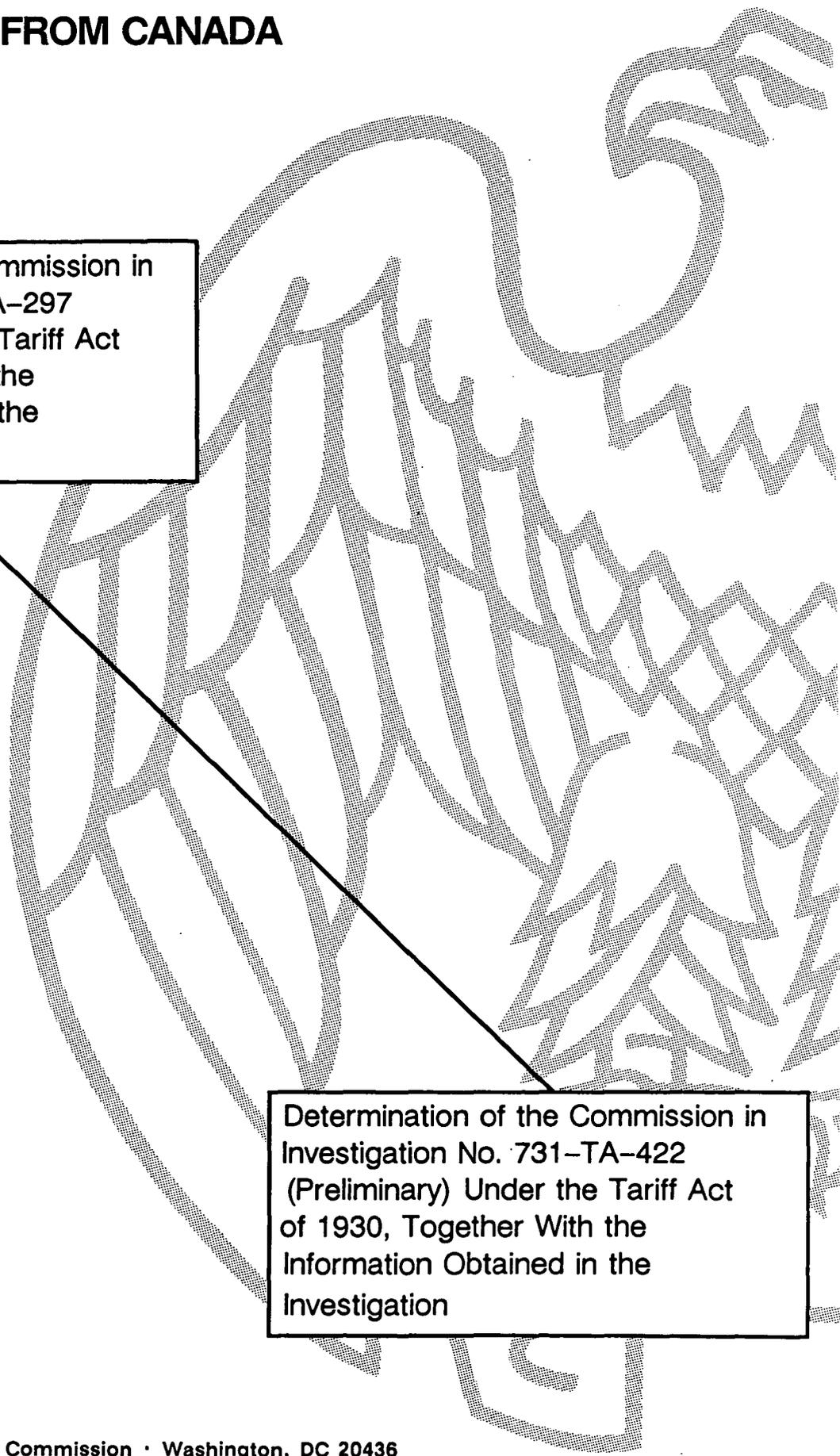


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NEW STEEL RAILS FROM CANADA

Determination of the Commission in Investigation No. 701-TA-297 (Preliminary) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigation



Determination of the Commission in Investigation No. 731-TA-422 (Preliminary) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigation

SITC PUBLICATION 2135

NOVEMBER 1988

UNITED STATES INTERNATIONAL TRADE COMMISSION

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Note.--Information that would reveal the confidential operations of individual concerns may not be published and, therefore, has been deleted from this report. Such deletions are indicated by asterisks.

UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigations Nos. 701-TA-297 (Preliminary)
and 731-TA-422 (Preliminary)

NEW STEEL RAILS FROM CANADA

Determinations

On the basis of the record 1/ developed in the subject investigations, the Commission unanimously determines, pursuant to section 703(a) of the Tariff Act of 1930 (19 U.S.C. § 1671b(a)), that there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports from Canada of new steel rails, 2/ provided for in items 610.20, 610.21, and 688.42 3/ of the Tariff Schedules of the United States (subheading 7302.10.10, 7302.10.50, and 8548.00.00 of the Harmonized Tariff Schedule of the United States), that are alleged to be subsidized by the Government of Canada.

The Commission also determines, pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)), that there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports from Canada of new steel rails that are alleged to be sold in the United States at less than fair value (LTFV).

1/ The record is defined in sec. 207.2(i) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(i)).

2/ For the purposes of these investigations, "new steel rails" include rails, whether of carbon, high carbon, alloy or other quality steel, including, but not limited to, standard rails, all main line sections (over 60 pounds per yard), heat-treated or head-hardened (premium) rails, transit rails, contact rails (or "third rails"), and crane rails, provided for in items 610.2010, 610.2025, 610.2100, and 688.4280 of the Tariff Schedules of the United States Annotated (TSUSA) (subheadings 7302.10.1020, 7302.10.1040, 7302.10.5000, and 8548.00.0000 of the Harmonized Tariff Schedule of the United States (HTS)).

Specifically excluded from the scope of these investigations are imports of "light rails," which are 60 pounds or less per yard. "Relay rails," which are used rails that have been taken up from a primary railroad track and are suitable to be reused as rails (such as on a secondary rail line or in a rail yard), are also excluded.

3/ The petition states that contact rails are provided for under this item number; however, according to the U.S. Customs Service, contact rails are provided for under TSUS item number 685.90 (HTS item 8536.90.00). Irrespective of where classified in the TSUS or HTS, contact rails are clearly included within the scope of these investigations.

Background

On September 26, 1988, a petition was filed with the Commission and the Department of Commerce by Bethlehem Steel Corporation, Bethlehem, PA, alleging that an industry in the United States is materially injured or threatened with material injury by reason of subsidized imports of new steel rails from Canada and by reason of LTFV imports from Canada. Accordingly, effective September 26, 1988, the Commission instituted preliminary countervailing duty investigation No. 701-TA-297 (Preliminary) and preliminary antidumping investigation No. 731-TA-422 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the Federal Register of October 3, 1988, (53 F.R. 38795). The conference was held in Washington, DC, on October 19, 1988, and all persons who requested the opportunity were permitted to appear in person or by counsel.

VIEWS OF COMMISSIONERS ECKES, LODWICK, ROHR,
CASS AND NEWQUIST

We unanimously determine that there is a reasonable indication that the domestic industry producing new steel rails is materially injured or threatened with material injury by reason of new steel rail imports from Canada, which are alleged to be both subsidized and sold at less than fair value.

The Legal Standard in Preliminary Investigations 1/

The legal standard in preliminary antidumping and countervailing duty investigations is set forth in sections 703(a) and 733(a) of the Tariff Act of 1930 (the "Act") 2/, which require the Commission to determine whether, based on the best information available at the time of the preliminary determination, there is a reasonable indication of material injury to a domestic industry, or threat thereof, or material retardation of establishment of such an industry, 3/ by reason of imports subject to

1/ See, Additional Views of Commissioner Eckes and Additional Views of Commissioner Cass.

2/ 19 U.S.C. §§ 1671b(a); 1673b(a). Cf. 19 C.F.R. § 207.17 (Determination by Commission of reasonable indication of injury).

3/ Material retardation of the establishment of a domestic industry is not an issue in these investigations and will not be discussed further. As we find a reasonable indication that the domestic industry is being materially
(continued...)

investigation -- in these investigations, "new steel rails". The definition of "material injury" and the elements of causation are the same in both preliminary and final investigations, but in preliminary investigations an affirmative determination is based on a "reasonable indication" of material injury by reason of the subject imports, as opposed to the actual finding of material injury required in a final determination. 4/

Like Product and Domestic Industry. 5/

To determine whether there exists a "reasonable indication of material injury", the Commission must first determine the "like product" and "domestic industry" corresponding to the imported merchandise under investigation. 6/

"Like product" is defined in section 771(10) of the Tariff Act of 1930 ("Act") as "a product which is like, or in the absence of like, most similar

3/(...continued)

injured by reason of the subject imports, we do not reach the question of threat of material injury.

4/ Compare 19 U.S.C. §§ 1671b(a) and 1673b(a) with 19 U.S.C. §§ 1671d(b)(1) and 1673d(b)(1). See, *American Lamb v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986); *Shock Absorbers and Parts, Components, and Subassemblies Thereof from Brazil ("Shock Absorbers")*, 731-TA-421 (Preliminary) USITC Pub. No. 2128 (Sept. 1988) at 3-7, 34-39, 49-51 (analyzing "reasonable indication" standard).

5/ Commissioner Cass joins in this section of the opinion, but also has certain additional views on the like product issue. See, *Additional Views of Commissioner Cass*.

6/ We accept the determination by the Department of Commerce as to the class of imported merchandise subject to investigation for being allegedly subsidized or sold at less than fair value. The Commission, however, determines what domestic products are "like" the ones subject to investigation, and identifies the domestic producers of such like products. *Algoma Steel Corp. v. United States*, Slip Op. 88-74 (CIT June 8, 1988) at 9-10.

in characteristics and uses with, the article subject to an investigation." 7/

In turn, the domestic industry is defined in Section 771(4)(A) of the Act

as:

. . . the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product. 8/

The Commission's like product determination is essentially factual, and application of "like" and "most similar in characteristics and uses" is performed case-by-case. 9/ In determining whether a domestic product is "like" the product subject to investigation, the Commission has analyzed a number of factors, including (1) physical characteristics and uses, (2) interchangeability, (3) channels of distribution, (4) common manufacturing facilities and production employees, and (5) customer or producer perceptions. 10/ No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a given investigation. The Commission has found minor distinctions to be an

7/ 19 U.S.C. § 1677(10).

8/ 19 U.S.C. § 1677(4)(A).

9/ The Asociacion Colombiana de Exportadores de Flores v. United States, ___ CIT ___, Slip Op. 88-91 (July 14, 1988) ("ASCOFLORES") at 9 (the like product issue "is essentially one to be based on the unique facts of each case").

10/ E.g., Certain All-Terrain Vehicles from Japan, Inv. No. 731-TA-388 (Preliminary), USITC Pub. No. 2071 (March 1988) at 6; Certain Fabricated Structural Steel from Canada, Inv. No. 731-TA-387 (Preliminary), USITC Pub. No. 2062 (Feb. 1988) at 5, n.10. In some cases, the Commission has also considered price. ASCOFLORES, CIT Slip Op. 88-91 at 12, n.8.

insufficient basis for finding separate like products; instead, the Commission looks for clear dividing lines between products. 11/

In this instance the Department of Commerce has initiated an investigation into "new steel rails", which are defined as:

. . . "new steel rails" includ[ing] rails, whether of carbon, high carbon, alloy or other quality steel, including, but not limited to, standard rails, all main line sections (over 60 pounds per yard), heat-treated or head-hardened (premium) rails, transit rails, contact rails (or "third rails"), and crane rails, provided for in items 610.2010, 610.2025, 610.2100, and 688.4280 of the Tariff Schedules of the United States Annotated (subheadings 7302.10.1020, , 7302.10.1040, 7302.10.5000, and 8548.00.0000 of the Harmonized Tariff Schedule of the United States).

Specifically excluded from the scope of these investigations are imports of "light rails", which are 60 pounds or less per yard. "Relay rails," which are used rails that have been taken up from a primary railroad track and are suitable to be reused as rails (such as on a secondary rail line or in a rail yard), are also excluded. 12/

The petitioner 13/ alleged that the like product is "'new' rail manufactured by Bethlehem, and CF&I," 14/ and not "light" rail manufactured

11/ ASCOFLORES, CIT Slip Op. 88-91 at 9 ("It is up to the ITC to determine objectively what is a minor difference."). See, e.g., Operators for Jalousie and Awning Windows from El Salvador, Inv. Nos. 701-TA-272 and 731-TA-319 (Final), USITC Pub. No. 1934 (Jan. 1987) at 4, n.4.

12/ 53 Fed. Reg. 41393-94 (Oct. 21, 1988); Staff Report ("Report") at A-5 and A-6.

13/ The only other current U.S. producer of new steel rail, CF&I Corporation, filed a notice of appearance dated October 11, 1988. The notice was rejected by the Secretary as untimely, and although CF&I was informed that it could submit a late notice of appearance with a showing of good cause, CF&I has not done so. A third entity that produced steel rail in the U.S. during the period of investigation, Pittsburgh-Wheeling, went into bankruptcy and stopped shipping rail in April, 1987. See Report at A-10 (discussion of U.S. rail producers).

14/ Petition at 80.

by West Virginia Steel Corporation 15/ or "relay" rail, which consists of used rail. 16/ Respondents 17/ agreed with petitioner that light and relay rail are not like the rail under investigation, but argued that new rail should be broken into two separate like products, prime 18/ and industrial 19/ rail, because, by definition, industrial rail does not compete with prime rail in prime applications, i.e. for use in main line track by class I railroads. 20/

15/ Id. at 80. "Light" rail is defined as rail weighing 60 lbs. per yard and less, and is used for amusement park and mining applications. See, Staff Conference Transcript ("Tr.") at 24, 49-50.

16/ Petition at page 80. "Relay" rail is taken up from a heavily-used track, reconditioned as necessary, and "relaid" on a track that is lesser used. See, Tr. at 112-13. Respondents have not contested petitioner's position, and we have found no compelling information indicating that relay rail should be considered a like product in these investigations.

17/ Respondents, the only two Canadian new rail producers, Algoma Steel Corporation, Ltd ("Algoma") and Sydney Steel Corporation ("Sysco"), submitted a single post-conference brief ("Respondents' brief").

18/ Prime rail refers to the combined category encompassing both premium and standard rail, each of which meets AREA specifications and is suitable for use by class I railroads (railroads with average annual revenues of \$87.9 million or more). Report at A-5, A-11. Tr. at 106-07. Class I railroads make up 60 to 70 percent of the U.S. market for new steel rails. Transit authorities, distributors and contractors comprise approximately 20 percent of the market, while about 500 class II and III railroads account for the remaining 10 percent. Report at A-31. Questionnaire data were not gathered from class II and III railroads. Report at A-11.

19/ Respondents' brief at 1-8. "Industrial" rail is new rail that fails to meet the chemical or physical specifications of class I railroads and it cannot be used in primary applications such as on main line track. Industrial rail cannot be butt-welded together; one length of rail must be bolted to the next. Tr. at 108-09. This off-spec rail is a byproduct of prime rail production and is primarily used by the industrial sector and short-line railroads for factory rail, railroad spurs, etc. Tr. at 72, 106-12. Report at A-6.

20/ Tr. at 106-12.

In determining whether "prime" and "industrial" rail are a single or two separate like product(s), we note that some of the factors traditionally considered by the Commission support each characterization. Prime rail and industrial rail share common manufacturing facilities and production employees. The basic use of each, to allow for the movement of locomotives and rolling stock, is the same. They share the same physical shape and composition, and they are often marketed in the same manner to distributors who sell both industrial and prime rail, as needed. 21/

For purposes of these preliminary investigations, we find that the like product includes both prime and industrial rail. We base this finding on the overlapping uses and channels of distribution, and common production facilities and processes shared by prime and industrial rail. 22/ In light of our preliminary like product definition, we further find that the domestic industry consists of U.S. producers of new steel rail. 23/
Condition of the domestic industry 24/

21/ Report at A-11, A-31; petitioner's brief at 21-22. Prime rail, however, is unlike industrial rail because industrial rail does not meet the distinct physical and chemical specifications characteristic of prime rail. Prime and industrial rail, therefore, are not interchangeable in prime applications. See, supra notes 17, 18. Moreover, prime rail is most often sold by manufacturers directly to class I railroads, while industrial rail is primarily sold through distributors. Report at A-31, A-33. Further, there are substantial price differences between prime and industrial rail. Report Table 3.

22/ We will reexamine this finding in light of any new information developed if these investigations return for final determinations.

23/ Bethlehem and CF&I produced new steel rail throughout the period of investigation, and continue to do so. Wheeling-Pittsburgh produced new steel rail until it stopped shipping in April, 1987.

24/ Commissioner Cass believes that information concerning the condition of the domestic industry, while relevant, should be considered as part of an
(continued...)

In determining the condition of the domestic industry, we consider, among other factors, apparent domestic consumption, U.S. production, capacity and capacity utilization, shipments, inventories, employment, financial performance, and existing development and production efforts, within the context of the business cycle and conditions of competition that are distinctive to the domestic industry. 25/

Apparent domestic consumption of new rail fell by 37.4 percent over the period of investigation, 26/ a trend that continued from interim 1987 to interim 1988. 27/ Domestic production of new rail fell 38.6 percent from 1985 to 1987, but leveled off from interim 1987 to interim 1988. 28/

New rail domestic practical production capacity rose slightly over the period of investigation, while capacity utilization fell from 64.1 to 36.3 percent. 29/ With the closing of the Wheeling-Pitt facility in Monessen,

24/(...continued)

analysis aimed at determining whether there is a reasonable indication that the subject imports have caused material injury to the domestic industry. See, Additional Views of Commissioner Cass.

25/ See, Shock Absorbers, Inv. No. 731-TA-421, USITC Pub. No. 2128 at 18.

26/ We adopted a three year period of investigation, and analyzed data for 1985, 1986, 1987 and interim data from the first six months of 1987 and the first six months of 1988.

27/ Report Tables 1 and 15. New rail purchases by class I railroads have been slowed by fluctuations in freight revenues and availability of relay rail resulting from contraction of railroad operation after deregulation of the railroad industry in October, 1980. Report at A-11.

28/ Report Table 2.

29/ Report Table 2.

PA, capacity shrank and capacity utilization rose from interim 1987 to interim 1988. 30/

New rail shipments by U.S. producers fell 38.8 percent in volume from 1985 through 1987, but leveled off from interim 1987 to interim 1988. In dollar value, shipments of new rail fell 43.5 percent from 1985 to 1987, but rose from interim 1987 to interim 1988. 31/

New rail inventories of U.S. producers are not significant in these investigations because rails are produced in response to specific orders and inventories are minimal. 32/ U.S. importers inventories, likewise, are not significant because many shipments are made directly from foreign producers to U.S. customers. 33/ In any event, inventories have been flat over the period of investigation. 34/

Employment data for new steel rail producers, including average number of employees, hours worked by production and related workers, total compensation paid, and average hourly wages show substantial declines from 1985 to 1987, with some recovery from interim 1987 to interim 1988. 35/

The financial experience of U.S. new rail producers, including sales, gross profit, operating income, net income, cash flow, return on assets capital expenditures, and research and development has been increasingly

30/ Report at A-12-A-13.

31/ Report Table 1.

32/ Report at A-15.

33/ Report Table 11 and accompanying text.

34/ Report at A-15; Table 11.

35/ Report Table 4.

negative or in decline from 1985 to 1987, with some recovery from interim 1987 to interim 1988. 36/ 37/

Reasonable indication of material injury

"Material injury" is defined in section 771(7)(A) of the Act as "harm which is not inconsequential, immaterial or unimportant." 38/ The Act sets forth factors for the Commission to consider in assessing the relationship between any material injury to the domestic industry and the imports under investigation, including import volume, the effect of imports on domestic prices, and the impact of imports on the U.S. operations of domestic producers. 39/ No one factor is determinative, 40/ and the Commission is entitled to consider other economic factors relevant to analysis of the

36/ Report Tables 5-10 and accompanying text. Note that Bethlehem's pending \$20 million purchase of the Wheeling-Pitt Monessen facility is not included in these data.

37/ Commissioner Rohr notes that it is clear that the financial performance of this industry has been particularly poor in comparison with many of the industries examined by the Commission. It is somewhat unusual, for example, for an industry to be operating at substantial negative gross profit levels throughout the entire period of investigation. If this matter returns to the Commission for final investigations he will look for additional information to provide a proper context for examining the financial performance of this industry.

38/ 19 U.S.C. § 1677(7)(A).

39/ 19 U.S.C. § 1677(7)(B), as amended by section 1328(1) of the recently enacted Omnibus Trade and Competitiveness Act of 1988 (the "1988 Trade Act"), P.L. No. 100-418, 102 Stat. 1107.

Section 771(7)(C) of the Act, 19 U.S.C. § 1677(7), as amended by section 1328(2) of the 1988 Trade Act, provides detailed guidance with respect to evaluation by the Commission of import volume, domestic price effects, and the impact of imports on the domestic industry.

