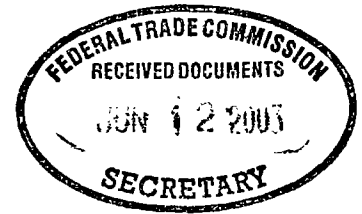


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



_____)
In the Matter of)
)
CHICAGO BRIDGE & IRON COMPANY N.V.)
a foreign corporation,)
)
CHICAGO BRIDGE & IRON COMPANY,)
a corporation, and)
)
PITT-DES MOINES, INC.,)
a corporation.)
_____)

DOCKET NO. 9300

ORDER GRANTING RESPONDENTS' MOTION TO STRIKE

I.

On March 7, 2003, Respondents filed a motion to strike, seeking an order striking certain exhibits and striking many of Complaint Counsel's Findings of Fact (CCFF) from the record. Respondents' motion is supported by Respondents' Post-Trial Reply Brief and Memorandum in Support of Their Motion to Strike, pages 82-83. Complaint Counsel filed its opposition to the motion to strike on March 13, 2003. For the reasons set forth below, Respondents' motion is GRANTED.

II.

Respondents assert that Complaint Counsel has cited to documents and testimony that were never admitted into evidence. Respondents further assert that Complaint Counsel's findings include various charts and graphs that were never offered or entered into evidence. In addition, Respondents assert that Complaint Counsel's Findings of Fact include several proposed findings that lack any citation to the record.

Complaint Counsel, in its opposition, characterizes Respondents' motion as a "meaningless diversion" for this "Tribunal." Complaint Counsel responds by conceding that five exhibits it used in its Findings of Fact were inadvertently omitted from the Joint Exhibit list and argues that other exhibits which were not admitted into evidence do not affect the substance of any finding. Complaint Counsel further responds that the charts and graphs objected to by Respondents are merely "pedagogical aids" to understanding the evidence in this case. Complaint Counsel also asserts that the findings related to Chung Fan's testimony are proper.

III.

Complaint Counsel created new charts and graphs after the record was closed and included them in post trial pleadings. These new charts and graphs are equivalent to unlabeled post trial exhibits, irrespective of whether they are referred to as “pedagogical aids” or otherwise. A proper pedagogical aid would be a demonstrative exhibit, which, to be considered against an opposing party, must be offered into evidence after a proper foundation has been laid and admitted into evidence before the record closes. Complaint Counsel’s use of charts and graphs which were created after the close of the record in this case is clearly improper and indefensible. Complaint Counsel’s arrogant tone in its opposition is unfortunate. Complaint Counsel stridently argues in its opposition that the creation of new exhibits after the close of the record is acceptable conduct. It is not. Fairness demands that one party will not be allowed to create exhibits after the close of the record to be considered against the opposing party. Unless due process is to be completely ignored in these proceedings, then the date the record closes must mean that the record is indeed closed. Such charts and graphs will be disregarded.

Another category of findings that Respondents seek to have disregarded are proposed findings that are devoid of record citation or are merely legal arguments. Commission Rule 3.46(a) requires proposed findings of fact to contain adequate references to the record relied upon. 16 C.F.R. § 3.46(a). The parties were specifically ordered to comply with this rule in the January 15, 2003 Order on Post Trial Briefs. While the statements made in these proposed findings may be appropriate for argument in Complaint Counsel’s post trial brief, they will be disregarded as proposed findings of fact.

As to the documents that were not admitted as exhibits, there can be no dispute that reference to these documents in any post trial pleading is improper and they will be disregarded.

Regarding Chung Fan's testimony, his statistical analysis of CB&I's pricing, beyond that he thought it was “high,” was previously ruled not admissible for the truth of the matter asserted. (Tr. at 1012). Mr. Fan's statistical analysis of CB&I's pricing is unreliable and is an improper expert opinion of a lay witness. *Id.* Findings of fact relying on such testimony will be disregarded.

IV.

It is hereby ORDERED that the following unadmitted exhibits and findings of fact cited to and proposed by Complaint Counsel will be disregarded:


Documents cited by Complaint Counsel in their CCFF and initial post-trial brief that are not in evidence: CX 105; CX 190; CX 370; CX 822; CX 823; CX 1572; CX 1591; CX 1682; CX 1685, and unidentified "interviews with industry participants." (See CCFF at 177).

Findings replicating demonstrative exhibits that were not received in evidence in the form presented in these findings: CCFF 826; CCFF 882; and CCFF 913.

Findings devoid of citation to record evidence or other authority: CCFF 29; CCFF 33; CCFF 50; CCFF 78; CCFF 260; CCFF 265; CCFF 384; CCFF 421; CCFF 449; CCFF 581; CCFF 589; CCFF 615; CCFF 642; CCFF 687; CCFF 749; CCFF 752; CCFF 776-77; CCFF 810; CCFF 816; CCFF 822; CCFF 831; CCFF 849; CCFF 864; CCFF 868; CCFF 883; CCFF 885; CCFF 906; CCFF 912; CCFF 928; CCFF 929-30; CCFF 942; CCFF 954; CCFF 955; CCFF 968; CCFF 977; CCFF 978; CCFF 981; CCFF 997; CCFF 1006; CCFF 1007; CCFF 1012; CCFF 1053; CCFF 1056; CCFF 1057; CCFF 1075-76; CCFF 1085-1087; CCFF 1091; CCFF 1099; CCFF 1165; CCFF 1180; CCFF 1181; CCFF 1220-21; CCFF 1223; CCFF 1225; CCFF 1226; CCFF 1281; CCFF 1289; CCFF 1327; CCFF 1347; and CCFF 1351.

Findings relying on the testimony of Chung Fan, to the extent Complaint Counsel relies on Mr. Fan's testimony to establish that CB&I "has raised prices." These findings include: CCFF 1053; CCFF 1054; and CCFF 1057-1070.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: June 12, 2003