 32, 71, 72. In fact, the only companies selling or attempting to sell cast steel railway wheels in the United States are

⁴¹ Respondents point to the failure of a Brazilian company in the mid-1990s to enter the United States market successfully. *See* Resps. Br. at 133-34. That failure, however, is not relevant to the situation here where the respondents are located in China and are marketing products some 15 years later.

Respondents also rely on a high failure rate for wheels produced at the Calera facility with the ABC Process in the 1980s and 1990s. *See* Resps. Br. at 134-35 (citing Oliver Tr. 907-908). The memory of those failures may have some effect on people today vis-a-vis TianRui wheels made using many of the same trade secrets, but the likelihood of such is speculative.

⁴² The Staff points out that during the hearing, respondents did not present any evidence of their own on the issue of injury, nor did they call their injury expert to testify. *See* Staff Br. at 102 n.9.

Amsted's Griffin Wheel and respondents. Prior to respondents' entry into the domestic market, no company other than Griffin Wheel sold cast steel railway wheels in the United States. *See* Worries Tr. 96. The evidence demonstrates that respondents are using the same marketing channels that Amsted uses to sell railway wheels. Carter Tr. 1509-1510.

Indeed, the evidence demonstrates that Amsted's domestic industry has experienced actual injury in the form of sales lost to respondents, underselling by respondents, and Amsted's declining sales and profitability. Respondents have already sold [

] Worries Tr. 125. Further, [

] Putnam Tr. 2195-2196. Given the nature of the cast steel railway wheel market in the United States, the inescapable conclusion is that those sales by respondents were made directly at the expense of Amsted, and thus directly injured Amsted.⁴³

In addition, the evidence shows that due to respondents' actions, Amsted has experienced [] Amsted has experienced a [] due to respondents' entry into the market and [] exploration of alternatives, including TianRui. Worries Tr. 101, 149. Specifically, as a result of respondents' sales of cast steel railway wheels in the United States, Amsted [

] *See* Worries Tr. 101-102.

[

⁴³ The capacity utilization for the Griffin Wheel plants in the United States is currently at [] percent. Carter Tr. 1483. Thus, wheels sold by respondents could easily have been supplied by Amsted.

]

Wories Tr. 107-109. Inasmuch as TianRui is the only other producer of cast steel railway wheels for the North American market, the other source could only have been TianRui.

Amsted is currently in [

] Carter Tr. 1498,

1511-1512. Therefore, as a result of respondents' actions, Amsted risks losing sales [

] or making the sales but being forced to accept lower prices for its

wheels, and/or other sales conditions that reduce profits.

Thus, the evidence clearly demonstrates that the respondents' misappropriation of the ABC Trade Secrets has resulted in injury to Amsted's domestic industry. The evidence further demonstrates respondents' intent to target the United States market for railway wheels. Most significantly, respondents have sought and received AAR approval for their wheels. See JX-1C at ¶ 81; CX-2101C.⁴⁴ This certification would not be relevant to parties selling exclusively outside of the United States. Respondents make CH-36 wheels, and the only major market for CH-36 wheels is in North America. Carter Tr. 1496.

Further evidence of respondents' marketing plans is the fact that TianRui had a booth at the 2008 Railway Supply Institute ("RSI") show held in Chicago, Illinois (RSI is the largest railroad industry trade show), where it stated that it was producing cast steel railway wheels at a

⁴⁴ Once a wheel manufacturer has completed the AAR application process it receives conditional approval to sell an allotment of 32,000 wheels, and after that allotment it may receive repeated, unlimited grants of additional allotments of 20,000 wheels. Oliver Tr. 832, 881-82. In addition, once a wheel manufacturer has gained AAR approval, there are no limitations on the number of wheels they may sell. Oliver Tr. 833.

facility with a capacity to exceed 400,000 annually. In addition, TianRui also passed out promotional brochures at the show. Oliver Tr. 873, 877, 879; CX-80C. TianRui has also admitted that its plant has the capacity to produce[] annually. Fu Tr. 2109. In a 2008 sales projection, respondents forecast selling [] Putnam Tr. at 2183; CX-1197C.15; CX-1410C. This clearly demonstrates respondents' intent to sell in the United States.

Indeed, respondents have targeted, contacted, and marketed TianRui wheels to almost all of Amsted's customers, including [

].⁴⁵ Worries Tr. 97, 127; Carter Tr. 1495-96; Putnam Tr. 2192-93; CX-33C.21; CX-74; CX-399C; CX-1197C, CX-2474C. Further, there is already evidence that some of respondents' efforts have been successful. Price is important to the purchasers of railway wheels, and as discussed above, []

⁴⁵ [

] Thus, there is evidence that respondents' sales might have been higher but that they depressed their sales until after the record closed in this investigation.