40/ 19 U.S.C. § 1677(7)(E)(ii) ("The presence or absence of any factor . . . shall not necessarily give decisive guidance with respect to the determination by the Commission of material injury."), cited in Atlantic Sugar, Ltd. v. United States, 519 F. Supp. 916, 922 (CIT 1981).

industry in question, so long as such factors are identified and their relevance is fully explained. 41/

Canadian imports of new steel rail increased substantially in both volume and value from 1985 to 1987; Canadian market penetration rose from 0.7 percent in 1985 to 1.4 percent in 1986, and then to 4.3 percent in 1987. 42/ For purposes of these preliminary determinations, we find that the volume of new steel rail imports from Canada is significant.

Analyzing the price effects of Canadian rail imports in these investigations is particularly difficult because of the "bid-quote" system applicable to new rail sales. 43/ 44/ The market for new steel rail primarily consists of class I railroads, 45/ which frequently purchase directly from rail producers by soliciting bids, and then negotiating with qualified low bidders for particular volumes of rail to be delivered on particular terms at a particular price. 46/ Transit Authorities follow a

41/ See, Section 1328(1) of the 1988 Trade Act.

42/ Report Table 15.

43/ The Commission was unable to obtain information regarding comparative prices for industrial rail during these preliminary investigations. The Commission will seek additional information regarding sales of industrial rail should this matter return for final investigation.

44/ Commissioner Cass does not join in the remaining portion of the opinion. His views on the impact of the subject imports on the price of the domestic like product are set forth separately in the Additional Views of Commissioner Cass.

45/ Report page A-39 (class I railroads comprise 60 to 70 percent of the market for new steel rails).

46/ Report at A-31, A-33-A-34.

similar procedure, but use a sealed bidding procedure without subsequent negotiations.

In any given sales competition, U.S. producers do not know whether Canadian producers are going to submit a bid or a quote. The record contains information indicating that Canadian producers played a significant role in overall rail procurements of class I railroads from 1986 through mid-1988, and that Canadian producers actively participated in the U.S. rail market by submitting quotes to U.S. class I railroads. 47/ At this time it is not possible to determine whether there is a pattern of Canadian underselling or "underquoting" because of the difficulty in obtaining consistent information about specific bids. 48/ The information before the Commission suggests that in at least some instances Canadian products were purchased or domestic bids were lowered in situations in which initial Canadian bid prices were lower than domestic producer prices.

In light of the poor condition of the domestic industry during the period of investigation, the significant and rising volume and market penetration of Canadian imports, and the information suggesting the adverse price effect of Canadian participation in the domestic rail market, we find a reasonable indication of material injury to the domestic industry by reason of Canadian imports of new steel rail, which are alleged to be both subsidized and sold at less than fair value.

47/ Report Table 16.

48/ The Commission will seek additional information regarding specific bids and quotes relating to the Canadian imports here under investigation in the event this matter returns for final investigation.

ADDITIONAL VIEWS OF COMMISSIONER ECKES

Although I have concurred with my colleagues in joint views, this Commissioner believes it appropriate and necessary to offer several additional observations about the appropriate legal standard being employed in Title VII preliminary investigations.

I continue to have concerns about proper interpretation of the American Lamb standard 1/ in light of the Court of International Trade's (CIT) recent decision in the Yuasa appeal. 2/ Is the relevant standard for a preliminary negative determination whether there is "clear and convincing evidence that there is no material injury," a position a Commission majority adopted in the recent Shock Absorbers investigation? 3/ Or, is the appropriate standard "clear and convincing evidence of no reasonable indication" of material injury, an interpretation that I offered in the same preliminary determination? 4/

Regrettably parties to this steel rails investigation elected not to address the issue. My review of the record found

1/ American Lamb Co. v. United States, 785 F.2d. 994, (Fed. Cir. 1986) (hereinafter, "American Lamb").

2/ Yuasa-General Battery Corp. v. United States, Slip. Op. 88-89, (July 12, 1988) (hereinafter, "Yuasa").

3/ Views of Acting Chairman Brunsdale, Commissioners Liebeler, Lodwick and Cass, Shock Absorbers and Parts, Components and Subassemblies Thereof from Brazil, Inv. No. 731-TA-421 (Preliminary) USITC Pub 2128 (Sept. 1988) (hereinafter, "Shock Absorbers").

4/ Views of Commissioner Alfred E. Eckes, Shock Absorbers at 33.

only a brief mention of the standard in petitioner's post-conference brief, but this document offered no analysis or comment on what is the proper standard. 5/ Since some of my colleagues observed at the public vote that their affirmative preliminary determinations were a close call, 6/ it seems more important than ever for parties and our reviewing courts, when appropriate, to address the issue and provide guidance. As I noted in the Shock Absorbers preliminary, other Commissioners also seem to have questions about the CIT's application of American Lamb in the Yuasa decision. Three of us voted to seek appeal of that decision, but the action failed for lack of a Commission majority. 7/

Some seem to believe this issue is insignificant or inconsequential, since the CIT applied the American Lamb standard in reviewing three other preliminary negative determinations prior to Yuasa. But, my cursory review of those appeals suggests that considerable ambiguity remains. The first, Maverick Tube Corp. 8/ does indeed refer to the majority's view of the standard, yet that appeal was dismissed after remand to the Commission, and thus by some standards is not a final

5/ Petitioner's Post Conference Brief at p. 25.

6/ Transcript of Commission Meeting, November 4, 1988, at p. 22 and 23 (hereinafter "Transcript").

7/ Action Jacket C059-L-001 and my separate views in Shock Absorbers at fn. 6, p. 37.

8/ Maverick Tube Corp. v. United States, 687 F. Supp. 1569, at 1573 (CIT 1988).

determination. Moreover, in that case only the second requirement of the American Lamb standard was at issue - namely, whether "no likelihood exists that contrary evidence will arise in a final investigation." For this reason, I do not believe that Maverick Tube provides compelling guidance on aspects of the standard in question now.

The other two decisions also are inconclusive. In Wells Mfg. Co. ^{9/} the CIT employs the preliminary American Lamb standard, but does not state what the specific language of the standard is. Similarly, in Jeannette Sheet Glass Corp., ^{10/} the Court does not elaborate this issue. Consequently, from my vantage point, the assertion that Yuasa is inconsistent with earlier CIT decisions or that it is an unartful articulation of the American Lamb standard is disingenuous. Earlier CIT decisions reviewing negative preliminary determinations do not provide unequivocal guidance nor do they help resolve the ambiguities raised by the most recent application of the standard in the Yuasa decision.

Some lawyers also seem to think that my interpretation of Yuasa as mandating "clear and convincing evidence of no reasonable indication of material injury" for a preliminary negative determination is tantamount to resurrecting the CIT's

^{9/} Wells Mfg. Co. v. United States, 677 F. Supp. 1239, (CIT 1987).

^{10/} Jeannette Sheet Glass Corp. v. United States, 654 F. Supp. 179 (CIT 1987).

"mere possibility" standard from Republic Steel 11/. I reject that conclusion, and state now that I do not employ a "mere possibility" standard. My views in Shock Absorbers demonstrate clearly that I do not use the "mere possibility" standard in preliminary investigations. Nor do the present views support any inference that the standard of "clear and convincing evidence of no reasonable indication of material injury" is subterfuge for employing a "mere possibility" standard. Those who believe the two standards are identical conveniently overlook that the second requirement for a negative preliminary determination in American Lamb -- the requirement that "no likelihood exists that contrary evidence will arise in a final investigation -- has no place in the "mere possibility" standard employed in Republic Steel.

If some believe this issue is a pedantic distinction without meaning, that is their privilege. From my standpoint, however the issues are real. The significance of these issues is particularly magnified in determinations where "the evidence just barely rises to that level that is required for preliminary [affirmatives]." 12/ Uncertainty regarding the standard for Commission decision-making can only frustrate predictability and consistency in the administration of our trade laws.

11/ Republic Steel Corp. v. United States, 591 F. Supp. 640 (1984).

12/ Transcript at 22.

ADDITIONAL VIEWS OF COMMISSIONER RONALD A. CASS

New Steel Rails from Canada
Inv. Nos. 701-TA-297 and 731-TA-422
(Preliminary)

I join my colleagues in determining that there is a reasonable indication that an industry in the United States has been materially injured by reason of unfairly traded imports of new steel rails from Canada.^{1/} However, I reach this conclusion by a different route than that taken by certain of my colleagues.

I. LEGAL STANDARDS GOVERNING DISPOSITION OF
PRELIMINARY INVESTIGATIONS

For reasons explained in Section III, infra, I have determined that the record evidence presented to us in these preliminary investigations is sufficient to warrant an affirmative determination, although just barely so. In order to explain how I have reached this conclusion, it would perhaps be useful to first explain my understanding of the circumstances under which the Commission may terminate an

^{1/} Accordingly, I do not reach the question of threat of material injury. Material retardation of a domestic industry is not an issue in these investigations.

investigation with a negative determination after the completion of a preliminary investigation.

The starting point for such a discussion is, of course, the statute that governs Title VII preliminary investigations. Under the standard established by Congress in the Trade Agreements Act of 1979, in preliminary antidumping and countervailing duty investigations, the Commission is required to determine whether there is a "reasonable indication" that an industry in the United States has been materially injured, or is threatened with such injury, by reason of imports that have allegedly been dumped or subsidized.^{2/}

The statute does not explicitly address two related questions that must be resolved in order to apply the "reasonable indication" to the cases that come before us. First, what quantum of proof will justify a determination by the Commission that there is a reasonable indication of material injury, or threat thereof, by reason of imports alleged to have been unfairly traded? Second, what methodology should the Commission employ in determining

^{2/} 19 U.S.C. §§ 1671b(a), 1673b(a). The statute also contemplates that the Commission will, in appropriate cases, reach an affirmative determination if there is a reasonable indication that the development of a domestic industry has been materially retarded by reason of imports that have allegedly been unfairly traded. For the purposes of this discussion, the concept of "injury" is intended also to encompass the notion of material retardation.

whether that quantum of proof has in fact been established? The answer to these questions is not self-evident, but the statute and its legislative history, judicial precedent and past Commission practice provide guidance on both of these issues.

By providing that antidumping and countervailing duty investigations shall go forward if there is a "reasonable indication" of material injury, Congress clearly intended to "weight the scales in favor of affirmative and against negative determinations."^{3/} In short, the quantum of proof required to sustain an affirmative determination is clearly lower than that required in order to support such a determination in a final investigation. Put another way, the preponderance of the evidence need not be in favor of a petitioner in a preliminary investigation before an affirmative determination may be made.

By the same token, however, it is just as plain that the "reasonable indication" standard was not intended to preclude any possibility of negative determinations in preliminary investigations. As the Court of Appeals made clear in its decision in American Lamb,^{4/} in articulating this standard,

^{3/} American Lamb Co. v United States, 785 F.2d 994, 1001 (Fed. Cir. 1986); see also Yuasa-General Battery Corp. v. United States, slip op. 88-89 (Ct. Int'l Trade, July 12, 1988), at 5.

^{4/} Cited, supra, at n. 3.

Congress sought to balance two competing concerns.^{5/} Congress did not want meritorious petitions rejected, and hence provided that investigations should continue past the preliminary stage even when the evidence of record was not sufficient to support an affirmative final determination. The very reason for providing the intermediate step of a preliminary investigation, however, was Congress' belief that the costly process of final investigations both by this Commission and the Department of Commerce, with the attendant disruptive effect upon trade, should not be endured unless there were sufficient injury to a domestic industry at stake to justify the cost.

The preliminary investigation originated in the Trade Act of 1974. That legislation established the preliminary investigation as a mechanism pursuant to which an investigation may be terminated if the Commission finds insufficient evidence of injury. At the time the legislation was passed, the Secretary of the Treasury was responsible for determining whether imported products had been dumped or unlawfully subsidized. The statute authorized the Secretary to refer a case to the Commission at any time during the course of an investigation for a Commission determination

^{5/} See *American Lamb*, *supra*, 785 F.2d at 1002-3, citing S. Rep. No. 1298, 93d Cong., 2d Sess. 171 (1974).

whether there was evidence of injury sufficient to warrant further proceedings by the Secretary. The statute provided that the Commission was to issue its decision within thirty days after the Secretary referred a case to the Commission. If the Commission found that there was "no reasonable indication that an industry is being injured or is likely to be injured" by reason of imports alleged to have been unfairly traded,^{6/} this was sufficient to terminate the Secretary's investigation. The legislative history of the 1974 Act states the purpose of this provision:

Under the present Act, the Secretary of the Treasury must complete his entire investigation as to sales at less than fair value before the matter can be referred to the International Trade Commission for its injury determination. The Committee felt that there ought to be a procedure for terminating investigations at an earlier stage where there was no reasonable indication that injury or the likelihood of injury could be found The amendment is designed to eliminate unnecessary and costly investigations which are an administrative burden and an impediment to trade.^{7/}

After the 1974 Act became effective, the Commission found, in a significant proportion of the cases that were referred to it

^{6/} Pub. L. 93-618, Title III, ch. 2, 88 Stat. 2023 (1974).

^{7/} S. Rep. No. 93-1298, 93rd Cong., 2d Sess. 170-71 (1974).

for a preliminary investigation, that there was "no reasonable indication" of injury.^{8/}

The Trade Agreements Act of 1979 revised the preliminary investigation process in two respects. First, it made preliminary investigations mandatory in Title VII cases.^{9/} Second, it slightly modified the standard to be used in such investigations by restating it in the affirmative rather than the negative; the statute was revised to provide that the Commission shall make a determination whether there is a "reasonable indication" that a domestic industry is materially injured or threatened with such injury.^{10/} However, there is no indication in the language or legislative history of the

^{8/} See *Multimetal Lithographic Plates from Mexico*, Inv. No. AA1921-Inq.-4, USITC Pub. 775 (May 1976); *Methyl Alcohol from Brazil*, Inv. No. AA1921-Inq.-7, USITC Pub. 837 (October 1977); *Uncoated Free Sheet Offset Paper from Canada*, Inv. No. AA1921-Inq.-10, USITC Pub. 869 (March 1978); *Photographic Color Paper from Japan and West Germany*, Inv. No. AA1921-Inq.-11-12, USITC Pub. 885 (May 1978); *Standard Household Incandescent Lamps from Hungary*, Inv. No. AA-1921-Inq.-18, USITC Pub. 912 (September 1978); *Certain 45 RPM Adaptors from the United Kingdom*, Inv. No. AA1921-Inq.-24, USITC Pub. 953 (March 1979); *Steel Wire Coat and Garment Hangers from Canada*, Inv. No. AA1921-Inq.-25, USITC Pub. 974 (May 1979); *Coke from West Germany*, Inv. No. AA1921-Inq.-29, USITC Pub. 1015 (November 1979).

These cases represented approximately one-third of the cases referred to the Commission for a preliminary investigation during the period in question.

^{9/} See 19 U.S.C. §§ 1671(b), 1673(b).

^{10/} *Id.*

1979 Act that the Act was intended to alter fundamentally the standard applicable in preliminary investigations or the manner in which the Commission applied that standard. To the contrary, in the report that it issued in connection with that legislation, the Senate Finance Committee stated that it understood that the "reasonable indication" standard would be applied in the same manner as it had been under previous law.^{11/} The Committee also noted that "[t]he burden of proof . . . would be on the petitioner".^{12/} Subsequent court cases and legislative history have cast some doubt on the precise nature of the burden imposed on a petitioner.^{13/} Still, it is plain that some quantum of proof of injury must be on the record to justify an affirmative determination. The precise quantum of proof required can not, of course, be quantified, and can not easily be described with great precision. Indeed, almost any verbal formula designed to express the required quantum of proof will be subject to disparate interpretations. That said, however, I have suggested elsewhere^{14/} that past

^{11/} See S. Rep. No. 96-249, 96th Cong., 1st Sess. 49, 66 (1979).

^{12/} Id.

^{13/} See Budd Co. Railway Division v. United States, 507 F. Supp 997, 1003 (Ct. Int'l Trade 1980); H.R. Rep. 1156, 98th Cong., 2d Sess 182 (1984).

^{14/} Electrolytic Manganese Dioxide from Japan, Ireland and Greece, Inv. Nos. 731-TA-406-408 (Preliminary), USITC Pub. (continued...)

Commission practice suggests that the burden falls on Petitioner to satisfy the Commission that there is "at least a colorable basis" for an affirmative final determination.

Our standard for preliminary determinations seldom is discussed separately from a second factor that shapes our disposition of preliminary investigations: the methodology for evaluating whether that standard is met. Several discrete methodological issues are subsumed in our discussions of preliminary determinations. First, are we limited to consideration only of evidence offered by the Petitioner? Second, if evidence not adduced by Petitioner can be considered, how should conflicting evidence be weighed? Third, how should the Commission treat evidentiary gaps on issues critical to our substantive determination?

On these issues as well, the precedents are instructive, if not always entirely clear. Commission and judicial treatment of the first methodological issue offers the clearest answer to these questions. Commission practice, approved by the U.S. Court of Appeals for the Federal Circuit in American Lamb Co. v. United States,^{15/} among other

^{14/} (...continued)

2097 (July 1988) (Additional Views of Vice Chairman Brunsdale and Commissioners Liebeler and Cass) at 23-24.

^{15/} American Lamb, cited, supra, at n. 3.

cases,^{16/} has been to consider evidence offered by Commission staff and respondents as well as petitioners.

In weighing competing evidence, the Commission's practice, also approved by our reviewing courts, has been to view evidence in a light favorable to petitioners, drawing inferences adverse to petitioners' case only where the opposing evidence clearly and convincingly supported the contrary proposition.^{17/} As with other verbal formulations of evidentiary standards, this "clear and convincing" standard is subject to divergent applications. But, whatever disparities may be found in its application, it has been understood plainly to mean that a negative determination will not be reached in a preliminary investigation simply because on each substantive issue the Commission finds the weight of the evidence marginally favors an inference consistent with such a decision.

Finally, the absence of adequate evidence on a given factor relevant to our disposition of an investigation will not necessarily preclude an affirmative preliminary

^{16/} See, e.g., *Yuasa-General Battery Corp. v. United States*, *supra*, at 5.

^{17/} See *Certain Welded Carbon Steel Pipes and Tubes from the Republic of Korea and Taiwan*, Inv. No. 731-TA-131 and 132 (Preliminary), USITC Pub. 1324 (June 1983); *Canned Mushrooms from the People's Republic of China*, Inv. No. 731-TA-115 (Preliminary), USITC Pub. 1324 (December 1982).

determination. In each instance, the Commission will consider the significance of the factor, the likelihood of obtaining evidence adequate to our purposes in a subsequent investigation, and the basis for the belief that such evidence, when obtained, will support petitioner's claims.^{18/}

In its much noted American Lamb decision, the Federal Circuit sustained the Commission's practice with respect to each of these issues.^{19/} In that case, the Court stated that the Commission's practice is to

issue a negative determination . . . only when (1) the record as a whole contains clear and convincing evidence that there is no material injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation.^{20/}

The Court then held that the Commission's practice, as the Court understood it, was "permissible within the governing statute".^{21/}

Unfortunately, I believe that the import of the Court's

^{18/} Electrolytic Manganese Dioxide from Japan, Ireland and Greece, Inv. Nos. 731-TA-406-408 (Preliminary), USITC Pub. 2097 (July 1988) (Additional Views of Vice Chairman Liebelier and Commissioners Liebelier and Cass).

^{19/} American Lamb, supra, 785 F.2d at 994.

^{20/} Id. at 1001.

^{21/} Id. at 1001.

decision may not be properly understood.^{22/} There is no basis, either in American Lamb or elsewhere, for the argument that the Commission must issue affirmative determinations in preliminary investigations unless respondent offers clear and convincing evidence of the absence of injury. To the contrary, I believe that such an interpretation of the statute would be at odds not only with the Commission's own recent practice, as evidenced by numerous cases decided by the Commission in the years after the passage of the Trade Agreements Act of 1979, which contained the language that governs preliminary investigations today. More important, it would also be squarely at odds with the language and legislative history of that Act and its predecessor statute.

The statute requires that an affirmative determination be made when there is a "reasonable indication" of material injury or threat of material injury. While we will only draw inferences adverse to the petition from conflicting evidence when the contrary evidence is clear and convincing, that is

^{22/} This confusion may be compounded by the recent decision of the Court of International Trade in Yuasa-General, cited at n. 3, supra. In that case, the Court referred to the two-part test approved in American Lamb as a "requirement". The Court did not indicate, however, whether this test must be applied in all cases, or whether the standard was required in that case because of its adoption by the Commission during the particular administrative proceedings that were the subject of that case. See id. at 5, n. 2 ("Defendant's memorandum states . . . that 'there is no question in this case that this is the standard applicable'") (emphasis added).

not tantamount to a requirement that an affirmative determination be rendered unless the Commission is provided with clear and convincing evidence of the absence of injury or threat of injury. As a practical matter, such a requirement would make preliminary investigations -- which consume a substantial amount of the time and resources of the Commission and the parties who appear before us -- an essentially meaningless process in all but the very rare case where we are asked to consider a patently unmeritorious petition. I do not believe that this is what Congress intended when it created, and later made mandatory, the preliminary investigation process. Further, it is important to emphasize that the Commission's precedents embody a very different standard and very different use of the "clear and convincing" language.

