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.

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[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

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[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

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[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. Wories 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 Process[6] – and that it owns both of them. *See* Wories 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.

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[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; Wories Tr. 167, 172.

Scaw Metals is located in South Africa. It is a licensee of the technology at issue. *See* CX-18C (Scaw license); Wories 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]

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[7] [ ] *See* Wories Tr. 64, 85, 91. [ ] *See* Resps. Reply at 10.

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,

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[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 asserts 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 and 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;

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[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

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[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*

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[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]

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[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

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[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).

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[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).

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[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.").

Morever, 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. If 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

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[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 Smitherman[18] 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

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[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]

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[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

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[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

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[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* Wories 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

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[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 Opthalmics, 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

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[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.

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[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

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[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, Jaio 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,

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[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.

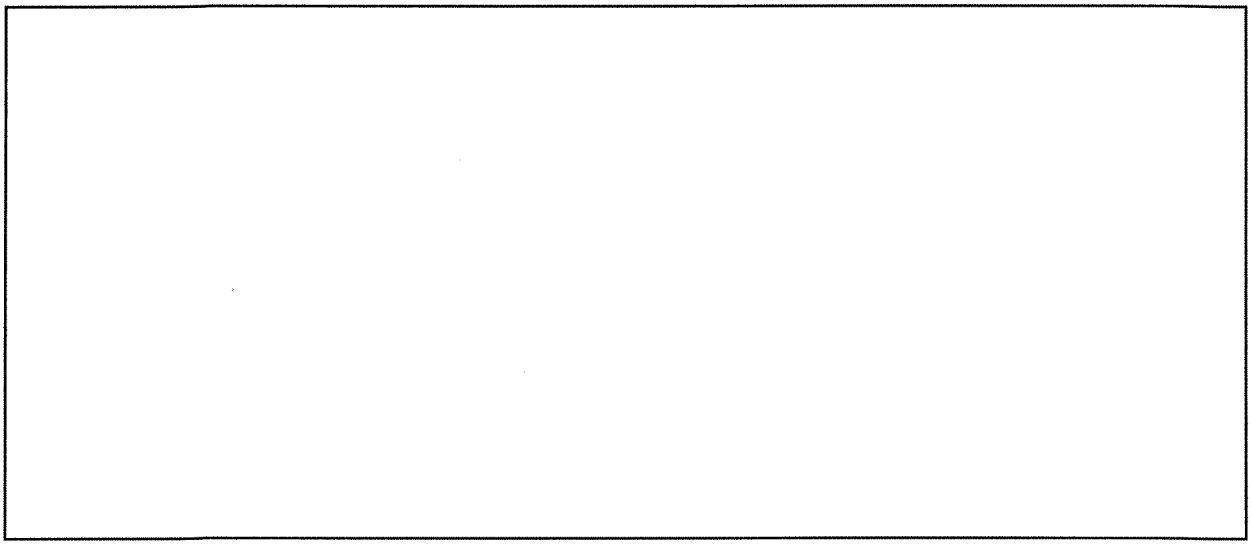
ABC Trade Secret No. 123 relates to [ ] *See* CX-160C.37-.38; Kleeschulte Tr. 507-508, 514-515. TianRui's technical specification RZ4-ZXGC-02 (Technical Operation Rules for [ ]) when combined with certain information from TianRui's technical specification No. RZ4-ZXXX-02 (Wheel Production Information), 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 - [:] (ABC Trade Secret Nos. 57, 59, 60, 61, 62, 69, 70)