Carter Tr. 1493-94; Putnam Tr. 2195-96. Against that backdrop, [

] Putnam Tr. 2197; CX-1197C.

These events place Amsted at risk because, contrary to respondents' arguments, while Amsted [

] Carter Tr. 1497. [

] Carter Tr. 1502. [

.]

Carter at 1513. [

] Carter Tr. 1497; CX-1197C.

Accordingly, the evidence establishes that the domestic industry has already been substantially injured by wheels manufactured as a result of respondents' misappropriation of Amsted trade secrets, and there is also a continued threat of substantial injury to the industry.

VII. Conclusions of Law

1. The Commission has personal jurisdiction over all parties in the investigation, *in rem* jurisdiction over the accused products, and subject matter jurisdiction over the investigation.
2. Respondents have sold for importation into the United States, imported or sold after importation accused products.
3. Amsted owns the asserted ABC Trade Secrets, and has standing as the complainant in the investigation.
4. Respondents have misappropriated the asserted ABC Trade Secrets.

5. The threat or effect of respondents' misappropriation is to destroy or substantially injure an industry in the United States.

6. A violation of section 337(a)(1)(A) has occurred.

VIII. Initial Determination and Order

Based on the foregoing, it is the INITIAL DETERMINATION ("ID") of the undersigned that a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain cast steel railway wheels or products containing same by reason of trade secret misappropriation.

Further, this ID, together with the record of the hearing in this investigation consisting of: (1) the transcript of the hearing, with appropriate corrections as may hereafter be ordered; and (2) the exhibits received into evidence in this investigation, as listed in the attached exhibit lists; is CERTIFIED to the Commission.

In accordance with 19 C.F.R. § 210.39(c), all material found to be confidential by the undersigned under 19 C.F.R. § 210.5 is to be given *in camera* treatment.

The Secretary shall serve a public version of this ID upon all parties of record and the confidential version upon counsel who are signatories to the Protective Order (Order No. 1) issued in this investigation, and upon the Commission investigative attorney.

To expedite service of the public version, each party is hereby ORDERED to file with the Commission Secretary by no later than October 23, 2009, a copy of this ID with brackets that show any portion considered by the party (or its suppliers of information) to be confidential, accompanied by a list indicating each page on which such a bracket is to be found. At least one

copy of such a filing shall be served upon the Administrative Law Judge, and the brackets shall be marked in red. If a party (and its suppliers of information) considers nothing in the ID to be confidential, and thus makes no request that any portion be redacted from the public version of this ID, then a statement to that effect shall be filed in lieu of a document with brackets.

Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review pursuant to § 210.43(a) or the Commission, pursuant to § 210.44, orders on its own motion a review of the ID or certain issues herein.


Carl C. Charneski
Carl C. Charneski
Administrative Law Judge

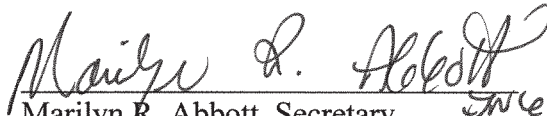
Issued: October 16, 2009

**CERTAIN CAST STEEL RAILWAY WHEELS, CERTAIN PROCESSES FOR
MANUFACTURING OR RELATING TO SAME AND CERTAIN PRODUCTS
CONTAINING SAME**

INV. NO. 337-TA-655

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **INITIAL DETERMINATION** has been served by hand upon the Commission Investigative Attorney, Jeffrey T. Hsu, Esq. and Aarti Shah, Esq., and the following parties as indicated, on November 23, 2009.


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**CERTAIN CAST STEEL RAILWAY WHEELS, CERTAIN PROCESSES FOR
MANUFACTURING OR RELATING TO SAME AND CERTAIN PRODUCTS
CONTAINING SAME**

INV. NO. 337-TA-655

<p>FOR RESPONDENTS BARBER TIANRUI RAILWAY SUPPLY, LLC., TIANRUI GROUP CO., LIMITED AND TIANRUI GROUP FOUNDRY CO. LIMITED:</p> <p>Tom M. Schaumberg, Esq. ADDUCI, MASTRIANI & SCHAUMBERG, LLP 1200 Seventeenth St., N.W. Fifth Floor Washington, D.C. 20036</p>	<p><input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Overnight Mail <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____</p>
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