For the foregoing reasons, in my view, the only reasonable interpretation of the statutory standard is the one that I believe that the Commission has in fact adopted. Specifically, the Commission may issue a negative determination either because the evidence presented in support of a petition does not, standing alone, amount to a reasonable indication of injury or threat of injury, or because the contrary evidence is so clear and convincing that the evidence supporting the petition cannot on the record as a whole be said to provide reasonable indication of injury. In this case, I do not

believe that a negative determination can be justified upon either of these bases.

II. DOMESTIC LIKE PRODUCT AND INDUSTRY

For the purposes of these preliminary investigations, I have adopted the definitions of the domestic like product and the domestic industry that have been suggested by Petitioner. However, the evidence presented by Respondents on this issue suggests to me that the issue is close enough to warrant careful reconsideration by the Commission if this case should return to us in a final investigation. It should be noted that, even if I were to adopt the position urged by Respondents, this would not affect my disposition of these preliminary investigations. However, since the parties have devoted substantial time to the like product issue and because that issue could be significant in any final investigation, I will explain briefly here how I have analyzed the like product issue in this proceeding.

Under the Trade Agreements Act of 1979, in defining domestic like products, the Commission must include within the like product the articles that are most directly competitive with and most directly affected by the LTFV imports, and should neither include articles that compete significantly less closely with the subject imports nor exclude articles

that, although distinguishable, compete very closely with those imports.^{23/} The Commission has traditionally attempted to carry out this mandate by considering five aspects of the potentially like products: (1) product characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) common manufacturing facilities and production employees; and (5) customer or producer perceptions.^{24/} These factors provide information that falls into two categories: information about consumer demand and information about producer supply. As I have stated in other opinions,^{25/} I believe that in the usual case the proper test for like products should require substantial coincidence of both supply and demand among domestic products. That is, a domestic like product, in addition to satisfying the requirement that the product competes closely with subject imports, should comprise

^{23/} S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979).

^{24/} See, e.g., Fabric and Expanded Neoprene Laminate from Taiwan, Inv. No. 731-TA-371 (Final), USITC Pub. 2032 (November 1987) at 4 and n. 5.

^{25/} See, e.g., Certain Brass Sheet and Strip from Japan and the Netherlands, Inv. Nos. 731-TA-379 and 380 (Final), USITC Pub. 2099 (July 1988) (Dissenting Views of Commissioner Cass) at 58; 3.5" Microdisks and Media Therefor from Japan, Inv. No. 731-TA-389 (Preliminary), USITC Pub. 2076 (April 1988) (Additional Views of Commissioner Cass) at 49.

essentially one market for domestic consumers and be produced by one market for domestic producers.^{26/}

In this investigation, as in many others, the dividing lines are not as clear as one might like. The information concerning producer supply points clearly in the direction of a single like product consisting of all new steel rails like the products under investigation. Prime rail and industrial rail share common manufacturing facilities and production employees.^{27/} Indeed, industrial rail is essentially a by-product of prime rail production.

However, from the standpoint of consumer demand, there is a plausible argument for considering prime rail and industrial rail as separate like products. The physical and chemical characteristics of the products are different, and limit the extent to which one product can be substituted for the other.^{28/} In particular, industrial rail is not generally used for the mainline railroad applications to which the bulk of new prime rail is put.^{29/} There are substantial price differences between the two products, and prime rail and

^{26/} Id.

^{27/} See Views of Commissioners Eckes, Rohr, Lodwick, Cass and Newquist at 5.

^{28/} Id. at 5-6.

^{29/} See discussion, infra, at n. 47.

industrial rail are generally sold through different channels of distribution.^{30/} There may be some limited substitutability between the two products. Specifically, Petitioner asserts that prime rail can be used for the same applications as industrial rail.^{31/} The record evidence, however, is insufficient to enable us to determine that prime rail is in fact used for such purposes.

Given the evidence concerning producer supply that suggests a single like product and the conflicting evidence relating to consumer demand -- though the latter evidence, on balance, appears to support a finding of two like products -- I have decided to use a single like product for the purposes of these preliminary investigations. As previously indicated, however, I might reach a different conclusion based upon the evidence that might be developed if this case were to return to us as a final investigation.

III. CAUSATION OF MATERIAL INJURY:
NEW STEEL RAILS FROM CANADA

In order to determine whether there is a reasonable indication that the domestic industry has suffered material injury by reason of the subject imports, I have carried out

^{30/} See Views of Commissioners Eckes, Rohr, Lodwick, Cass and Newquist at 6.

^{31/} See Petitioner's Postconference Brief at 22.

the three-part inquiry suggested by the statute that governs Title VII investigations.^{32/} Under this approach, the possible existence of material injury is analyzed by comparing the conditions experienced by the domestic industry to the conditions that would have existed had there been no unfairly traded imports. Three questions must be examined in order to perform this analysis. First, it is necessary to draw inferences respecting the extent to which prices and sales of the subject imports were affected by the alleged unfair trade practices. Second, the effect of these apparent changes in the market for the subject imports on prices and sales of the domestic like product must be assessed. Finally, the impact of these changes in prices and sales of the domestic like product on employment and investment in the domestic industry must be considered. Each of these questions is examined in turn below.

Before turning to a discussion of these factors, I note that the Omnibus Trade and Competitiveness Act of 1988 requires Commissioners to address specifically three factors that are set forth in the statute and also requires explanation of other, unlisted factors that a Commissioner considers relevant. In this regard, I should emphasize that

^{32/} See, e.g., 3.5" Microdisks and Media Therefor from Japan, Inv. No. 731-TA-389 (Preliminary), USITC Pub. 2076 (April 1988) (Additional Views of Commissioner Cass) at 70-74.

the three-part inquiry that I have outlined is designed to analyze the particular statutory factors that we are required to consider in Title VII investigations. The first statutory factor is the volume of imports of the merchandise under investigation. The volume of allegedly unfair imports, and the effect of the unfair practice on the volume of such imports, are central to the first part of the Title VII inquiry, which evaluates the extent to which the sales and prices of these imports changed as a consequence of the alleged unfair trade practices under investigation; this inquiry necessarily entails full consideration of the actual volume of the subject imports during the period covered by the investigation. The second statutory factor, the effect of the subject imports on prices in the United States for like products, is the principal focus of the second part of the three-part inquiry. Examination of the relation between the imports and domestic like product, and the nature of the markets for the production and consumption of the domestic like product, is essential to evaluation of the effect of the allegedly unfair imports on the prices of the domestic like product. As the effect on prices is integrally related to effects on sales of the domestic product, the latter effects also are considered in the second part of the inquiry undertaken here. The third part of the inquiry explicitly

focuses on the third statutory factor, the impact of the subject imports on domestic producers of like products, including explicit attention to the various indicia of such impact listed in Title VII. Certain other relevant economic factors, such as data pertaining to the volume of sales made by Respondent producers in their home markets, are also considered in carrying out this three-part inquiry; their relevance is explained in the pertinent following subsections of this opinion.

A. LTFV Imports

Petitioner has provided the Commission with evidence suggesting that the prices of the subject imports substantially decreased as a result of the alleged unfair trade practices under investigation. Petitioner alleges that the subject imports were sold at prices that were lower than fair value by significant margins. Petitioner asserts that the dumping margins for these sales ranged from a low of 17 percent to as much as 150 percent.^{33/} Petitioner also contends that Respondents received countervailable subsidies amounting to at least 3.96% ad valorem in the case of Algoma and 139.22% in the case of Sysco.

In Title VII investigations, we are of course required to assess cumulatively the effects of the imports that have

^{33/} Petition at 11.

allegedly been dumped and the imports that have allegedly been subsidized.^{34/} Although this requirement has been said to exist in cases involving imports from two or more countries, I believe that it also applies when the imports that have allegedly been dumped or subsidized come from a single country, as they do here. Thus, in this investigation, in assessing the extent to which the alleged unfair trade practices affected the sales and prices of the subject imports, I have cumulatively assessed the effects of the alleged dumping and the effects of the alleged subsidization.

Respondents strongly challenge the dumping margins alleged by Petitioner, claiming, inter alia, that they are inflated, and unreliable because they are not based upon data derived from actual sales transactions.^{35/} Respondents request the Commission to instead consider certain evidence supplied by Respondents, specifically four sales invoices relating to sales made by Respondent Algoma and Respondent

^{34/} See Bingham & Taylor Division v United States, 815 F.2d 1482 (Fed. Cir. 1987).

^{35/} Respondents' Postconference Brief at 34-35. Petitioner's margins calculations were made in a number of different ways. Petitioner derived one set of figures by using Respondents' list prices, adjusted in certain instances to take into account published spot market quotations for structural steel. Petitioner also computed the margins by using published export data, Petitioner's own export prices and Petitioner's cost of production. See Petition at 8-9.

Sysco in the United States and Canada.^{36/} Counsel for Respondents has stated that these sales are representative of those made by Respondents in those two markets during the relevant period.^{37/} Respondents similarly attack Petitioner's subsidy allegations. Respondents note, *inter alia*, that in an earlier investigation, Oil Country Tubular Goods from Canada, the U.S. Department of Commerce found that many of the Canadian federal and provincial programs cited in the instant Petition were not countervailable, and also found zero or de minimis subsidy margins for most of the respondents in that investigation, including Algoma.^{38/}

Although I am concerned that factual assertions, such as the Petitioner's alleged margins, not be accepted uncritically, I do not believe that a full inquiry into the margins is appropriate under the bifurcated statutory framework governing Title VII investigations. Where assertions on this or other issues are inherently implausible or plainly contradicted by clear record evidence, we may not be able to accept them, but generally, until the Department of Commerce has spoken, the alleged margins will be the best evidence

^{36/} Respondents' Postconference Brief at 36, Attachments 3-6.

^{37/} Id. at 36.

^{38/} Id.

available to us.^{39/} While Respondents have raised concerns about the allegations in this case, even if it were appropriate to evaluate those allegations, the record evidence is insufficient to support a conclusion that there is no basis for Petitioner's margin allegations. These allegations are not, on their face, demonstrably false or implausible. Further, Respondents' evidence and argument on this issue do not persuasively rebut these allegations. Respondents supplied to the Commission a handful of sales invoices relating to only a small percentage of the sales made by Respondents in the United States and Canada during the relevant period. The Commission can not attach broad importance to these invoices based solely upon the representation of Respondents' counsel that the sales to which they relate were "representative" of those made by Respondents during the relevant period.

Respondents' response to Petitioner's subsidy claims is likewise incomplete. Respondents state that "many" of the Canadian governmental programs cited in the Petition were found by Commerce to be non-countervailable in an earlier,

^{39/} Indeed, the legislative history of the Trade Agreements Act makes clear that, in preliminary investigations in antidumping cases, the Commission "will be guided by the description of the allegation of the margin of dumping contained in the petition or as modified by . . . [Commerce]". Statements of Administrative Action, Trade Agreements Act of 1979, at 415.

unrelated case. However, as this statement implicitly acknowledges, Respondents do not -- and, indeed, can not -- claim that all of the programs cited in the Petition were at issue in that earlier proceeding. Accordingly, the earlier Commerce determination does not provide a sufficient basis for evaluating the subsidy claims made in the instant Petition.^{40/ 41/}

On the record before me, then, I must conclude that there is a reasonable indication that the sales under investigation were made at prices reflecting significant dumping and/or subsidy margins. There is reason to believe that these prices were significantly lower than those that would have prevailed in the absence of dumping or subsidization. During the period covered by the investigation, Respondents' sales in Canada accounted for a very substantial percentage of Respondents' sales in the combined U.S./Canadian market. As I have explained elsewhere, the decline in the price of the subject

^{40/} Accordingly, I need not decide whether Commerce determinations in other, unrelated investigations could ever constitute a sufficient basis upon which the Commission might evaluate a petitioner's claims in the context of a preliminary investigation.

^{41/} It should also be noted that, as Respondents also implicitly acknowledge, Respondent Sysco was not, in any event, a party to the earlier Commerce proceeding. That proceeding therefore has no bearing whatever on the subsidy claims that have been made against Sysco. It is noteworthy that substantially higher margins were alleged against Sysco than against Respondent Algoma.

imports that occurs as result of dumping or subsidization will generally be less than the full amount of the dumping or subsidy margin. So far as dumping is at issue, the actual decrease, as a percentage of the relevant margin, will be, in large measure, a function of the proportion of the sales of the subject foreign producer(s) in their combined U.S. and (respective) home markets that is accounted for by sales in their (respective) home markets.^{42/} Throughout the period covered by the Commission's investigation, Respondents' sales of new steel rails in Canada accounted for 80% or more of Respondents' sales in a combined U.S./Canadian market.^{43/}

Where subsidy allegations are involved, the analysis is somewhat different. First, unlike dumping, subsidies can have very different characteristics. Some subsidies may be direct payments for exports. Other subsidies may be payments for production regardless of the destination of the production. Still other subsidies may be payments for the use of particular inputs to production, including the location of

^{42/} See, e.g., Granular Polytetrafluoroethylene Resin from Japan, Inv. No. 731-TA-385 (Final), USITC Pub. 2112 (August 1988) (Additional Views of Commissioner Cass) at 74; 3.5" Microdisks and Media Therefor from Japan, Inv. No. 731-TA-389 (Preliminary), USITC Pub. 2076 (April 1988) (Additional Views of Commissioner Cass) at 82, n. 100; Certain Bimetallic Cylinders from Japan, Inv. No. 731-TA-383 (Final), USITC Pub. 2080 (May 1988) (Additional Views of Commissioner Cass) at 43-44.

^{43/} Report at a-27, Table 12.

production. The effect of these different subsidies will differ, and in each case a careful evaluation of the manner in which the subsidy operates is necessary to determine whether and by how much the subsidy lowered the price and altered the volume of imports.^{44/} In this investigation, however, insufficient information is available to allow assessment of the degree to which the alleged subsidies have affected import volumes and prices.

Given the possibility that the prices of the subject imports that have allegedly been dumped or subsidized could have been reduced by at least a significant percentage of the asserted dumping and subsidy margins, respectively, for the purposes of my analysis of these preliminary investigations, I must conclude that the alleged dumping could have caused a substantial decline in the prices of the subject imports.

For reasons more fully explained in the succeeding section of these Additional Views, the record evidence in this proceeding cannot support any precise conclusions respecting the effect that this price decrease may have had on the volume of sales of the subject imports. At this point, all that can

^{44/} For a general discussion of this point, see Diamond, Toward an Economic Foundation for Countervailing Duty Law, Workshop Paper for Georgetown University Law Center Law and Economics Program, October 1988. In some instances, a subsidy tied to use of particular production inputs actually can reduce the volume of imports. See Silberberg, The Structure of Economics: A Mathematical Analysis 209-211 (1978).

be said is that a price change of the magnitude posited might have been accompanied by a significant increase in the volume of sales of the subject imports relative to the volumes that would have obtained otherwise. This volume increase may indeed have accounted for a substantial portion of the sales actually made by the Respondent producers in the United States during the relevant period. It should be noted, however, that in absolute terms the volume of Canadian imports sold during that period remained small.

B. Domestic Prices and Sales

In these investigations, the record evidence suggests that, even if the alleged unfair trade practices under investigation significantly affected the market for the subject imports, the changes in the price and sales of the domestic like product that were caused by the alleged unfair trade practices were nevertheless quite small and perhaps de minimis. Notably, the U.S. market penetration of the subject imports during the period covered by the investigation was, and continues to be, low. For example, in 1987 and the first half of 1988, the subject imports, measured on the basis of quantity, accounted, respectively, for only 4.3% and [* * *] of total domestic consumption of new steel rails.^{45/} If measured on the basis of value, market penetration by the

^{45/} Id. at a-32, Table 15.

Canadian producers was even lower, amounting to 3.1% in 1987 and [* * *] the first half of 1988. These data, standing alone, suggest that the impact of the subject imports on sales of the domestic like product was very limited.

I am unable, however, to find, on the basis of the evidence now before us, that the effect of the allegedly dumped and subsidized imports was inconsequential. First, imports of new steel rails from Canada rose by a significant percentage over the period covered by the investigation, albeit to a level that is still quite low relative to the domestic market. Under the statute that governs these investigations, this is a factor that the Commission is required to take into account in determining whether unfairly traded imports have caused material injury to the domestic industry.^{46/}

Second, there is evidence in the record suggesting the possibility that sales of dumped and subsidized imports had more significant price effects. Critical to this determination is the evidence indicating that the domestic like product and the imported Canadian product may be at least moderately substitutable. For example, it appears that all new steel rail used on mainline tracks of U.S. Class I railroads must meet quality standards established by the

^{46/} See 19 U.S.C. §1677(7)(C)(i).

American Railway Engineering Association ("AREA").^{47/}
Respondents argued,^{48/} and Petitioner did not dispute, that domestic Class I railroads are unwilling, for safety, liability and maintenance reasons, to use rails that do not comply with AREA specifications on their mainlines. At first blush, this suggests that there may be a reasonably high degree of interchangeability among the domestic and imported Canadian products. If this is the case, then it is conceivable that even the low level of imports from Canada experienced during the period covered by the investigation could have had a small, but nevertheless significant effect on prices of the domestic like product. The price of the domestic product may have been suppressed by the availability of the competing Canadian product.

Other evidence in the record, however, suggests that this effect at best is likely to have been small. First, some evidence indicates that a number of factors may limit the substitutability of the two products. For example, a significant proportion of the subject imports was industrial rail; industrial rail is not suitable for mainline railroad

^{47/} See Report at a-5-a-6; Respondents' Postconference Brief at 3.

^{48/} See Respondents' Postconference Brief at 3.

applications.^{49/} It is unclear, at present, whether there are other differences in the composition of the imported Canadian product -- for example, the proportion of the subject imports that consisted of "premium" rail as opposed to "standard" rail -- that distinguish the imported product from the domestic like product. It should also be noted that, in certain projects financed by state or local governments, the eligibility of foreign producers to compete for contracts may be limited by so-called "Buy America" provisions.^{50/} In addition, Class I railroads and domestic transit authorities generally will purchase rail only from qualified suppliers, and there is some record evidence that the Canadian producers have not yet achieved this status with certain domestic purchasers of new steel rails.^{51/} Finally, the information provided by the Commission in these preliminary investigations indicates that certain Class I railroads may perceive differences in the quality of the domestic and imported products.^{52/}

^{49/} See Report at a-27, Table 12; Respondents' Postconference Brief at 9. Industrial rail also is significantly cheaper than rail that meets AREA specifications. See Respondents' Postconference Brief at 7.

^{50/} Report at a-12-a-13.

^{51/} Id. at a-34-a-36.

^{52/} See, e.g., id. at a-36, a-37, a-39.

However, the record is not fully developed on these issues; if this case should return to the Commission in the form of a final investigation, I believe that special attention should be given to these issues by the Commission and by the parties to this proceeding. On the record as it now stands, however, I am unable to say that the substitutability of the subject imports and the domestic like product is sufficiently limited to establish that the alleged unfair trade practices under investigation could not have had a significant effect on prices of the domestic like product.

Having said that, I should also note that I have not in fact found any persuasive record evidence indicating that the subject imports have had a significant effect on prices of the domestic like product. Although such evidence would not, in my view, be of great probative value, there is, for example, no record evidence that domestic prices for new steel rail have been falling. Furthermore, the price data compiled by the Commission contain little, if any evidence, that the Canadian producers have been competing -- successfully or unsuccessfully -- with the domestic industry on the basis of price.^{53/}

Thus, the ambiguity of the present record, far more than clear inferences from established fact, supports a conclusion

^{53/} See Report at a-34-a-40.

that the record is not incompatible with an ultimate finding of significant impact on domestic prices and sales. This is the weakest possible statement respecting this important analytical factor that can be consistent with an affirmative determination.

C. Investment and Employment

The data relating to employment and investment in the domestic industry that have been compiled by the Commission are not inconsistent with a finding that there is a reasonable indication that the subject imports have caused material injury to the domestic industry. By the same token, however, they provide little, if any, independent support for such a finding.

The industry has apparently sustained sizeable operating losses throughout the period covered by these investigations.^{54/} As a threshold matter, it should be noted that it can not be plausibly argued that imports from Canada were responsible per se for these losses. Imports from Canada remain relatively small, and they were virtually de minimis in 1985, which was a very unprofitable year for the industry. In short, other factors plainly account for the bulk of the injury that the domestic industry has experienced.

Respondents have identified several possible causes of that

^{54/} See Report at a-19, Table 6.

injury, including, inter alia, declining domestic demand and accompanying domestic competition, and increased exports from other nations.^{55/} However, in Title VII investigations, the Commission does not weigh the various possible causes of injury to the domestic industry.^{56/} Our task is to determine whether the subject imports caused material injury; if they have, that is sufficient grounds for an affirmative determination even if it appears, as it does here, that other factors may have accounted for the preponderance of the problems experienced by the domestic industry.