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 [

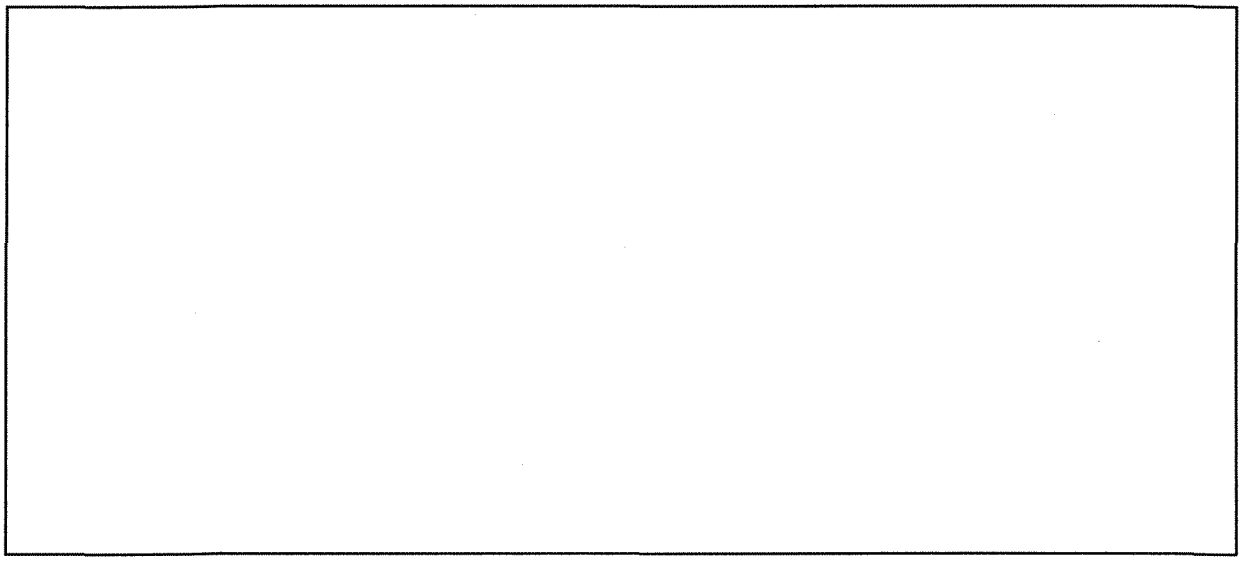
] in making any type of cast steel product, including cast steel railway wheels, directly affects the quality of the product. Conley Tr. 1352-1353.

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

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[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

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[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 - [ ]: (ABC Trade Secret Nos. 75, 88, 89, 90, 91, 92, 93, 94, 95, 103)

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 - [ ] (ABC Trade Secret Nos. 27, 73, 130, 131, 132, 133, 229, 235)

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 [

]

[

]

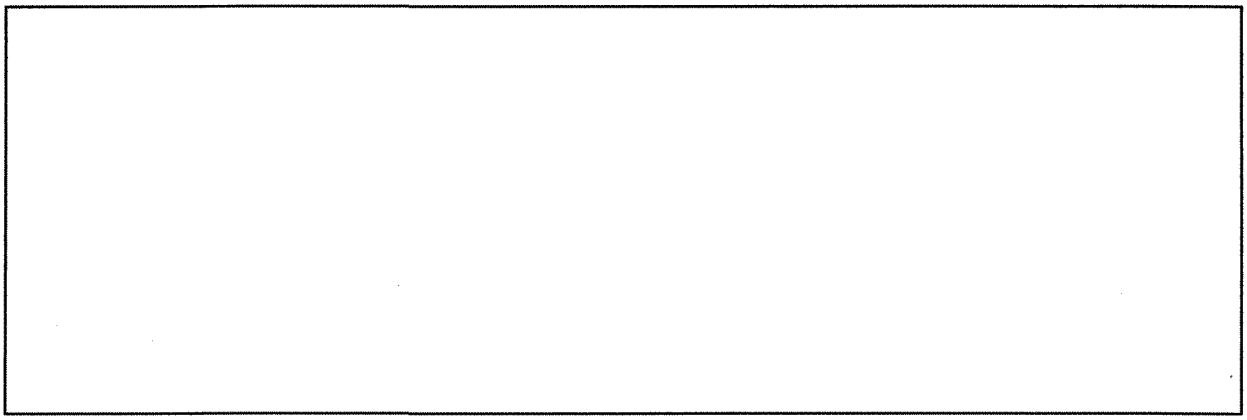
The [ ] chart for CH-36 wheels set forth the DACC Procedure Book (CX-406C) is the same [ ] chart referred to in ABC Trade Secret Nos. 27 and 73.

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 - *See* 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

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[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.

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[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]

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[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

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[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* Wories 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. Wories 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

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

Griffin Wheel's annual sales of cast steel railway wheels in the United States varies between [ ] wheels. Wories 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 [ ] Wories 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. Wories 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* Wories 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

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[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* Wories 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 [

] Wories 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. Wories Tr. 101, 149. Specifically, as a result of respondents' sales of cast steel railway wheels in the United States, Amsted [

] *See* Wories Tr. 101-102.

[

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[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

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[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] Wories 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 a 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
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.

Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112A
Washington, D.C. 20436

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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

FOR RESPONDENTS BARBER TIANRUI RAILWAY SUPPLY, LLC., TIANRUI GROUP CO., LIMITED AND TIANRUI GROUP FOUNDRY CO. LIMITED: Tom M. Schaumberg, Esq. **ADDUCI, MASTRIANI & SCHAUMBERG, LLP** 1200 Seventeenth St., N.W. Fifth Floor Washington, D.C. 20036	( ) Via Hand Delivery (X) Via Overnight Mail ( ) Via First Class Mail ( ) Other: _____

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