Still, on this point, the available financial data are ambiguous. For example, the industry incurred its largest losses in 1986, when the subject imports accounted for only 1.4% of the total quantity of U.S. consumption of new steel rails and only 0.9% of the total value of such consumption. The biggest rise in the level of the subject imports occurred in 1987, and the industry's performance improved marginally that year. Accordingly, the financial data, standing alone, do not establish the existence of a causal relationship between the subject imports and the financial difficulties that the industry has been experiencing. Indeed, if one were

^{55/} See Respondents' Postconference Brief at 17-22.

^{56/} See, e.g., *Hercules, Inc. v. United States*, 673 F. Supp. 454, 481 (Ct. Int'l Trade 1987); S. Rep. No. 249, 96th Cong., 1st Sess. 57 (1979).

to attempt to interpret these data in terms of the apparent trends that they reveal, one might reach the conclusion that the increase in the level of the subject imports has occurred almost entirely at the expense of other imports; in 1987, imports from countries other than Canada fell by approximately the same amount that Canadian imports increased.^{57/} However, the record before us does not contain enough other information about the interrelationships, if any, between imports from Canada and imports from other countries to warrant a negative disposition of these preliminary investigations on that basis.

The employment data compiled by the Commission is similarly ambiguous. Employment in the industry declined dramatically from 1985 to 1987 before increasing slightly in the first half of 1988.^{58/} Hourly wages received, and hours worked, by production workers followed roughly similar patterns.^{59/} Again, however, the bulk of the decline occurred in 1986, when Canadian imports were still at essentially de minimis levels. It is impossible to draw any inferences concerning causal relationships between the subject imports and industry employment from these data alone.

^{57/} Id. at a-32, Table 15.

^{58/} Report at a-15-a-16.

^{59/} However, the level of hours worked did not increase in the first half of 1988. Id. at a-15-a-16.

Finally, I have also considered whether there is any evidence that the subject imports actually or potentially impede existing development efforts of the domestic industry.^{60/} There is little record evidence bearing on this issue. Petitioner has alleged that the subject imports have hampered certain development efforts that the domestic industry supposedly otherwise would undertake.^{61/} Respondents, on the other hand, have pointed out, inter alia, that

[

].^{62/} The evidence presented by the parties, is therefore, conflicting. Moreover, I do not believe that this evidence has any strong probative value in determining whether the subject imports have in any way affected existing development efforts of development industry.

On balance, I believe that the record evidence bearing upon the impact of the subject imports upon domestic producers is consistent with other evidence indicating that there is a reasonable indication that the alleged unfair trade practices

^{60/} See 19 U.S.C. §1677(7)(C)(iii), as amended by the Omnibus Trade and Competitiveness Act of 1988.

^{61/} See, e.g., Transcript of 10/19/88 Conference at 24-25.

^{62/} See, e.g., Respondents' Postconference Brief at 31, n. 31.

under investigation have caused material injury to the domestic industry. In particular, the employment and financial data before us, when viewed in conjunction with other information previously discussed, suggest that it is at least conceivable that the subject imports had a significant impact on sales and prices of the domestic like product and, therefore, on returns to investors and employees in the domestic industry. Given the statutory standard that we must apply in preliminary investigations, this evidence constitutes a minimally sufficient basis for an affirmative determination in this proceeding.

D. Conclusion

For the foregoing reasons, I join my colleagues in finding that there is a reasonable indication of material injury to the domestic industry.

VIEWS OF ACTING CHAIRMAN ANNE E. BRUNSDALE

New Steel Rails from Canada
Invs. Nos. 701-TA-297 and 731-TA-422 (Preliminary)

November 10, 1988

I concur in the Commission's affirmative determination in these investigations. However, for the reasons set forth in Part II below, I found this to be a very difficult case. I also set out in Part I my views on the standard we employ in preliminary determinations.

I. THE STANDARD IN PRELIMINARY INVESTIGATIONS

Since 1986, the Commission has employed a standard in preliminary determinations derived from the decision of the Court of Appeals for the Federal Circuit in American Lamb Co. v. United States.^{1/} Recently, one commissioner suggested that the precise scope of this standard is open to some question.^{2/} I agree that some confusion exists regarding the standard we are to use in preliminary determinations and that the topic deserves further thought and discussion. I therefore take this opportunity to present a few observations on the matter.^{3/}

^{1/} 785 F.2d 994 (Fed. Cir. 1986).

^{2/} See Shock Absorbers and Parts, Components, and Subassemblies Thereof from Brazil, Inv. No. 731-TA-421 (Preliminary); USITC Pub. 2128 (September 1988) at 33-39 (Views of Commissioner Eckes).

^{3/} I agree for the most part with the Commission's discussion of the preliminary standard in Shock Absorbers, *id.* at 3-7. I present these views in order to flesh out that discussion and to put it into a more detailed historical context.

A. The Current State of the American Lamb Standard

The statute governing dumping and countervailing duty investigations provides that, within 45 days following the institution of an investigation, the Commission must determine whether the evidence of record establishes "a reasonable indication" of material injury by reason of the imports under investigation.^{4/} The Commission, citing the American Lamb decision, has interpreted the statute to require a negative preliminary determination only when (1) the record contains clear and convincing evidence that there is no material injury to a domestic industry and (2) there is no likelihood that evidence of such injury or threat will be developed through further investigation.^{5/} The critical language in the American Lamb decision is familiar to those who follow Commission proceedings:

Since the enactment of the 1974 Act, the ITC has consistently viewed the statutory "reasonable indication" standard as one requiring that it issue a negative determination, as above indicated, only when (1) the record as a whole contains clear and convincing

^{4/} 19 U.S.C. 1671b(a), 1673b(a). The statute also calls for an assessment of whether a domestic industry is threatened with material injury or whether the development of a domestic industry has been materially retarded by reason of such imports. For the purposes of this discussion, the issues of threat and material retardation are subsumed within the discussion of injury.

^{5/} See, e.g., Sewn Cloth Headwear from the People's Republic of China, Inv. No. 731-TA-405 (Preliminary), USITC Pub. 2096 (1988) at 7 ("The Commission is to determine whether, based on the 'best information available at the time of the preliminary determination' there is a reasonable indication of material injury or threat thereof to an industry within the United States. The Commission may conclude that no reasonable indication exists only if '(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation[']') (footnotes omitted).

evidence that there is no material injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation.... Under the appropriate standard of judicial review, ITC's longstanding practice must be viewed as permissible within the statutory framework.^{6/}

Despite the court's plain holding that the formulation proposed by the Commission was acceptable but not mandatory, the Commission routinely has invoked the two-pronged standard as the required approach in preliminary determinations.^{7/}

In its preliminary decisions, the Commission has implemented the American Lamb standard by evaluating all of the evidence on the record to determine whether the record as a whole demonstrates the requisite likelihood that the Commission will render an affirmative final determination. Thus, many Commission opinions have turned on an assessment of the presence or absence of these factors indicating injury and their impact on the domestic industry.^{8/} In other opinions the Commission has considered evidence that factors other than the imports under investigation

^{6/} American Lamb, *supra*, 785 F.2d at 1001 (emphasis added).

^{7/} See Color Picture Tubes from Canada, Japan, the Republic of Korea and Singapore, Inv. No. 731-TA-367-370 (Preliminary), USITC Pub. 2046 (1987) at 6-7.

^{8/} See, e.g., Certain Fabricated Structural Steel from Canada, 731-TA-387 (Preliminary), USITC Pub. 2062 (1988) at 3 ("We base this [negative] determination on the healthy condition of the domestic industry which shows no reasonable indication of material injury"); Certain Brass Sheet and Strip from Brazil, Canada, France, Italy, the Republic of Korea, Sweden and West Germany, 701-TA-269-270 and 731-TA-311-317 (Preliminary), USITC Pub. 1837 (1986) at 5 ("These [affirmative] determinations are based primarily on the deteriorating conditions of the domestic industry in 1984-85, the significant market penetration ratios, and the adverse impact of imports on prices for the domestic product during the period of these investigations").

caused the injury cited in the petition.^{9/} In all of these cases, the Commission will issue a negative determination if the evidence as a whole clearly and convincingly supports a finding of no material injury by reason of the imports under investigation, i.e., the record as a whole indicates less than a reasonable chance that the Commission will render an affirmative final determination.^{10/}

The Commission's traditional approach to preliminary determinations was the subject of the Court of International Trade's decision in Yuasa General Battery Corp. v. United States.^{11/} In reversing the Commission's negative preliminary determination in 12-Volt Motorcycle Batteries from Taiwan,^{12/} the court in Yuasa formulated the Commission's preliminary standard as requiring, to support the Commission's negative determination, "clear and convincing evidence of no reasonable indication of a threat of material injury and no likelihood of later contrary evidence."^{13/} The addition of the "no reasonable indication" language to the original American Lamb standard is troublesome

9/ See, e.g., All-Terrain Vehicles from Japan, Inv. No. 731-TA-388 (Preliminary), USITC Pub. 2071 (1988) at 18 (comparing evidence concerning the foreign domination in the domestic market with the impact of the decline in demand resulting from public safety concerns).

10/ See, e.g., Portland Hydraulic Cement and Cement Clinker from Colombia, France, Greece, Japan, Mexico, the Republic of Korea, Spain, and Venezuela, Inv. Nos. 731-TA-356-363 (Preliminary), USITC Pub. 1925 (1986) at 13 (noting the evidence that the decline in employment in the industry was the result of an increase in productivity and not by reason of the subject imports).

11/ C.I.T. ___, slip op. no. 88-89 (Ct. of Int'l Trade, July 12, 1988).

12/ Inv. No. 731-TA-238 (Preliminary), USITC Pub. 1654 (1985).

13/ Yuasa, supra, slip op. at 5 (emphasis in original).

because it draws the key statutory phrase into the standard purporting to implement the statute, rendering the entire exercise circular. Moreover, while the change in the American Lamb language was most likely a transcription error, it does raise the unlikely possibility that the court intended to modify the original American Lamb language by lowering the threshold at which the Commission must render affirmative determinations.^{14/}

In addition, the court in the Yuasa decision criticized the Commission's practice of assessing all of the evidence in the record with an eye towards judging the prospects for an affirmative final determination. The court noted that the Commission plurality supporting the negative determination "do[es] not appear to have taken the approach American Lamb contemplates. For example, the plurality seems to have considered the evidence for an indication of an affirmative [and found it lacking] rather than of the negative."^{15/} While the Yuasa decision as a whole is most comfortably read as holding only that the Commission in that one case evaluated the evidence on the entire record incorrectly, this language in the opinion again takes issue with the Commission's traditional approach to preliminary determinations.

Consequently, one commissioner has been led to ask whether a determination that there is "clear and convincing evidence of no material injury" relies on a standard

^{14/} Shock Absorbers, supra, USITC Pub. 2128 at 35-36 (Views of Commissioner Eckes). Because I believe that the Commission has the obligation in the first instance to resolve any confusion regarding the statute it administers, I voted not to appeal the Yuasa decision to the Federal Circuit.

^{15/} Yuasa, supra, slip op. at 6.

which is compatible with the statutory requirement that the Commission shall make a determination of whether there is a reasonable indication that an industry is materially injured, or threatened with material injury[.]^{16/}

I believe the answer to that question, which lies at the very heart of our obligations in a preliminary investigation, rests in the origins of the statutory "reasonable indication" language and the history of the American Lamb decision. The statute governing preliminary determinations, its legislative history, and the American Lamb decision itself all support continuation of the Commission's traditional practice in preliminary determinations.

B. The Origins of the American Lamb Standard

The concept of a preliminary determination in a dumping or countervailing duty case came in the Trade Act of 1974.^{17/} That statute was the first to establish a procedure by which the Commission could halt an investigation if it found insufficient evidence of injury. Under the statute, the Secretary of the Treasury (then the administrative authority responsible for determining the existence of actionable dumping and subsidies) could, at any time during the course of an investigation, refer a case to the Commission for a determination whether the evidence of injury on the record was sufficient to warrant further proceedings. The Secretary was required to convey the information he had collected to the Commission; the Commission then had

^{16/} Shock Absorbers, supra, USITC Pub. 2128 at 37 (Views of Commissioner Eckes).

^{17/} Pub. L. 93-618, Title III, Ch. 2, 88 Stat. 2023.

thirty days to engage in any further inquiry and issue a decision. If the Commission, at the end of thirty days, found "no reasonable indication that an industry in the United States is being or is likely to be injured," the investigation ended at that point.

The legislative history of the 1974 statute stresses the utility of the preliminary determination:

Under the present Act, the Secretary of the Treasury must complete his entire investigation as to sales at less than fair value before the matter can be referred to the International Trade Commission for its injury determination. The Committee felt that there ought to be a procedure for terminating investigations at an earlier stage where there was no reasonable indication that injury or the likelihood of injury could be found.... The amendment is designed to eliminate unnecessary and costly investigations which are an administrative burden and an impediment to trade.^{18/}

While useful as an overview of Congress' intentions in adopting the "no reasonable indication" provision, the legislative history of the 1974 Act provides no illumination of Congress' expectations as to the practical application of the provision.

The Commission's first case under the 1974 Act was also the first to flirt with the notion of "clear and convincing evidence." In Butadiene Acrylonitrile Rubber from Japan,^{19/} the Commission stated:

We do not believe, however, that by virtue of the amendment to the Antidumping Act there was any intent that the amendment be used to weaken -- or to deny U.S. industry -- the protection of the Antidumping Act, by aborting a full investigation in the absence of a clear and convincing showing that there is "no reasonable indication" that a full investigation might develop

^{18/} S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) at 170-71.

^{19/} Inv. No. AA1921-Inq.-1, USITC Pub. 727 (1975).

facts which could afford a basis for an affirmative injury determination under the Act.^{20/}

The Commission thus established the evidentiary standard by which it would implement the substantive "no reasonable indication of injury" standard contained in the 1974 statute.^{21/}

Congress substantially revised the procedures in dumping and countervailing duty investigations in the Trade Agreements Act of 1979.^{22/} Under the statute, which made preliminary determinations mandatory, the Commission is to determine whether "at the time of the determination...there is a reasonable indication" that an industry in the United States is materially injured.^{23/} Though phrased slightly differently to reflect the change in preliminary procedures, the statute maintained the balance between preliminary and final determinations that existed under prior law.

The legislative history of the 1979 statute provides some expression of Congress' intentions regarding the application of the preliminary determination procedures. The House Ways and Means Committee reiterated its intention to maintain the reasonable indication standard: "[A] 'reasonable indication' will exist in each case in which the facts reasonably indicate that an industry in the United States could possibly be suffering material

^{20/} Id. at 5 (emphasis added).

^{21/} In subsequent cases, the Commission cited Butadiene Acrylonitrile Rubber for the proposition that a different "quantum of proof" existed in preliminary and final determinations. Methyl Alcohol from Brazil, Inv. No. AA1921-Inq.-7, USITC Pub. 837 (1977) at 4.

^{22/} Pub. L. 96-39, Title I, § 101, 93 Stat. 193.

^{23/} 19 U.S.C. 1671b(a), 1673b(a).

injury, threat thereof or material retardation."^{24/} The Senate Finance Committee stated its understanding that the "reasonable indication" provision would be applied in the same manner as it had been under previous law.^{25/}

The Commission during the period between the 1979 Act and the American Lamb case continued to examine the state of the evidence on the record as a whole with an eye toward evaluating the likelihood that the Commission would render a final determination. For example, in a 1982 decision, Canned Mushrooms from the People's Republic of China,^{26/} the Commission majority based its affirmative determination "primarily on the accelerating trend of increased imports from the PRC and on the recent increase in the number of canning facilities in the PRC that have been certified to export canned mushrooms to the United States."^{27/} In rendering negative determinations, the Commission routinely noted the scant evidence of injury. For example, in a 1983 case, Certain Welded Carbon Steel Pipes and Tubes from the Republic of Korea and Taiwan,^{28/} the Commission found that "the insignificant or nonexistent impact of imports from Korea and Taiwan has precluded a finding of any link between these imports and material injury to the relevant domestic industries."^{29/} The Commission under the 1979 Act thus continued its practice in preliminary determinations

^{24/} H. Rep. No. 96-317, 96th Cong., 1st Sess. (1979) at 52.

^{25/} S. Rep. No. 96-249, 96th Cong., 1st Sess. (1979) at 49, 66.

^{26/} Inv. No. 731-TA-115 (Preliminary), USITC Pub. 1324 (1982).

^{27/} Id. at 3.

^{28/} Inv. Nos. 731-TA-131 and 132, USITC Pub. 1324 (1982).

^{29/} Id. at 4.

of evaluating the record as a whole to determine whether it revealed a reasonable indication of injury.

Two legal issues swirled around preliminary determinations during the period 1980 through 1986. The first was whether the Commission could weigh conflicting evidence on the record (that is, evidence contrary to the allegations in the petition) in reaching a preliminary determination. Petitioners argued that the only relevant evidence was the evidence tending to support a reasonable indication of injury. The second issue was the evidentiary threshold at which the Commission was required to render an affirmative preliminary determination. Petitioners contended that the Commission must render an affirmative preliminary determination if the record revealed the mere possibility of an affirmative final determination, without regard to the overall weight of the evidence as a whole. Petitioners thus questioned prior Commission practice procedurally insofar as the Commission considered all of the evidence on the record, and substantively insofar as the Commission required more than a mere possibility that the case would ultimately be resolved in favor of petitioners.

In the first two judicial decisions to address this matter, Republic Steel Corp. v. United States ^{30/} and Jeannette Sheet Glass Corp. v. United States,^{31/} the Court of International Trade agreed with petitioners and directed the Commission (1) not to

^{30/} 591 F. Supp. 640 (Ct. of Int'l Trade 1984).

^{31/} 607 F. Supp. 123 (Ct. of Int'l Trade 1985).

consider evidence tending to negate the existence of material injury or threat and (2) to render affirmative determinations should the mere possibility exist that the Commission might render an affirmative final determination. In emphatic terms and italicized print, the court in Republic Steel held: "The object of these determinations should have been to find whether there were any facts which raised the possibility of injury. The resolution or interpretation of conflicting facts should have been reserved for a possible final determination."^{32/} In the court's view, an affirmative determination was required "if there are any elements which raise the possibility of injury," and evidence that the domestic industry was not injured, or that the injury was caused by market forces other than the subject imports, was irrelevant to a preliminary determination.^{33/}

American Lamb was the third case to consider the propriety of weighing conflicting evidence in a dumping or countervailing duty case. In the Court of International Trade, the Commission requested that the court decline to follow Republic Steel and Jeannette Sheet Glass. As summarized by the court, the Commission argued that "19 U.S.C. § 1673b permits the Commission to evaluate conflicting evidence at the preliminary determination and to dismiss a petition if there is clear and convincing evidence that there is no reasonable indication that an industry is, or is likely to be, injured by reason of alleged less than fair value

^{32/} 591 F. Supp. at 650 (emphasis in original).

^{33/} Id.

imports."^{34/} Despite the Commission's suggestion, the court followed the earlier decisions and declined to sanction the consideration of conflicting evidence in preliminary determinations.^{35/}

On appeal of that decision, the Federal Circuit framed the issue as "Whether ITC's weighing of evidence in applying the 'reasonable indication' standard...in a preliminary investigation is permissible."^{36/} After reviewing the structure of the 1979 statute and the legislative history, the court held that the ITC should not "disregard evidence that clearly and convincingly refutes the allegations in a petition."^{37/} In addition to rejecting the Republic Steel and Jeannette Sheet Glass decisions, the court of appeals approved the Commission's decisions in cases like Butadiene Acrylonitrile Rubber that had established "clear and convincing evidence" as an appropriate burden of proof in preliminary decisions when the Commission's weighed conflicting evidence.^{38/} In sum, American Lamb stands for the narrow propositions that the Commission is to examine all of the evidence on the preliminary record and that the record does not provide a "reasonable indication of material injury" warranting an affirmative determination if the overwhelming weight of the evidence is negative.

^{34/} American Lamb Co. v. United States, 611 F. Supp. 979, 981 (Ct. of Int'l Trade 1985) (emphasis added), rev'd, 785 F.2d 994 (Fed. Cir. 1986).

^{35/} Id.

^{36/} American Lamb, supra, 785 F.2d at 997.

^{37/} Id. at 1003.

^{38/} Id. at 999.

C. The Procedure Approved in American Lamb

As the Commission and the courts made clear in cases up to and including American Lamb, the only relevant standard governing preliminary determinations is the "reasonable indication" standard set forth in the statute. Furthermore, the 1979 Act and its legislative history establish that, in a preliminary determination, the sole issue is whether the facts supporting the petition amount to a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of the imports under investigation. The critical aspect of American Lamb is not that it redefined the preliminary standard, which it did not do, but rather that it approved the Commission's procedure for "applying the reasonable indication standard."^{39/}

Under American Lamb, the Commission may consider all of the evidence on the record in rendering its preliminary decision. As we recently noted, the Commission is to render its decision "in light of the evidence on the record as a whole."^{40/} Furthermore, the American Lamb decision unequivocally recognized that the threshold for an affirmative preliminary determination is a reasonable indication of material injury. The Commission thus has

^{39/} Id. at 997.

^{40/} Shock Absorbers, supra, USITC Pub. 2128 at 6 (footnote omitted); see also Certain Line Pipes and Tubes from Canada, 731-TA-375 (Preliminary), USITC Pub. 1965 (1987) at 3 (evidence supporting the allegations in a petition cannot be considered "in a vacuum").

rendered negative determinations either because the evidence supporting the allegations in the petition does not amount to a "reasonable indication of injury" or because the contrary evidence is so clear and convincing that any evidence supporting the petition did not amount to a "reasonable indication."^{41/}

The American Lamb decision did not displace or redefine the "reasonable indication" standard, but merely approved a quantum of proof by which to weigh conflicting evidence. That is the procedure developed by the Commission under the 1974 Act, commended by Congress in the legislative history of the 1979 Act, and approved by the court in American Lamb. I will therefore continue to employ the "reasonable indication" standard in accordance with the statutory mandate, and assess the record in accordance with the threshold for affirmative determinations approved in American Lamb.

II. MATERIAL INJURY BY REASON OF CANADIAN IMPORTS

Although this is a very close case, the record as developed thus far in the investigation does provide a reasonable, though far from convincing, indication that a domestic industry is materially injured by reason of the subject Canadian imports. While respondents question the reliability of some of the evidence and

^{41/} See Shock Absorbers, *supra*, USITC Pub. 2128 at 5 ("[T]he Commission...may issue a negative preliminary determination if some evidence on the record supports an affirmative determination, or even if there is some reasonable doubt about whether an affirmative determination is warranted, as long as the evidence refuting the allegations of a petition is clear and convincing").

raise a number of reasoned arguments in support of a negative determination, these matters cannot be resolved on the present record. I therefore expect to reconsider these views in any final investigation.

Like Product. I reluctantly agree with my colleagues that, at this phase in the investigation, the domestic industry consists of the producers of all new steel rail, except light rail, including prime rail and industrial rail. I rely mainly on the facts that the uses for industrial rail and prime rail overlap and that the industrial rail market is dependent on the prime rail market.

Industrial rail is defined as prime rail that does not meet certain production specifications. Because Class I railroads must use prime rail on their main lines, industrial rail is relegated to secondary uses, principally in rail yards and on secondary tracks. Of course, prime rail may also be used for these secondary purposes.

Rail producers will sell industrial rail only if the price of the rail on the market exceeds the value of the rail as scrap.^{42/} The available supply of industrial rail therefore depends on the dependability of the production process and the price of scrap. Demand for industrial rail depends on the willingness of buyers to use industrial rail for tracks not requiring premium rail.^{43/}

^{42/} Report at a-6.

^{43/} The demand for premium rail apparently depends also on the availability of relay rail, that is, used premium rail which can be "relaid" on secondary track.

The fortuitous availability of industrial rail can therefore, in theory, displace other products, like prime rail that would otherwise be used on secondary tracks. Furthermore, one would expect that the price of prime rail provides a ceiling above which the price of industrial rail will not rise lest customers purchase the higher quality prime rail for less than the industrial rail. To this extent, the markets for prime and industrial rail overlap and the two types of rail can reasonably be said to be one like product.

The description of the overlap in the industrial and prime rail markets, however, rests on assumptions regarding the nature of the industrial rail market that are open to some doubt. I will therefore expect in a final investigation to look carefully at information on the uses of industrial rail by Class I railroads and other rail users. I will also consider the arguments forcefully advanced by respondents that the different distribution systems for industrial and prime rail effectively separate these two kinds of rail into separate like products.^{44/} In addition, because of indications that relay rail and industrial rail fulfill similar functions and follow similar lines of distribution, I will also consider a broader definition of like product that includes relay rail.

^{44/} For example, most prime rail is sold directly to the end user on a supply contract basis, while industrial rail is sold through distributors. The extent to which prime rail may be available through distributors will contribute to an understanding of the overlap in the two markets.

Given the evidence thus far collected indicating that a large portion of the Canadian imports subject to investigation consist of industrial rail, I believe that this issue deserves considerable attention and reconsideration in a final investigation. As the record now stands, however, petitioner's argument that new steel rail constitutes one like product is reasonable and supported by the available evidence.

The Impact of Canadian Imports. Petitioner claims material injury by reason of Canadian imports of new steel rail.^{45/} Petitioner bases this claim primarily on the Canadian producers' growing penetration of the domestic market during the period of investigation and the decline in the price of rail during that same period. Based on this conclusion, petitioner claims that the presence of the Canadian imports has suppressed the price of steel rail in the American market.^{46/}

Based on the record in these investigations as they now stand, petitioner presents a reasonable interpretation of events. The decline in domestic demand for new steel rail as indicated by the decrease in apparent domestic consumption in each year under investigation conceivably places downward pressure on domestic prices. Domestic producers, if they are to maintain production

^{45/} Petitioner does not present strenuous arguments that the industry is threatened with material injury by reason of the imports. In any event, the issue of threat is, at this point in the investigation, defeated by the fact that respondents do not anticipate major shipments of rail into the United States during the first half of 1989.

^{46/} Petition at 88-97; Transcript of Preliminary Conference ("Tr.") at 18, 24, 32.

levels, can in this depressed market be especially prone to downward pressure on prices. The appearance of the Canadian producers as direct competitors for contracts and their capture of 4.1 percent of the domestic market (up from 0.7 percent in 1985), reasonably indicates that Canadian imports might have injured the domestic industry.

This scenario, however, is based on assumptions that may not withstand scrutiny in a final investigation. For example, the scenario on which petitioner bases its entitlement to relief assumes a high degree of substitutability between domestic and Canadian rails. The entry of the Canadian producers into competition with domestic producers for supply contracts will have a suppressive impact on domestic prices only if, at a given price, the purchaser views Canadian imports as close substitutes for the domestic product in quality and terms of sale. The higher the degree of substitutability, the greater the potential impact the imports will have on the domestic producers.

In fact, evidence on the record indicates that Canadian steel rail may not be highly substitutable with the domestic product. Several railroads have reported quality and shipping problems associated with domestic rail producers.^{47/} Furthermore, several railroads have a policy of purchasing rail from a number of different sources regardless of price.^{48/} Thus, in many of the instances in which petitioner complains that railroads have

^{47/} See, e.g., Report at a-36-a-37.

^{48/} Tr. at 90.

awarded small portions of a supply contract to a Canadian rail producer, the Canadian bid was higher than the bids submitted by the domestic companies and/or the award was for the purpose of testing and qualifying the Canadian product.^{49/} Some evidence indicates, therefore, that Canadian and domestic rail are not highly substitutable at a given price.

Another factor in the rail market that affects petitioner's price-suppression scenario is the presence in the domestic market of imports from several other countries. During the period of investigation, imports into the United States from countries other than Canada dropped from 163,008 short tons in 1985 to 97,003 short tons in 1987. While Canadian imports nearly quadrupled in quantity terms, from 5755 short tons in 1985 to 23,241 short tons in 1987, it is likely that the increase was in part at the expense of other imports and not the domestic industry.^{50/} This is particularly true because imports from the other countries are constrained by voluntary restraint agreements, whereas imports from Canada are not; given the railroads' demonstrated policy of awarding contracts to different suppliers without regard chiefly to price, a shift from other imports to Canadian imports is logical.

In sum, the evidence of record provides a "reasonable indication" than an industry in the United States is materially injured by reason of Canadian imports. While respondents

^{49/} Report at a-36-40.

^{50/} Tr. at 55.

questioned the evidence on which this conclusion could be based and argued against a finding of material injury, they did not present, and the record of the investigation does not contain, clear and convincing evidence rebutting petitioner's contentions. Under our statutory scheme, that state of affairs requires an affirmative preliminary determination. In a final investigation, we will be in a better position to assess whether the record as a whole establishes material injury by reason of the Canadian imports.

INFORMATION OBTAINED IN THE INVESTIGATIONS

Introduction

On September 26, 1988, the Commission received a petition filed by counsel on behalf of Bethlehem Steel Corp., Bethlehem, PA. The petition alleges that an industry in the United States is materially injured or threatened with material injury by reason of imports from Canada of new steel rails ^{1/} that are alleged to be subsidized by the Government of Canada and that are alleged to be sold in the United States at less than fair value (LTFV).

Accordingly, the Commission instituted, effective September 26, 1988, preliminary countervailing duty investigation 701-TA-297 (Preliminary), under section 703(a) of the Tariff Act of 1930, and preliminary antidumping investigation No. 731-TA-422 (Preliminary), under section 733(a) of the Tariff Act of 1930, to determine whether there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Canada of new steel rails that are allegedly being subsidized by the Government of Canada and sold in the United States at LTFV.

Notice of the institution of the Commission's investigations and of a conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the Federal Register of October 3, 1988 (53 F.R. 38795). ^{2/} The conference was held on October 19, 1988, ^{3/} and the Commission voted on these investigations on November 4, 1988. The statute directs that the Commission make its determinations in these cases within 45 days after receipt of the petition, or by November 10, 1988.

^{1/} For the purposes of these investigations, "new steel rails" include rails, whether of carbon, high carbon, alloy or other quality steel, including, but not limited to, standard rails, all main line sections (over 60 pounds per yard), heat-treated or head-hardened (premium) rails, transit rails, contact rails (or "third rails"), and crane rails, provided for in items 610.2010, 610.2025, 610.2100, and 688.4280 of the Tariff Schedules of the United States Annotated (TSUSA) (subheadings 7302.10.1020, 7302.10.1040, 7302.10.5000, and 8548.00.0000 of the Harmonized Tariff Schedule of the United States (HTS)).

Specifically excluded from the scope of these investigations are imports of "light rails," which are 60 pounds or less per yard. "Relay rails," which are used rails that have been taken up from a primary railroad track and are suitable to be reused as rails (such as on a secondary rail line or in a rail yard), are also excluded.

The petition states that contact rails are provided for under TSUS item 688.42; however, according to the U.S. Customs Service, contact rails are provided for under TSUS item 685.90 (HTS item 8536.90.00). Irrespective of where classified in the TSUS or HTS, contact rails are clearly included within the scope of these investigations.

^{2/} Copies of the Commission's and Commerce's notices are shown in app. A.

^{3/} A list of witnesses appearing at the conference is presented in app. B.

Previous Commission Investigations Concerning Steel Rails

There have been seven previous Commission investigations concerning steel rails. During October 1982 the Commission determined, pursuant to section 703(a) of the Tariff Act of 1930, that there was a reasonable indication that an industry in the United States was materially injured or threatened with material injury by reason of imports of steel rails from the Federal Republic of Germany, France, the United Kingdom, and Luxembourg, upon which bounties or grants were alleged to be paid (investigations Nos. 701-TA-191-194 (Preliminary)). The Commission also determined, pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)), that an industry in the United States was materially injured or threatened with material injury by reason of imports of steel rails from the Federal Republic of Germany, France, and the United Kingdom, that were alleged to be sold in the United States at LTFV (investigations Nos. 731-TA-104-106 (Preliminary)). ^{1/} Subsequent to the preliminary determinations in those investigations, the petition was withdrawn and there were no final investigations.

The Product

Product description

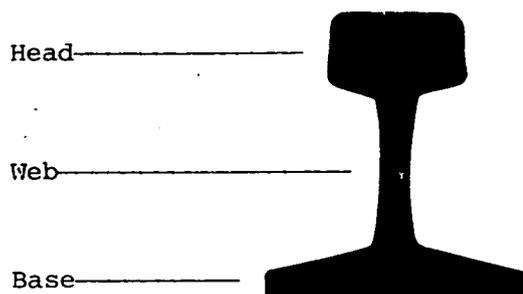
For the purposes of these investigations, "new steel rails" include carbon and alloy steel rails, weighing over 60 pounds per yard. Specifically excluded from the scope of these investigations are imports of "light rails," which are 60 pounds or less per yard, such as are used in amusement park rides. "Relay rails," which are used rails that have been taken up from a primary railroad track and are suitable to be reused as rails (such as on a secondary rail line or in a rail yard), are also excluded. The TSUSA defines rails as "hot rolled steel products, weighing not less than 8 pounds per yard, with cross-sectional shapes intended for carrying wheel loads in railroad railway, and crane runway applications. Rails may be punched or not punched."

Rails are generally produced to American Railway Engineering Association (AREA) standards for chemical composition, hardness, and size/proportional tolerances. They are designed with a head for wheel treads and for guiding wheel flanges, a web for girder strength, and a base for fastening the rail to its support. They differ according to size and weight, metallurgical composition, and with regard to end use. Rails are characterized as "standard" or "premium" on the basis of alloy content and hardness. Premium rails are those that have been heat treated for increased hardness or those made from alloy steel, which is inherently harder than carbon steel. There are four common rail shapes: Tee, crane, girder, and contact (fig. 1). Tee rails (so named because they resemble the letter "T") are the most common. They are used in open-track construction, and have nominal weights which, for main line

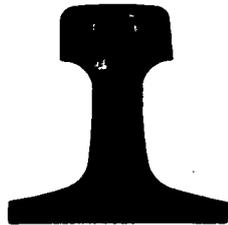
1/ Steel Rails from the Federal Republic of Germany, France, the United Kingdom, and Luxembourg: Determinations of the Commission in Investigations Nos. 701-TA-191-194 (Preliminary) and Investigations Nos. 731-TA-104-106 (Preliminary) Under the Tariff Act of 1930, Together with the Information Obtained in the Investigations, USITC Publication 1301, October 1982.

Figure 1
Rail shapes by types

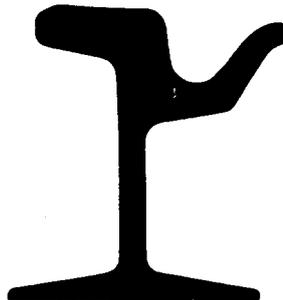
RAILS, JOINT BARS AND TIE PLATES



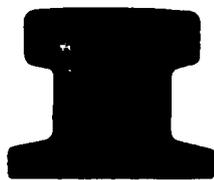
TEE RAIL



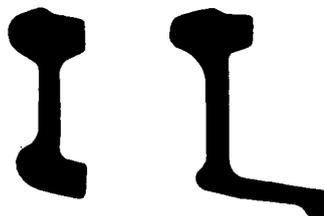
CRANE RAIL



GIRDER RAIL



CONTACT RAIL



JOINT BARS

Bethlehem steel rails are used to form a continuous runway of track to carry moving wheel loads of railroad rolling stock, overhead and gantry cranes, transit vehicles, and miscellaneous mining and industrial equipment. Rails are designed with a **head** for contact with wheel treads and for guiding wheel flanges, a **web** for girder strength, and a **base** for bearing and for fastening the rail to its support. For various loading conditions, the size and proportion of the head, web, and base will vary. All Bethlehem rails are manufactured at Steelton, Pa., of superior quality continuous cast steel, and can be furnished control-cooled, end-hardened, or fully heat-treated.

For more information on steelmaking for railroad rails, see page 1-15.

The four general types of rail rolled by Bethlehem are

Standard Tee Rails— Rails having a nominal weight greater than 60 lb per yard and having a "tee" shaped configuration

Crane Rails— Rails with a shorter and thicker web larger head, and thicker base than tee rails. Crane rails usually carry very heavy concentrated loads at slow speeds.

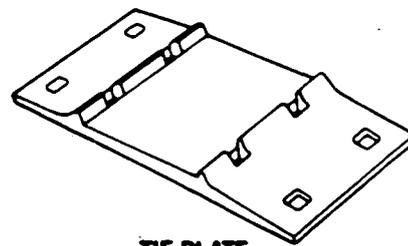
Girder Rails— Rails rolled with a raised lip which provides a channel for a moving wheel flange. Girder rails are generally imbedded in pavement and the lip guards against pavement encroachment.

Contact Rails— Rails used to conduct current for electric transit systems. It is important that contact rails have a low electrical resistance.

Joint bars (also known as splice bars or fish plates) are used in pairs to bolt together the ends of abutting rails. The bars are I- or L-shaped and are attached in the web area of each side of the rail.

Tie plates are placed under rails on wood ties to give the rails the desired cant, hold the rail to gauge, protect the tie, and distribute the wheel load to the tie.

Details on rails, joint bars and tie plates are contained in this section.



TIE PLATE

track sections, average between 115 and 140 pounds per yard. Main line rails are now commonly produced in lengths of 78 to 82 feet (a recent change from the 39-foot length that was standard).

Crane rails are similar in shape to standard tee rails, with the distinction that the head is deeper and wider, and that the web and base are much thicker than the standard tee rail. Crane rails are designed to carry heavy concentrated loads and are produced to the specifications of individual rail customers. Their principal use is on crane runways.

Girder rails differ from tee and crane rails in that they are not symmetrical in section, having a beam-type base and a grooved head, together with a flange projecting off the grooved head to prevent encroachment by the pavement in which they are usually embedded. Whereas tee and crane rails are produced to AREA and Federal Railway Administration standards; girder rails are produced to American Society for Testing Materials (ASTM) standards. Their standard length is 60 to 62 feet.

Contact rails, classified as electrical apparatus used for carrying electricity, do not resemble the standard tee, crane, or girder rails, in that their shape resembles the letter I and their use is not for load bearing or providing a wheel runway, but for conducting electricity.

Rails are further classified by a number of quality criteria including hardness, chemical composition, and metal cleanliness. Hardness is the principal criterion by which wear may be analyzed--the harder a rail or rail head is, the longer its service life. Hardness may be achieved through metallurgy (e.g.; adherence to strict tolerances in carbon, molybdenum, chrome-vanadium, and silicon percentages), or via a tempering treatment. Cleanliness is a measure of the nonferrous inclusions in the rail, such as silicon or aluminum. Weight, measured in pounds per linear yard, determines the physical dimensions and load-bearing characteristics of the rails. Hardness and cleanliness are to a great extent achieved in the basic steelmaking process, and weight and shape are achieved in rolling operations. Carbon rails under 115 pounds per yard measure 248 minimum on the Brinell Hardness scale; those over 115 pounds per yard, 285 minimum; and high-strength rails, 341 to 388 minimum.

Manufacturing processes

Improvements in efficiency have tended to be concentrated in the steelmaking process through the switch to electric arc furnaces, ladle metallurgy, and vacuum degassing so as to more efficiently utilize facilities and improve yields; installation of continuous casting capability improves yields as well.

Rails can be made from continuous-cast blooms or ingot-rolled blooms. In either case the rail section is hot formed by passing the bloom through a series of grooved rollers that progressively and gradually form the rail into its desired contour and shape. In a typical mill, the bloom is rolled or passed 10 to 15 times through a series of roughing, intermediate, and finishing stands. After the rail exits the final pass, it is hot-sawed to desired length, cambered, and allowed to cool to 750 to 1,000 degrees F. It is then charged into an insulated cooling box and control cooled to 300 degrees F. Control cooling helps eliminate hydrogen gas, which may cause internal

fractures or ruptures in the rail. 1/ After control cooling, which takes about 10 hours, the rail is unloaded, inspected for surface defects, and straightened by either a roller straightener or a special press. The rails are sawed to length and inspected. 2/

The rail may then be heat treated (or tempered), so as to improve grain structure in the steel, head hardness, and overall wear capability. In general, tempering the rail allows the substitution of less costly carbon rail for alloy rail. Heat treatment may involve heating the entire rail in a re-heat furnace or the head only via induction heating, followed by a quench (oil and/or water) of the heated portion. A tempering process that is part of the production line ("on-line") is less costly than off-line tempering because of lower energy and process costs. Algoma, a major Canadian producer, has developed a prototype on-line tempering process, but has not utilized it for rail production. U.S. producers currently use off-line processes for tempering; CF&I produces a head-hardened rail using an off-line induction heating process, and Bethlehem uses a re-heat furnace to produce a through-hardened rail.

Uses

End use, based on the service demands of a particular installation, dictates the type of rail designated for use. The principal engineering considerations are the type and wheel loads of the motive power and cars, the density and speed of traffic, and the physical characteristics of the line (e.g., track alignment, including the degree of curvature; track gradients; and subgrade and ballast conditions). The railroads have upgraded main lines with heavier track in response to the new longer and heavier cars coming into service, and heavier service in general.

Rails for domestic railroad uses are customarily ordered to AREA specifications and those for industrial or export uses are ordered to ASTM specifications; differences between the two have narrowed over time. Carbon tee rails are generally considered to be the basic rail of the railroad industry, and are commonly used on main and secondary tangent rail lines. Premium rails (alloy composition rails and/or fully and partially heat-treated rails) are used for heavy service, such as on curves and heavy use-lines, because both possess resistance to abrasion and limitations to stress-induced plastic flow (shelling) above that of ordinary carbon rail of the same weight. Main line track uses rail designated RE (railway engineer) in the weight categories 100 pounds per yard and higher. Rail weighing under 100 pounds per yard is used in secondary, spur, and industrial tracks. Industrial uses favor lighter rail sections, and spurs or side tracks may use rails weighing 90 pounds per yard, but commonly use rails of 100 to 115 pounds per yard. Most track now laid is of continuous-welded rail, and the use of 80-foot continuous-welded rails has superseded the bolted 39-foot rail sections, because of lower installation costs. With high capital costs limiting some track improvement programs, there is a tendency to reuse old rails rather than buy new ones. In

1/ The control-cooling process may be bypassed by eliminating hydrogen gas from the molten steel before casting the steel into blooms; the degassing process requires specialized equipment for maintaining molten steel in a vacuum.

2/ During the entire railmaking process, various chemical, mechanical, and internal tests are performed to insure the quality of the product.

the United States and Western Europe, railway investments have slowed substantially, or more efficient use is being made of rails and better quality products are available.

Rails that fail quality inspections, but which are otherwise usable for non-main line applications, may be sold as "industrial rails." Industrial rails, which do not meet main line specifications, represent a small fraction (generally 5 percent or less) of rail production. ^{1/} A railmaking facility will sell such rail when the net receipt exceeds the scrap value less disposal costs of freight and handling. Industrial rail is generally purchased for track in the yard of industrial facilities and for limited use on class II and III rail lines. Thus, to a limited extent, it competes with relay (used) rail. Financial considerations tend to favor lighter rail in industrial applications (e.g., on an industrial site, or siding, off main line railroad spurs or on side tracks where slow speeds and infrequent use allow lighter rail). Industrial rails can be used to supplement relay track where low volume and low speed is the characteristic of usage.

U.S. tariff treatment

Imports of standard steel rails, over 60 pounds per yard, are classified in TSUS item 610.20 and reported for statistical purposes under TSUSA item 610.2010 (subheading 7302.10.1020 of the HTS); other carbon steel rails, over 60 pounds per yard, are reported under TSUSA item 610.2025 (subheading 7302.10.1040 of the HTS); alloy steel rails of all weights are classified and reported under TSUS item 610.21 (subheading 7302.10.50 of the HTS); and the petition states that contact rails (electrical rails) are provided for as miscellaneous electrical articles under TSUSA item 688.4280 ^{2/} (subheading 8548.00.00 of the HTS), as electrical apparatus.

The current column 1 rates of duty for steel rails, applicable to imports from Canada, are 0.3 percent ad valorem for TSUS item 610.20, 3.5 percent ad valorem for item 610.21, and 3.9 percent ad valorem for item 688.42. ^{3/}

^{1/} Transcript of conference, p. 106.

^{2/} The Customs National Import Specialist, Mr. J. Miller, gave the TSUS classification of these articles as item 685.90 (subheading 8536.90.00 of the HTS).

^{3/} The rates of duty in col. 1 are most-favored-nation (MFN) rates and are applicable to imported products from all countries except those Communist countries and areas enumerated in general headnote 3(d) of the TSUS. However, MFN rates would not apply if preferential tariff treatment is sought and granted to products of developing countries under the GSP or the Caribbean Basin Economic Recovery Act (CBERA), or to products of Israel or of least developed developing countries (LDDC's), as provided under the Special rates of duty column.

In addition, pursuant to the Omnibus Budget Reconciliation Act of 1986, a user fee of 0.22 percent ad valorem on most imports took effect on Dec. 1, 1986.

The special duty rate, applicable in this instance under the Generalized System of Preferences (GSP) to eligible products of designated beneficiary developing countries, is free.

The TSUS does not distinguish new from used rails, or between types of rail, such as girder from standard tee, or crane from girder rail. It does differentiate between carbon and alloy steel and classifies contact rail differently from other types of rail. Industrial rails are not distinguished from either new or other types of rail.

Imports of rail have been subject to nontariff quantitative limitations under the Voluntary Restraint Agreements negotiated with 19 foreign governments, plus the European Community (EC), since 1984. All current suppliers of rail except Canada are subject to either a market share (in the case of the EC and Japan), or a quota agreement limiting import quantities. The market share agreements range from a low of 0.25 percent of apparent U.S. consumption for Australia to a high of 5.48 percent for Japan.

The Nature and Extent of Alleged Subsidies and Sales at LTFV

Alleged subsidies

The petition alleges that Canadian producers of new rail benefit from numerous Federal and Provincial Government subsidies as summarized below:

Canadian Federal subsidies--

Income tax exemption for government-owned companies
Special tax subsidy to the Algoma Steel Corporation Ltd. (Algoma)
Investment tax credits
Regional development incentive program and industrial and regional developmental program
Enterprise development program
Defense industrial productivity program
Promotional projects program
Program for export market development
Federal expansion and development - Northern Ontario
Cape Breton Development Corporation

Canadian Federal-Provincial subsidies--

Additional benefits conferred by government ownership of Sysco-Sydney Steel Corporation (Sysco)
Iron ore freight subsidy to Algoma
Mineral development agreements
Government assistance to Algoma's reduction-in-force program

Provincial subsidies--

Ontario Development Corporation export support loans, other loans, and loan guarantees
Provision of subsidized electric energy by Hydro-Quebec

According to the petition, the various subsidies amount to at least 3.96 percent ad valorem for Algoma and 139.22 percent ad valorem for Sysco. 1/

Alleged LTFV sales

Petitioner estimated Canadian home-market prices from producer list prices for structural shapes, adjusted according to spot market quotations. Given the similarity of products, petitioner submits that this is a reasonable basis for estimating the discounting structure in the Canadian rail market.

In addition, petitioner used its own prices and Commerce export statistics to derive other estimates of Canadian home-market prices for steel rail. The estimated Canadian home-market prices were compared with petitioner's own prices and with derived unit values for rail exported to the United States from Canada. On the basis of these comparisons, petitioner alleges that LTFV margins range from 17.5 to over 150 percent ad valorem.

The Domestic Market

U.S. consumption

The data on apparent U.S. consumption of new steel rails presented in table 1 are composed of U.S. rail mills' shipments of steel rails reported in response to the Commission's questionnaires; plus imports of steel rails for TSUSA items 610.2010, 610.2025, and 610.2100 reported in official statistics of the U.S. Department of Commerce (Commerce) for all countries except Canada; plus exports of new steel rails from Canada to the United States reported in official statistics of the Government of Canada; less exports of new standard tee rails reported in official Commerce data.

On the basis of the data presented in table 1, apparent consumption of new steel rails dropped 31.2 percent from 1985 to 1986 and declined 9.0 percent from 1986 to 1987. Apparent consumption decreased by *** percent during January-June 1988 compared with that during the corresponding period of 1987.

U.S. producers

There are currently two U.S. producers of the subject new steel rails-- Bethlehem Steel Corp. (Bethlehem), which is a publicly-owned company, and CF&I Steel Corp. (CF&I), which is privately owned. * * *. * * *. * * *.

Public reference sources contain much information about railmaking companies and publicly available information is used for much of the following description of the industry. 2/

Bethlehem produces ordinary and through-hardened steel rails at its Steelton, PA, plant. The company has a continuous modernization program for

1/ Petition, p. 75.

2/ Steel Industry Data Handbook, The US 1987, 33 Metal Producing Countries.

Table 1

New steel rails: U.S. rail mills' shipments, U.S. imports, U.S. exports, and apparent U.S. consumption, 1985-87, January-June 1987, and January-June 1988

| Item | (In short tons) | | | | |
|-----------------------------------|-----------------|---------|---------|------------------------|--------|
| | 1985 | 1986 | 1987 | January-June-- 1987 | 1988 |
| U.S. rail mills' | | | | | |
| total shipments <u>1/</u> | 690,455 | 461,233 | 422,564 | 231,113 | *** |
| U.S. imports from-- | | | | | |
| Canada <u>2/</u> | 5,755 | 8,008 | 23,241 | 8,797 | 11,964 |
| All other countries <u>3/</u> .. | 163,008 | 122,017 | 97,003 | 67,803 | 48,973 |
| Total imports..... | 168,763 | 130,025 | 120,244 | 76,600 | 60,937 |
| U.S. exports <u>4/</u> | 1,888 | 1,660 | 6,321 | 4,895 | 2,705 |
| Apparent U.S. consumption..... | 857,330 | 589,598 | 536,487 | 302,818 | *** |

1/ Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

2/ Compiled from official statistics of the Government of Canada.

3/ Compiled from official statistics of the U.S. Department of Commerce.

4/ Compiled from official statistics of the U.S. Department of Commerce, Schedule B item 610.2205 (standard tee rails over 60 pounds per yard). Principal export markets in 1987 were Brazil, Panama, and Chile. Official export statistics are used so that apparent consumption data can be published for 1985-87.

Note.--Because of rounding, figures may not add to the totals shown.

Source: As stated above.

the plant. Electric arc furnaces were installed during 1968-69, eliminating the need for coke batteries and its basic oxygen furnace (BOF). Ladle metallurgy capability, allowing improved temperature and alloy control and lance stirring, was added in 1982 and a three-strand continuous bloom caster was added in 1983. The company started producing "double-length" rail (80 feet) in late 1986. The three furnaces each have a rated capacity of 150 tons, and an average 3.1 hours tap-to-tap time (160 tons is the average heat size), utilizing a cold scrap charge. Not all three furnaces are being used at the present time, reducing melt capability.

Bethlehem's annual continuous-casting capacity is 1.329 million tons, its annual rolling capacity for blooms is 1.325 million tons, and its annual rolling capacity for rails is 1.16 million tons. 1/ Its reported capability based on current conditions is *** tons, considerably less than reported by the American Iron & Steel Institute (AISI). The company is investigating several processes that would allow it to go to a head-hardening process on-line.

1/ Iron and Steel Works of the United States and Canada, 1984, AISI.

CF&I produces steel rails at its plant in Pueblo, CO. Its steelmaking is via electric arc furnace, and its rails are produced by rolling continuous-cast blooms on a universal mill. The company has retrenched operations since 1983, decreasing melt capacity by more than 50 percent to 800,000 tons per year, while retiring four blast furnaces, a coke battery, and two BOFs. Peripheral holdings such as land and water and coal-mining rights were sold, and activities in product lines other than rail were reduced or discontinued. Employment dropped from 6,000 workers in 1983 to 2,100 workers in 1987. At the same time the company modernized by adding capacity to its two electric furnaces and by constructing a new continuous caster. Annual rail-rolling capacity on its universal mill is 1.25 million tons. ^{1/} The company produces a 78-foot long high-silicon carbon steel rail and a premium alloy rail of chromium-molybdenum steel. CF&I bought a patented process from BHP, an Australian conglomerate, for head hardening via induction heating and now produces a head-hardened standard AREA rail in 80-foot lengths. Its head-hardening process is an off-line one.

Wheeling-Pittsburgh (Wheeling) began rail production on a new combination rail and structural mill at Monessen, PA, during July-September 1981, and brought a continuous bloom caster on line in the second quarter of 1983. The company was capable of rolling "double-length" tee rails up to 82 feet in length, as well as producing an alloy premium rail. In December 1986, a decision to cease production was made, and shipments stopped in April 1987, about 2 years after the company entered bankruptcy proceedings. The mill was returned to the Economic Development Association, a part of the Department of Commerce, which had guaranteed loans of over \$100 million to build the mill. Sharon Steel bought the hot end (i.e., the coke ovens, blast furnace, and caster) in the second quarter of 1988, and Bethlehem Steel has been granted the right to negotiate the purchase of the rail-rolling mill. The annual rolling capacity of the facility's universal rail mill is 400,000 tons. ^{2/}

There are two other companies that produce or produced steel rails. One is Steel of West Virginia, which started up in the third quarter of 1982. This company only manufactures rails weighing under 60 pounds (and most commonly weighing between 15 and 25 pounds) per yard for the mining and quarrying industries. It produces the light rails on a bar mill and rolls assorted special shapes, and does not have the capability of producing standard rails.

U.S. Steel (USX) has also produced rails in the United States. USX produced standard 39-foot tee rails at its facility at Fairfield, AL, through the end of 1981. USX ceased production at Fairfield at that time, and planned to resume production at what were basically new facilities located at its Southworks plant in Gary, IN, following the installation of a continuous bloom caster to replace rolled-ingot production, but never did. The company has stated that rail sales in 1984 were based on inventory. USX produced heat-treated and alloy premium rails. The rolling equipment at Fairfield was partially sold to Algoma, and there are said to be further discussions between USX and Sydney Steel to sell the remainder of railmaking equipment at its Southworks.

^{1/} Ibid.

^{2/} Directory of Iron and Steel Works of the United States and Canada, 1984, AISI

U.S. importers

Information provided by the U.S. Customs Service identified about 30 significant importers of steel rails from Canada. Most of the importers of record do not import new rails, but import used rail and scrap rail, and many importers have Canadian addresses. Therefore, an importer and/or end-user questionnaire was issued in these preliminary investigations. Questionnaires were sent to the two Canadian producers of new rail, U.S. importers that were believed to sell new rails, and to the 17 U.S. class I railroads that were believed to be the principal end users of new steel rails.

As defined by the Interstate Commerce Commission, U.S. class I railroads are those with average annual operating revenues of \$87.9 million or more. The class I railroads reportedly account for more than 90 percent of total U.S. rail-freight revenues. In addition to the class I railroads, there are about 500 unregulated class II and class III railroads that may purchase some new rail; however, questionnaires for these preliminary investigations were not sent to class II or class III railroads.

Questionnaire responses were received from the Canadian producers, from the principal importers of new steel rails, and from many of the class I railroads that are the principal end users of new steel rails.

Marketing considerations and channels of distribution

In the U.S. market, sales of steel rails by domestic producers and importers or distributors are primarily made to end users. During January 1985-June 1988, over 95 percent of all domestically produced steel rails went to end users, either railroads or maintenance and construction firms, with the remainder going to service centers, distributors, and the export market. The largest end-user market was the rail transportation industry, accounting for more than 93 percent of domestic shipments during this period. Most steel rails consumed domestically are for the replacement of or upgrading of worn track.

Consumption is dependent upon new track programs (or rail line expansion), maintenance, replacement, or upgrading of existing roadbeds and lines, changes in track usage resulting from transportation system changes, and funding for rehabilitation of track. The main considerations are traffic, maintenance, and the revenues that traffic generates. Railway Age forecasts that the level of freight transportation demand in North America is at best static. ^{1/} The railroads are heavily dependent upon carriage of coal, which competes with oil; oil prices have been flat to declining since 1983, and revenues have widely fluctuated; increases in revenues have come from traffic innovations and heavier weights per car. Although traffic, measured in million-ton-miles per track, increased 50 percent during 1976-86, ^{2/} it appears that today's rails are surviving more than twice the tonnage sustained during the last period of rebuilding in the 1940's, ^{3/} mainly because of the longer service life of head-hardened rail, fully heat-treated rail, and alloy rail.

^{1/} Railway Age, October 1986, p. 41.

^{2/} Railway Age, January 1986, p. 31.

^{3/} Railway Age, September 1984, p. 66.

The Staggers Act deregulated the railroads on October 1, 1980, liberalizing processes for abandoning and selling rail lines, and accelerating the spin-off of branch lines and main line segments of class I railroads. 1/ Abandonments and bankruptcies generate used rail as well, which "cascades" downward in much the same manner as when a class I railroad relays rail on lesser-used sections of its own line. The reduction in Conrail's total track mileage from 35,370 miles at the end of 1977 to 25,792 miles at the end of 1985 illustrates the trend, 2/ as does the reported intention of an eastern carrier to reduce line mileage by 8,000 to 9,000 miles between 1987 and 2000. 3/

Of the 17 class I railroads, 7 purchase 65 to 70 percent of all new rails sold, with most purchases made for delivery west of the Mississippi River. New rails are generally purchased directly by railroads from the manufacturers and delivered to the railroad's nearest terminus. This gives a rail manufacturer that is situated in proximity to the terminus a competitive advantage of \$10 to \$35 per ton over another producer that must ship its product farther.

Purchases are usually negotiated in one or more rounds, with the railroad splitting up the tonnages involved and bidding among several sellers. Railroads currently purchase more on the basis of spot quotations and small tonnages than previously, when the practice was to order rail up to 1 year in advance. Class II and III railroads purchase both new and used rail on the open market via negotiated bidding and through distributors. * * *. None of the rail producers in the United States or Canada sells relay rail.

Because of State financing of track rehabilitation, there may be "Buy American" provisions that affect purchases of foreign rail. Municipal governments and transit authorities generally purchase new track for line rehabilitation via sealed bidding, and financing is limited by "Buy American" provisions (i.e., the offshore source must be at least 10 to 25 percent, or more, lower than the lowest available domestic producer). As noted above, main lines use mostly 115 through 136 RE; class II and III rail lines generally use relay, industrial, and new rail; and municipalities generally use rails weighing from 90 to 115 pounds per yard.

Consideration of Alleged Material Injury

In order to gather data on the question of material injury to the U.S. industry producing new steel rails, questionnaires were sent to the rail mills listed in the petition. The aggregate data appearing in this section of the report are for the three rail mills that responded to the Commission's questionnaires. These mills are believed to have been the only U.S. mills producing new steel rails, over 60 pounds per yard, during January 1985-June 1988.

1/ Railway Age, May 1986.

2/ Railway Age, March 1986, p. 33. In addition, a midwestern railroad in 1986 budgeted 820 miles of rail, of which more than one-half was to be relay rail.

3/ Railway Age, April 1987, p. 48.

U.S. capacity, production, and capacity utilization

The Commission requested rail mills to provide data on their average-for-period practical capacity for 1985-87, January-June 1987, and January-June 1988. Reported capacity was virtually constant during 1985-87, but dropped in January-June 1988, when compared with capacity during January-June 1987, because of the bankruptcy and closing of the Wheeling rail mill (table 2).

Table 2

New steel rails: Practical capacity, 1/ U.S. production, and capacity utilization of rail mills, 1985-87, January-June 1987, and January-June 1988

| Item | 1985 | 1986 | 1987 | January-June-- | |
|--|-----------|-----------|-----------|----------------|------|
| | | | | 1987 | 1988 |
| Practical capacity: <u>1/</u> | | | | | |
| All products: | | | | | |
| Average-of-period (short tons)..... | 1,792,265 | 1,884,733 | 1,915,009 | 897,505 | *** |
| New steel rails: | | | | | |
| Average-of-period (short tons)..... | 1,075,000 | 1,165,000 | 1,165,000 | 522,500 | *** |
| Production: | | | | | |
| New steel rails (short tons)..... | 689,542 | 464,119 | 423,435 | 232,938 | *** |
| Capacity utilization: | | | | | |
| New steel rails Average-of-period (percent)..... | 64.1 | 39.8 | 36.3 | 44.6 | *** |

1/ Practical capacity was defined as the greatest level of output a plant can achieve within the framework of a realistic work pattern. Producers were asked to consider, among other factors, a normal product mix and an expansion of operations that could be reasonably attained in their industry and locality in setting capacity in terms of the number of shifts and hours of plant operations. Reported data are for "rolling" capacity, without allowance for any melt capacity limitations.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

U.S. production of new steel rails by rail mills fell by 32.7 percent from 1985 to 1986 and dropped another 8.8 percent from 1986 to 1987 (table 2). Production during January-June 1988 increased slightly (by *** percent) compared with the level of production in the corresponding period of 1987.

The capacity utilization rate fell 37.9 percent from 1985 to 1986 and slipped another 8.8 percent from 1986 to 1987. Capacity utilization recovered by *** percent during January-June 1988 compared with January-June 1987.

U.S. producers' shipments

Domestic market shipments (excluding intracompany and intercompany transfers) of new steel rails by rail mills fell *** percent, on the basis of quantity, from 1985 to 1986 and dropped *** percent from 1986 to 1987 (table 3).

Table 3

New steel rails: Shipments of U.S. rail mills, by types, 1985-87, January-June 1987, and January-June 1988

| Item | 1985 | 1986 | 1987 | January-June-- | |
|---|---------|---------|---------|----------------|-------|
| | | | | 1987 | 1988 |
| <u>Quantity (short tons)</u> | | | | | |
| Intracompany and intercompany transfers.. | *** | *** | *** | *** | *** |
| Domestic market shipments: | | | | | |
| Standard tee rails..... | *** | *** | *** | *** | *** |
| Premium rails..... | *** | *** | *** | *** | *** |
| Industrial rails..... | *** | *** | *** | *** | *** |
| All other rails..... | *** | *** | *** | *** | *** |
| Subtotal..... | *** | *** | *** | *** | *** |
| Export shipments..... | *** | *** | *** | *** | *** |
| Total shipments..... | 690,455 | 461,233 | 422,564 | 231,113 | *** |
| <u>Value (1,000 dollars)</u> | | | | | |
| Intracompany and intercompany transfers.. | *** | *** | *** | *** | *** |
| Domestic market shipments: | | | | | |
| Standard tee rails..... | *** | *** | *** | *** | *** |
| Premium rails..... | *** | *** | *** | *** | *** |
| Industrial rails..... | *** | *** | *** | *** | *** |
| All other rails..... | *** | *** | *** | *** | *** |
| Subtotal..... | *** | *** | *** | *** | *** |
| Export shipments..... | *** | *** | *** | *** | *** |
| Total shipments..... | 313,128 | 201,620 | 176,814 | 92,248 | *** |
| <u>Unit value (per short ton)</u> | | | | | |
| Intracompany and intercompany transfers.. | \$*** | \$*** | \$*** | \$*** | \$*** |
| Domestic market shipments: | | | | | |
| Standard tee rails..... | *** | *** | *** | *** | *** |
| Premium rails..... | *** | *** | *** | *** | *** |
| Industrial rails..... | *** | *** | *** | *** | *** |
| All other rails..... | *** | *** | *** | *** | *** |
| Subtotal..... | *** | *** | *** | *** | *** |
| Export shipments..... | *** | *** | *** | *** | *** |
| Total shipments..... | 453.51 | 437.13 | 418.43 | 399.15 | *** |

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Domestic market shipments increased by *** percent during January-June 1988 compared with domestic market shipments during the corresponding period of 1987. * * *. * * *.

The total quantity of U.S. rail mills' shipments dropped 33.2 percent from 1985 to 1986, and declined 8.4 percent from 1986 to 1987. Total shipments during January-June 1988 increased slightly, by *** percent compared with such shipments during January-June 1987. The total value of U.S. rail mills' shipments fell 35.6 percent from 1985 to 1986 and fell 12.3 percent from 1986 to 1987. Total value of shipments increased *** percent during January-June 1988 compared with the value of total shipments during January-June 1987. The unit value (per short ton) of total shipments decreased 3.6 percent from 1985 to 1986 and decreased 4.3 percent from 1986 to 1987 before increasing *** percent during January-June 1988 compared with the unit value of total shipments during the corresponding period of 1987.

U.S. producers' inventories

Rail mills produce rails upon receipt of an order and consequently maintain few or no inventories. Sometimes the mills produce small production overruns or accumulate industrial rails and then sell such rails to distributors or whenever a suitable direct offer is received. The rail mills' end-of-period inventories are presented in the following tabulation:

| <u>Date</u> | <u>Inventories</u> (short tons) | <u>Share of rail mills' domestic ship-</u> <u>ments during the preceding period</u> (percent) |
|-------------|------------------------------------|---|
| Dec. 31-- | | |
| 1984..... | *** | <u>1/</u> |
| 1985..... | *** | *** |
| 1986..... | *** | *** |
| 1987..... | *** | *** |
| June 30-- | | |
| 1987..... | *** | <u>2/</u> *** |
| 1988..... | *** | <u>2/</u> *** |

1/ Not available.

2/ Based on annualized shipment data.

The rail mills' inventories of new steel rails were less than 1.0 percent of domestic market shipments during January 1985-June 1988.

Employment and wages

The three rail mills that responded to the Commission's questionnaire used different methods to arrive at the employment and wages for workers producing new steel rails. * * *. * * *. In addition, the data for January 1987-June 1988 are distorted by the bankruptcy and closing of Wheeling's rail mill. Because of the substantial differences in methods of estimating employment associated with new rail production, only trends in the data of table 4 have much use. The number of workers reported as producing new steel rails fell

Table 4

Average number of employees in U.S. rail mills; total and production and related workers producing all products and those producing new steel rails; and hours worked by and wages, total compensation, and average hourly wages paid to such workers, 1985-87, January-June 1987, and January-June 1988

| Item | 1985 | 1986 | 1987 | January-June-- | |
|--|-------|-------|-------|----------------|-------|
| | | | | 1987 | 1988 |
| Average number of employees..... | *** | *** | *** | *** | *** |
| Production and related workers producing-- | | | | | |
| All products..... | *** | *** | *** | *** | *** |
| New steel rails..... | *** | *** | *** | *** | *** |
| Hours worked by production and related workers producing-- | | | | | |
| All products (1,000 hours).... | *** | *** | *** | *** | *** |
| New steel rails (1,000 hours)..... | *** | *** | *** | *** | *** |
| Wages paid to production and related workers producing-- | | | | | |
| All products (1,000 dollars).. | *** | *** | *** | *** | *** |
| New steel rails (1,000 dollars)..... | *** | *** | *** | *** | *** |
| Total compensation paid to production and related workers producing: | | | | | |
| All products (1,000 dollars).. | *** | *** | *** | *** | *** |
| New steel rails (1,000 dollars)..... | *** | *** | *** | *** | *** |
| Average hourly wages paid to production and related workers producing: | | | | | |
| All products..... | \$*** | \$*** | \$*** | \$*** | \$*** |
| New steel rails..... | \$*** | \$*** | \$*** | \$*** | \$*** |

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

25.3 percent from 1985 to 1986 and dropped 15.5 percent from 1986 to 1987. The number of such workers increased slightly during January-June 1988 compared with the number of such workers during January-June 1987. Hours worked producing new steel rails dropped 28.7 percent from 1985 to 1986 and declined 7.0 percent from 1986 to 1987. Hours worked producing new rails declined by *** percent during January-June 1988 when compared with hours worked during January-June 1987. Wages paid to workers producing new steel rails fell 29.6 percent from 1985 to 1986 and fell 14.1 percent from 1986 to 1987. Wages paid to such workers increased *** percent during January-June 1988 when compared with wages paid during January-June 1987.

Financial experience of U.S. producers

Three producers supplied separate income-and-loss data on the overall operations of their establishments and on the subject product, new steel rails. The two current producers (Bethlehem and CF&I) furnished financial data for all periods, whereas Wheeling supplied data for all periods except interim 1988.

Overall operations.--Net sales of the subject product, as well as overall establishment and overall corporate operations, are shown for 1987 in the following tabulation (in thousands of dollars):

| <u>Company</u> | <u>Net sales</u> | | |
|----------------|------------------------|------------------------------|--------------------------|
| | <u>New steel rails</u> | <u>Overall establishment</u> | <u>Overall corporate</u> |
| Bethlehem..... | *** | *** | 1/ 5,117,700 |
| CF&I..... | *** | *** | *** |
| Wheeling..... | *** | *** | 2/ |

1/ Bethlehem Steel's 1987 Annual Report, p. 16.

2/ Not available.

Bethlehem's sales of new steel rails accounted for *** percent of its overall establishment sales and just over *** percent of its overall corporate sales in 1987. The CF&I establishment in Pueblo, CO, produces all of the company's products. New steel rails accounted for *** percent of its overall establishment/overall corporate sales in 1987. The Wheeling establishment produced only the subject product until its shutdown during January-June of 1987. The overall establishment income-and-loss experience of these firms is presented in table 5.

Operations on new steel rails.--Net sales of new steel rails declined 35.6 percent from \$313.1 million in 1985 to \$201.6 million in 1986 (table 6). In 1987, sales were \$176.2 million, a decrease of 12.6 percent from 1986 sales. Operating losses were \$11.8 million in 1985, \$32.9 million in 1986, and \$30.2 million in 1987. Operating (loss) margins, as a percent of sales, were (3.8) in 1985, (16.3) in 1986, and (17.2) in 1987. Operating losses were sustained by two firms in 1985 and all three firms in 1986 and 1987. Interim 1988 sales were \$*** million, an increase of *** percent from 1987 interim sales of \$91.8 million. Operating losses were \$16.2 million and \$*** million in interim 1987 and interim 1988, respectively. Operating (loss) margins were (17.7) in interim 1987 and *** in interim 1988. All three firms sustained operating losses in interim 1987 and both remaining firms reported such losses in interim 1988. A summary of income-and-loss data, by producers, is presented in table 7.

Factors affecting income-and-loss.--The rise in scrap steel prices increased expenses for the industry, but declining unit labor costs because of wage concessions and cutbacks had a positive effect on industry costs. Some of the factors responsible for the overall level of operating losses include high

Table 5
Income-and-loss experience of U.S. producers on the overall operations of their establishments within which new steel rails are produced, accounting years 1985-87 and interim periods ended June 30, 1987, and June 30, 1988

| Item | 1985 | 1986 | 1987 | Interim period ended June 30-- | |
|--|------------------------------|----------|----------|-----------------------------------|------|
| | | | | 1987 | 1988 |
| | Value (1,000 dollars) | | | | |
| Net sales..... | 465,370 | 359,274 | 427,881 | 197,473 | *** |
| Cost of goods sold..... | 482,753 | 406,790 | 457,688 | 215,001 | *** |
| Gross profit or (loss)..... | (17,383) | (47,516) | (29,807) | (17,528) | *** |
| General, selling, and administrative expenses.... | 18,705 | 12,405 | 9,617 | 4,666 | *** |
| Operating income or (loss)... | (36,088) | (59,921) | (39,424) | (22,194) | *** |
| Startup or shutdown expense.. | 1,566 | 1,419 | 13 | 13 | *** |
| Interest expense..... | 1,749 | 709 | 981 | 555 | *** |
| Other income or (loss), net.. | 2,293 | 1,046 | 1,181 | 247 | *** |
| Net income or (loss) before income taxes..... | (37,110) | (61,003) | (39,237) | (22,515) | *** |
| Depreciation and amortization included above..... | 27,752 | 28,960 | 25,007 | 12,089 | *** |
| Cash-flow ^{1/} | (9,358) | (32,043) | (14,230) | (10,426) | *** |
| | Share of net sales (percent) | | | | |
| Cost of goods sold..... | 103.7 | 113.2 | 107.0 | 108.9 | *** |
| Gross profit or (loss)..... | (3.7) | (13.2) | (7.0) | (8.9) | *** |
| General, selling, and administrative expenses.... | 4.0 | 3.5 | 2.2 | 2.4 | *** |
| Operating income or (loss)... | (7.8) | (16.7) | (9.2) | (11.2) | *** |
| Net income or (loss) before income taxes..... | (8.0) | (17.0) | (9.2) | (11.4) | *** |
| | Number of firms reporting | | | | |
| Operating losses..... | 3 | 3 | 3 | 3 | 1 |
| Net losses..... | 3 | 3 | 3 | 3 | 1 |
| Data..... | 3 | 3 | 3 | 3 | 2 |

^{1/} Cash-flow is defined as net income or (loss) plus depreciation and amortization.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Table 6

Income-and-loss experience of U.S. producers on their operations producing new steel rails, accounting years 1985-87 and interim periods ended June 30, 1987, and June 30, 1988

| Item | 1985 | 1986 | 1987 | Interim period ended June 30- | |
|--|----------|----------|----------|----------------------------------|------|
| | | | | 1987 | 1988 |
| Value (1,000 dollars) | | | | | |
| Net sales..... | 313,126 | 201,624 | 176,184 | 91,759 | *** |
| Cost of goods sold..... | 314,725 | 227,680 | 203,119 | 106,259 | *** |
| Gross profit or (loss)..... | (1,599) | (26,056) | (26,935) | (14,500) | *** |
| General, selling, and administrative expenses.... | 10,230 | 6,878 | 3,306 | 1,696 | *** |
| Operating income or (loss)... | (11,829) | (32,934) | (30,241) | (16,196) | *** |
| Startup or shutdown expense.. | 1,566 | 1,419 | 13 | 13 | *** |
| Interest expense..... | 0 | 0 | 0 | 0 | *** |
| Other income (loss), net..... | (396) | (396) | (383) | (383) | |
| Net income or (loss) before income taxes..... | (13,791) | (34,749) | (30,637) | (16,592) | *** |
| Depreciation and amortization included above..... | 18,733 | 20,590 | 16,992 | 8,041 | *** |
| Cash-flow <u>1/</u> | 4,942 | (14,159) | (13,645) | (8,551) | *** |
| Share of net sales (percent) | | | | | |
| Cost of goods sold..... | 100.5 | 112.9 | 115.3 | 115.8 | *** |
| Gross profit or (loss)..... | (0.5) | (12.9) | (15.3) | (15.8) | *** |
| General, selling, and administrative expenses.... | 3.3 | 3.4 | 1.9 | 1.8 | *** |
| Operating income or (loss)... | (3.8) | (16.3) | (17.2) | (17.7) | *** |
| Net income or (loss) before income taxes..... | (4.4) | (17.2) | (17.4) | (18.1) | *** |
| Number of firms reporting | | | | | |
| Operating losses..... | 2 | 3 | 3 | 3 | 2 |
| Net losses..... | 2 | 3 | 3 | 3 | 2 |
| Data..... | 3 | 3 | 3 | 3 | 2 |

1/ Cash-flow is defined as net income or (loss) plus depreciation and amortization.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Table 7

Income-and-loss experience of U.S. producers on their operations producing new steel rails, by producers, accounting years 1985-87 and interim periods ended June 30, 1987, and June 30, 1988

| Item | 1985 | 1986 | 1987 | Interim period ended June 30-- | |
|--------------------------------|----------|----------|----------|-----------------------------------|------|
| | | | | 1987 | 1988 |
| Value (1,000 dollars) | | | | | |
| Net sales: | | | | | |
| Bethlehem..... | *** | *** | *** | *** | *** |
| CF&I..... | *** | *** | *** | *** | *** |
| Wheeling..... | *** | *** | *** | *** | *** |
| Total..... | 313,126 | 201,624 | 176,184 | 91,759 | *** |
| Gross profit or (loss): | | | | | |
| Bethlehem..... | *** | *** | *** | *** | *** |
| CF&I..... | *** | *** | *** | *** | *** |
| Wheeling..... | *** | *** | *** | *** | *** |
| Total..... | (1,599) | (26,056) | (26,935) | (14,500) | *** |
| Operating income or (loss): | | | | | |
| Bethlehem..... | *** | *** | *** | *** | *** |
| CF&I..... | *** | *** | *** | *** | *** |
| Wheeling..... | *** | *** | *** | *** | *** |
| Total..... | (11,829) | (32,934) | (30,241) | (16,196) | *** |
| Share of net sales (percent) | | | | | |
| Gross profit or (loss): | | | | | |
| Bethlehem..... | *** | *** | *** | *** | *** |
| CF&I..... | *** | *** | *** | *** | *** |
| Wheeling..... | *** | *** | *** | *** | *** |
| Average..... | (0.5) | (12.9) | (15.3) | (15.8) | *** |
| Operating income or (loss): | | | | | |
| Bethlehem..... | *** | *** | *** | *** | *** |
| CF&I..... | *** | *** | *** | *** | *** |
| Wheeling..... | *** | *** | *** | *** | *** |
| Average..... | (3.8) | (16.3) | (17.2) | (17.7) | *** |

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

energy and depreciation costs and employee benefit costs for both current and former employees. These employee costs are mostly pension-related and are mandated by law and/or accounting principles. ^{1/}

^{1/} If final investigations occur, this aspect will be reviewed in greater detail.

Investment in productive facilities.--The value of property, plant, and equipment for the U.S. producers of new steel rails is shown in table 8. The return on assets for these producers is also included in the same table. The decline in assets was due to the elimination of facilities.

Table 8
Value of property, plant, and equipment and total assets of U.S. producers of new steel rails, accounting years 1985-87 and interim periods ended June 30, 1987, and June 30, 1988

(In thousands of dollars, except where noted)

| Item | As of end of accounting year-- | | | As of June 30-- | |
|--|--------------------------------|---------|---------|-----------------|------|
| | 1985 | 1986 | 1987 | 1987 | 1988 |
| All products of establishments: | | | | | |
| Original cost..... | 724,757 | 733,500 | 733,072 | *** | *** |
| Book value | 407,606 | 295,146 | 275,568 | *** | *** |
| Total assets <u>1/</u> | 535,167 | 494,869 | 498,015 | *** | *** |
| Return on fixed assets <u>2/</u> (percent)..... | (8.9) | (20.3) | (14.3) | *** | *** |
| Return on total assets <u>3/</u> (percent)..... | (6.7) | (12.1) | (7.9) | *** | *** |
| New steel rails: | | | | | |
| Original cost..... | 397,810 | 408,541 | 389,032 | *** | *** |
| Book value..... | 290,010 | 187,708 | 163,162 | *** | *** |
| Total assets <u>4/</u> | 380,501 | 314,737 | 294,825 | *** | *** |
| Return on fixed assets <u>2/</u> (percent)..... | (4.1) | (17.5) | (18.3) | *** | *** |
| Return on total assets <u>3/</u> (percent)..... | (3.1) | (10.5) | (10.3) | *** | *** |

1/ Defined as book value of fixed assets plus all other assets.

2/ Defined as operating income or (loss) divided by book value of fixed assets.

3/ Defined as operating income or (loss) divided by total assets.

4/ Defined as total establishment assets multiplied by the ratio of the book value of the product fixed assets to the book value of the establishment fixed assets.

Note.--Return on assets calculated from data of firms supplying data on both income and assets.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Capital expenditures.--The capital expenditures for the U.S. producers are presented in table 9. * * *.

Table 9
Capital expenditures by U.S. producers of new steel rails, accounting years 1985-87 and interim periods ended June 30, 1987, and June 30, 1988

(In thousands of dollars)

| Item | 1985 | 1986 | 1987 | Interim period ended June 30-- | |
|--|------|------|------|-----------------------------------|------|
| | | | | 1987 | 1988 |
| All products of establishments: | | | | | |
| Land and land improvements..... | *** | *** | *** | *** | *** |
| Building and leasehold improvements..... | *** | *** | *** | *** | *** |
| Machinery, equipment, and fixtures..... | *** | *** | *** | *** | *** |
| Total..... | *** | *** | *** | *** | *** |
| New steel rails: | | | | | |
| Land and land improvements..... | *** | *** | *** | *** | *** |
| Building and leasehold improvements..... | *** | *** | *** | *** | *** |
| Machinery, equipment, and fixtures..... | *** | *** | *** | *** | *** |
| Total..... | *** | *** | *** | *** | *** |

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Research and development expenses.--Research and development expenses for the U.S. producers are presented in table 10.

Table 10
Research and development by U.S. producers of new steel rails, accounting years 1985-87 and interim periods ended June 30, 1987, and June 30, 1988

(In thousands of dollars)

| Item | 1985 | 1986 | 1987 | Interim period ended June 30-- | |
|-------------------------------------|------|------|------|-----------------------------------|------|
| | | | | 1987 | 1988 |
| All products of establishments..... | *** | *** | *** | *** | *** |
| New steel rails..... | *** | *** | *** | *** | *** |

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Capital and investment.--The Commission requested U.S. producers to describe any actual or potential negative effects of imports of new steel rails from Canada on their firms' existing development and production efforts, growth, investment, and ability to raise capital. Their responses are shown in appendix C.

Consideration of the Question of
Threat of Material Injury

Section 771(7)(F)(i) of the Tariff Act of 1930 (19 U.S.C. § 1677(7)(F)(i)) provides that--

In determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of any merchandise, the Commission shall consider, among other relevant factors 1--

(I) If a subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the Agreement),

(II) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States,

(III) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,

(IV) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,

(V) any substantial increase in inventories of the merchandise in the United States,

(VI) the presence of underutilized capacity for producing the merchandise in the exporting country.

1/ Section 771(7)(F)(ii) of the act (19 U.S.C. § 1677(7)(F)(ii)) provides that "Any determination by the Commission under this title that an industry in the United States is threatened with material injury shall be made on the basis of evidence that the threat of material injury is real and that actual injury is imminent. Such a determination may not be made on the basis of mere conjecture or supposition."

(VII) any other demonstrable adverse trends that indicate the probability that the importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury,

(VIII) the potential for product-shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation(s) under section 701 or 731 or to final orders under section 736, are also used to produce the merchandise under investigation,

(IX) in any investigation under this title which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under section 705(b)(1) or 735(b)(1) with respect to either the raw agricultural product or the processed agricultural product (but not both), and

(X) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product. 1/

The available information on the nature of the subsidies alleged in the petition (item (I) above) is presented in the section of this report entitled "Alleged subsidies;" information on the volume, U.S. market penetration, and pricing of imports of the subject merchandise (items (III) and (IV) above) is presented in the section entitled "Consideration of the causal relationship between imports of the subject merchandise and the alleged material injury;" and information on the effects of imports of the subject merchandise on U.S. producers' existing development and production efforts (item (X)) is presented in the section entitled "Consideration of alleged material injury." Available information on U.S. inventories of the subject products (item (V)); foreign producers' operations, including the potential for "product-shifting" (items (II), (VI), (VIII) and (IX) above); any other threat indicators, if applicable (item (VII) above); and any dumping in third-country markets, follows.

1/ Section 771(7)(F)(iii) of the act (19 U.S.C. § 1677(7)(F)(iii)) further provides that, in antidumping investigations, ". . . the Commission shall consider whether dumping in the markets of foreign countries (as evidenced by dumping findings or antidumping remedies in other GATT member markets against the same class or kind of merchandise manufactured or exported by the same party as under investigation) suggests a threat of material injury to the domestic industry."

U.S. importers' inventories

U.S. importers' inventories may not be very meaningful in these investigations because many shipments are made directly from the foreign producers' plants to U.S. customers. Further, some of the U.S. importers that do maintain inventories combine inventories of foreign and domestic new steel rails and were unable to determine inventories by country of origin. The data collected on U.S. importers' end-of-period inventories of new steel rails from the two U.S. importers that reported inventory data are presented in table 11. Reported U.S. importers' aggregate inventories of their imports from Canada decreased from 1985 to 1986 and increased from 1986 to 1987. Inventories of Canadian product at the end of June 1988 were less than inventories at the end of June 1987.

Table 11

New steel rails: 2 U.S. importers' end-of-period inventories, by countries, Dec. 31, 1985-87, June 30, 1987, and June 30, 1988

| Country of origin | (In short tons) | | | | |
|-------------------------------------|-------------------|------|------|-------------------|-------------------|
| | Dec. 31-- 1985 | 1986 | 1987 | June 30-- 1987 | June 30-- 1988 |
| Canada..... | *** | *** | *** | *** | *** |
| All others or not specified..... | *** | *** | *** | *** | *** |
| Total..... | *** | *** | *** | *** | *** |

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Capacity of foreign producers to increase exports

Canada.--There are two rail producers in Canada, Algoma Steel Corp., Ltd., Sault Ste. Marie, Ontario, and Sydney Steel Corp., Sydney, Nova Scotia. ^{1/} In August 1988, Algoma was purchased by another Canadian steelmaker, Dofasco. Sydney is 100-percent owned by the Provincial Government of Nova Scotia. There are close links between Sydney and the national railroad, Canadian National, which purchases over 30,000 tons per year of new rail.

Algoma operates five BOFs, and rolls rail from continuous cast-blooms; its annual steelmaking capacity is 3 million tons, of which continuous-casting capacity is 500,000 tons. Sydney operates three open-hearth furnaces with oxygen lancing and a vacuum degassing unit; the annual steelmaking capability via cast ingot is 750,000 tons. Overall rolling capacity for Algoma is 3 million tons, but this is product dependent; rolling capacity in the blooming mills is 1.263 million tons, of which 606,000 tons is in rail and structural mills. Overall rolling capacity for Sydney is 650,000 tons for blooms, billets, slabs, rails, tie plates, and mine arches. Both firms produce a carbon steel rail. Algoma has a patent and prototype process for an on-line

^{1/} The information that follows is from "Metallurgical Works in Canada, Primary Iron and Steel, 1988", Mineral Bulletin MR 218, Energy, Mines and Resources Canada, Government of Canada.

head-hardening process, but is doing further research prior to bringing it on line.

Rails and accessories represented 4 percent in 1986 and 5 percent in 1987 (80,000 tons and 106,250 tons, respectively) of Algoma's overall business. ^{1/} Sydney has plans to modernize its plant, including a switch in steelmaking from open hearth to electric furnaces, which reportedly would upgrade its product's quality and allow the company to improve utilization of existing capacity. Modernization is scheduled for late 1989.

Both Canadian producers sell to the national railways in Canada, Canadian Pacific (CP) and Canadian National (CN). Sydney supplies 80 percent of CN's requirements for standard, intermediate grade, and alloy rail; in 1987, 40,000 short tons in total. ^{2/} In addition, Sydney has an advantage in shipping location, being located near port facilities, and has sold about 175,000 tons into the export market, including sales to India, Bangladesh, Mozambique, Mexico, and Indonesia. ^{3/} One factor assisting those sales was the availability of World Bank financing and Sydney's willingness to conclude counter-trade transactions. Algoma has indicated that the Canadian rail market is capable of absorbing only about 250,000 tons per year (roughly 1,100 miles of new rail).

The Commission requested counsel for the respondents in the investigations to provide information on the Canadian producers of new steel rails. The information requested consisted of the number and names of producing firms; production, capacity, capacity utilization, home-market shipments, exports to the United States, and total exports, for each of the periods covered by the investigations; projected changes in production, capacity, or capacity utilization in 1988; and intentions or projections as to the quantity of exports of the subject new steel rails to the United States in 1989. Data received from respondents' counsel for Canada's new steel rails industry are presented in table 12.

^{1/} The Algoma Steel Corp., Ltd., Annual Report, 1987.

^{2/} Metal Bulletin Monthly, October 1987.

^{3/} Ibid. This is confirmed by World Trade Steel, U.K. Iron and Steel Statistics Bureau, annual reports, 1985-87, which show exports from Canada of new steel rails as follows (in thousands of tons):

| <u>Major destinations</u> | <u>1985</u> | <u>1986</u> | <u>1987</u> |
|---------------------------|-------------|-------------|-------------|
| United States..... | 31.6 | 34.2 | 38.6 |
| Mexico..... | 43.8 | 55.6 | 76.1 |
| India..... | - | - | 27.3 |
| Africa..... | 9.2 | - | 25.0 |
| All other..... | <u>8.8</u> | <u>13.4</u> | <u>28.0</u> |
| Total..... | 93.4 | 103.2 | 195.0 |

Data for the United States are overstated because they include rail for re-rolling, which totaled about 15,000 tons in 1987.

Table 12

New steel rails: Canada's capacity, production, capacity utilization, shipments, and inventories, 1985-87, January-June 1987, and January-June 1988

(In short tons, except as noted)

| Item | 1985 | 1986 | 1987 | January-June-- | |
|--|------|------|------|----------------|------|
| | | | | 1987 | 1988 |
| Capacity..... | *** | *** | *** | *** | *** |
| Production..... | *** | *** | *** | *** | *** |
| Capacity utilization (percent)..... | *** | *** | *** | *** | *** |
| Home-market shipments... | *** | *** | *** | *** | *** |
| Exports to-- | | | | | |
| United States: | | | | | |
| Standard tee rails.. | *** | *** | *** | *** | *** |
| Premium rails..... | *** | *** | *** | *** | *** |
| Industrial rails.... | *** | *** | *** | *** | *** |
| Total..... | *** | *** | *** | *** | *** |
| All other countries <u>1/</u> | *** | *** | *** | *** | *** |
| Total shipments..... | *** | *** | *** | *** | *** |
| Inventories..... | *** | *** | *** | *** | *** |

1/ Principally * * * in 1987.

Source: Data submitted by counsel for respondents.

As can be seen in table 12, Canadian producers of new steel rail are operating below capacity, as are domestic producers. In addition, home-market shipments in Canada dropped significantly during 1985-87, as did shipments by U.S. producers in the U.S. market (table 3). Exports to the United States, as reported by respondents, include substantial quantities of industrial rails. Such rails reportedly sell at about one-half the cost of rails that meet class I railroad specifications.

Other foreign producers.--Other rail producers have sold carbon and alloy, as well as hardened rail into the U.S. market. Among the sellers are West Germany, France, Austria, Great Britain, and Japan. The West German producer Thyssen, which makes a unique 60-meter long rail, British Steel, and the Japanese producer Nippon Steel all have a hardening process. The Japanese possess an on-line head-hardening process, and are marketing a so-called super rail in the United States. Japanese sales of rail and accessories accounted for 59 percent of all such imports in the Western U.S. market in 1987.

The markets in Western Europe and the United States are said to be depressed, with little improvement in sight; the national railways in Europe have halted new expansion. 1/ British Steel and Thyssen/Krupp together export about 225,000 short tons of rail per year (or about 1,000 miles of track), which in 1987 was equivalent to more than one-third of U.S. domestic consumption. Other major markets are the Indian subcontinent (India and Bangladesh); Africa (Angola, Mozambique, Nigeria, Zimbabwe, Tanzania, and Botswana); Mexico; China; and the Middle East (Iran, Iraq, Turkey, and Egypt).

1/ Metal Bulletin, Mar. 21, 1988.

China is reportedly currently out of the market because of financing difficulties. There is new capacity coming onto the market from Brazil and India; it is anticipated that the Brazilian production will be sold to African users, because of freight advantages, and Indian production might be sold to east Africa and to the Middle East (particularly Egypt) as well as displacing any imports into India.

Consideration of the Causal Relationship Between Imports of the
Subject Merchandise and the Alleged Material Injury

U.S. imports

According to official statistics 1/ of the U.S. Department of Commerce, imports of steel rails decreased 4.1 percent (on the basis of quantity) from 1985 to 1986 and decreased another 12.6 percent from 1986 to 1987. Imports during January-June 1988 were 18.0 percent less than those during the corresponding period of 1987 (table 13). Official U.S. import statistics include, as noted in the petition, imports of relay rails from Canada and, according to Canadian Government officials, also include used rails that are scrap and are unsuitable for use as rails. Petitioner and respondents agree that the use of official U.S. import statistics for rails from Canada is inappropriate in these investigations, but disagree with respect to actual imports of the new steel rails that are subject to these investigations. Nevertheless, the data in table 13 are instructive because unit values of imports indicate that only imports from Canada are affected by imports of relay and scrap rails. Imports from all other countries are most likely to be new rails. 2/

Official Canadian export statistics separate rail into three categories-- new rails, relay rails, and rails n.e.s. Rails n.e.s. are, according to Canadian officials, predominately used rails that are used for rerolling into other finished products. Thus, for these preliminary investigations, official Canadian export data for new rails 3/ and official statistics of the U.S. Department of Commerce for all countries, except Canada, are presented in table 14 as the best available information on U.S. imports of new rails over 60 pounds per yard. The data in both tables 13 and 14 could be overstated because TSUSA item 610.2100 includes all imports of alloy rails, including imports of alloy rails 60 pounds or less per yard; however, imports of light alloy rails are believed to be negligible. The data in tables 13 and 14 are understated by an unknown amount because imports of contact rails are not included and cannot be estimated from the available data. Imports of contact rail are believed to be small in comparison with total imports of rails.

1/ Official statistics of the U.S. Department of Commerce presented here are for TSUSA items 610.2010, 610.2025, and 610.2100.

2/ Transcript of conference, pp. 138-140.

3/ It should be noted that official statistics of the Government of Canada differ from those reported to the Commission by the two Canadian producers.

Table 13
Steel rails: U.S. imports for consumption, by principal countries, 1985-87,
January-June 1987, and January-June 1988

| Source | 1985 | 1986 | 1987 | January-June-- | |
|--|----------|----------|----------|----------------|----------|
| | | | | 1987 | 1988 |
| Quantity (short tons) | | | | | |
| Canada..... | 37,396 | 70,136 | 70,881 | 28,021 | 29,627 |
| Japan..... | 98,764 | 60,079 | 61,348 | 43,370 | 22,785 |
| Belgium and Luxembourg..... | 4,432 | 7,094 | 10,992 | 5,316 | 10,977 |
| West Germany..... | 37,797 | 34,837 | 10,333 | 10,061 | 9,091 |
| United Kingdom..... | 1,375 | 3,836 | 5,662 | 5,662 | 2,207 |
| Sweden..... | 2,689 | 270 | 3,583 | 0 | 2,863 |
| France..... | 15,859 | 13,296 | 2,569 | 2,370 | 23 |
| Republic of Korea... | 1,746 | 2,541 | 2,514 | 1,022 | 1,027 |
| All others..... | 346 | 64 | 2 | 2 | 0 |
| Total..... | 200,404 | 192,153 | 167,884 | 95,824 | 78,599 |
| Landed duty-paid value (1,000 dollars) | | | | | |
| Canada..... | 6,094 | 9,387 | 11,840 | 5,672 | 6,069 |
| Japan..... | 52,624 | 27,937 | 27,273 | 18,981 | 10,889 |
| Belgium and Luxembourg..... | 2,025 | 3,391 | 5,829 | 2,890 | 5,409 |
| West Germany..... | 17,773 | 15,167 | 4,175 | 4,040 | 4,187 |
| United Kingdom..... | 551 | 1,623 | 1,954 | 1,954 | 928 |
| Sweden..... | 1,004 | 57 | 1,417 | 0 | 871 |
| France..... | 6,649 | 5,973 | 1,007 | 913 | 54 |
| Republic of Korea... | 667 | 1,013 | 756 | 407 | 432 |
| All others..... | 160 | 37 | 9 | 9 | 0 |
| Total..... | 87,547 | 64,584 | 54,260 | 34,867 | 28,840 |
| Unit value (per ton) | | | | | |
| Canada..... | \$162.96 | \$133.85 | \$167.05 | \$202.43 | \$204.84 |
| Japan..... | 532.82 | 465.00 | 444.56 | 437.66 | 477.93 |
| Belgium and Luxembourg..... | 457.05 | 477.91 | 530.27 | 543.73 | 492.76 |
| West Germany..... | 470.22 | 435.37 | 404.08 | 401.58 | 460.55 |
| United Kingdom..... | 400.68 | 423.06 | 345.03 | 345.03 | 420.31 |
| Sweden..... | 373.38 | 211.26 | 395.44 | 0 | 304.40 |
| France..... | 419.22 | 449.20 | 392.02 | 385.40 | 1/ |
| Republic of Korea... | 382.04 | 398.58 | 300.75 | 398.00 | 420.77 |
| All others..... | 465.53 | 581.90 | 1/ | 1/ | - |
| Average..... | 436.85 | 336.10 | 323.20 | 363.87 | 366.93 |

1/ Statistical aberration.

Note.--Because of rounding, figures may not add to the totals shown.

Source: Compiled from official statistics of the U.S. Department of Commerce.

Table 14
New steel rails: U.S. imports for consumption, by principal countries,
1985-87, January-June 1987, and January-June 1988

| Source | 1985 | 1986 | 1987 | January-June-- | |
|---|----------|----------|-----------|--------------------|--------------------|
| | | | | 1987 | 1988 |
| <u>Quantity (short tons)</u> | | | | | |
| Canada <u>1/</u> | 5,755 | 8,008 | 23,241 | 8,797 | 11,964 |
| Japan..... | 98,764 | 60,079 | 61,348 | 43,370 | 22,785 |
| Belgium and Luxembourg..... | 4,432 | 7,094 | 10,992 | 5,316 | 10,977 |
| West Germany..... | 37,797 | 34,837 | 10,333 | 10,061 | 9,091 |
| United Kingdom..... | 1,375 | 3,836 | 5,662 | 5,662 | 2,207 |
| Sweden..... | 2,689 | 270 | 3,583 | 0 | 2,863 |
| France..... | 15,859 | 13,296 | 2,569 | 2,370 | 23 |
| Republic of Korea... | 1,746 | 2,541 | 2,514 | 1,022 | 1,027 |
| All others..... | 346 | 64 | 2 | 2 | 0 |
| Total..... | 168,763 | 130,025 | 120,244 | 76,600 | 60,937 |
| <u>Landed duty-paid value (1,000 dollars)</u> | | | | | |
| Canada <u>2/</u> | 1,800 | 2,228 | 7,009 | <u>3/</u> 2,242 | <u>3/</u> 4,437 |
| Japan..... | 52,624 | 27,937 | 27,273 | 18,981 | 10,889 |
| Belgium and Luxembourg..... | 2,025 | 3,391 | 5,829 | 2,890 | 5,409 |
| West Germany..... | 17,773 | 15,167 | 4,175 | 4,040 | 4,187 |
| United Kingdom..... | 551 | 1,623 | 1,954 | 1,954 | 928 |
| Sweden..... | 1,004 | 57 | 1,417 | 0 | 871 |
| France..... | 6,649 | 5,973 | 1,007 | 913 | 54 |
| Republic of Korea... | 667 | 1,013 | 756 | 407 | 432 |
| All others..... | 160 | 37 | 9 | 0 | 0 |
| Total..... | 83,253 | 57,425 | 49,429 | 31,427 | 27,207 |
| <u>Unit value (per ton)</u> | | | | | |
| Canada..... | \$312.78 | \$278.24 | \$301.58 | <u>3/</u> \$254.86 | <u>3/</u> \$370.86 |
| Japan..... | 532.82 | 465.00 | 444.56 | 437.66 | 477.93 |
| Belgium and Luxembourg..... | 457.05 | 477.91 | 530.27 | 543.73 | 492.76 |
| West Germany..... | 470.22 | 435.37 | 404.08 | 401.58 | 460.55 |
| United Kingdom..... | 400.68 | 423.06 | 345.03 | 345.03 | 420.31 |
| Sweden..... | 373.38 | 211.26 | 395.44 | 0 | 304.40 |
| France..... | 419.22 | 449.20 | 392.02 | 385.40 | <u>4/</u> |
| Republic of Korea... | 382.04 | 398.58 | 300.75 | 398.00 | 420.77 |
| All others..... | 465.53 | 581.90 | <u>4/</u> | <u>4/</u> | - |
| Average..... | 493.31 | 441.65 | 411.07 | 410.27 | 446.37 |

1/ Statistics Canada, International Trade Division, Government of Canada.

2/ Canadian export value, converted to U.S. dollars.

3/ Estimated from January-July data.

4/ Statistical aberration.

Note.--Because of rounding, figures may not add to the totals shown.

Source: Data from all countries, other than Canada, compiled from official statistics of the U.S. Department of Commerce.

The quantity of imports of new steel rails from Canada increased 39.1 percent from 1985 to 1986, increased 190.2 percent from 1986 to 1987, and increased 36.0 percent during January-June 1988 compared with imports during January-June 1987 (table 14). Total imports of new steel rails from all countries dropped 23.0 percent from 1985 to 1986, declined 7.5 percent from 1986 to 1987, and fell 20.4 percent during January-June 1988 compared with imports during January-June 1987.

Market penetration of imports

U.S. imports of new steel rails as a share of apparent U.S. consumption are presented in table 15. The ratio of imports to consumption (on the basis of quantity) for Canada increased from 0.7 percent in 1985 to 1.4 percent in 1986 and 4.3 percent in 1987. The import penetration ratio for Canada increased from 2.9 percent during January-June 1987 to *** percent during January-June 1988.

Prices

Approximately 60 to 70 percent of the market for new steel rails consists of class I railroads; smaller railroads account for 10 percent of the market, and the remaining 20 percent consists of transit authorities, distributors, and contractors. ^{1/} Demand for new steel rails is directly related to the construction of new lines and the replacement of primary track for a railroad or a transit authority. More than 95 percent of new steel rails are purchased through a bid or quote procedure. Requests for quotes originate with the railroads and requests for bids originate with the transit authorities.

At the conference, both the petitioner and respondents stated that there are no products that can substitute for new steel rails. Other rail products, such as relay, industrial, and crane rails, are unsuitable principally because of weight requirements. Relay rail is used rail that is "relaid" at another location. According to both parties, it is used mostly by class II and III railroads that do not handle loads as often or as heavy as those handled by class I railroads. However, relay rail is acceptable for use in class I switching yards. Industrial rail is new rail that has imperfections. It is used as track at industrial sites such as steel mills for their rail use. Crane rail is used in industrial sites for large cranes, and generally has a different shape. Relay, industrial, and crane rails are also sold through different channels of distribution than new rails. New steel rail is primarily sold by producers directly to railroads; relay rail is sold from one railroad to another and through distributors. Industrial and crane rails are sold through distributors.

^{1/} Conference transcript, p. 32. Class I railroads are those with average annual operating revenues of \$87.9 million or more. These railroads account for more than 93 percent of total rail-freight revenues. There are currently 17 class I Railroads in the United States. * * * states that the following seven railroads represent 70 to 80 percent of all class I railroad revenues: Atchison, Topeka, and Santa Fe; Burlington Northern; Conrail; CSX; Norfolk Southern; Southern Pacific; and the Union Pacific.

Table 15

New steel rails: Apparent U.S. consumption, U.S. imports, and ratios of imports to consumption, 1985-87, January-June 1987, and January-June 1988

| Item | 1985 | 1986 | 1987 | January-June-- | |
|---|---------|---------|---------|----------------|--------|
| | | | | 1987 | 1988 |
| Quantity (short tons) | | | | | |
| Apparent U.S. consumption..... | 857,330 | 589,598 | 536,487 | 302,818 | *** |
| U.S. imports from-- | | | | | |
| Canada <u>1</u> /..... | 5,755 | 8,008 | 23,241 | 8,797 | 11,964 |
| All other countries <u>2</u> /..... | 163,008 | 122,017 | 97,003 | 67,803 | 48,973 |
| Total..... | 168,763 | 130,025 | 120,244 | 76,600 | 60,937 |
| Ratios (percent of quantity) | | | | | |
| To apparent U.S. consumption, of imports from-- | | | | | |
| Canada..... | 0.7 | 1.4 | 4.3 | 2.9 | *** |
| All other countries.... | 19.0 | 20.7 | 18.1 | 22.4 | *** |
| Total..... | 19.7 | 22.1 | 22.4 | 25.3 | *** |
| Value (1,000 dollars) | | | | | |
| Apparent U.S. consumption..... | 394,834 | 257,133 | 222,697 | 121,675 | *** |
| U.S. imports from-- | | | | | |
| Canada <u>1</u> /..... | 1,800 | 2,228 | 7,009 | 2,242 | 4,437 |
| All other countries <u>2</u> /..... | 81,453 | 55,197 | 42,420 | 29,195 | 22,771 |
| Total..... | 83,253 | 57,425 | 49,429 | 31,427 | 27,207 |
| Ratios (percent of value) | | | | | |
| To apparent U.S. consumption, of imports from-- | | | | | |
| Canada..... | 0.5 | 0.9 | 3.1 | 1.8 | *** |
| All other countries.... | 20.6 | 21.5 | 19.0 | 24.0 | *** |
| Total..... | 21.1 | 22.4 | 22.2 | 25.8 | *** |

1/ Consists of official statistics of the Canadian Government for new steel rails.

2/ Consists of official statistics of the U.S. Department of Commerce for all countries other than Canada.

Note.--Because of rounding, figures may not add to the totals shown.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission, official statistics of the Canadian Government, and from official statistics of the U.S. Department of Commerce.

New steel rail prices generally vary with weight requirements and whether the rail is standard carbon, alloy, heat-treated, or head-hardened. Premium rails such as alloy, heat-treated, and head-hardened rails are more expensive than standard carbon steel rails. 1/ At the conference, Bethlehem stated that there were only two types of new steel rail, premium and standard. However, * * *, assistant sales manager for * * *, stated that some railroads (e.g., * * *) make a distinction between head-hardened and heat-treated rails in their rail application. 2/ Currently, CF&I is the only U.S. producer of head-hardened rails; Bethlehem's premium rail is heat-treated.

Although producers differ as to what constitutes a large-volume, medium-volume, or small-volume sale or quote, questionnaire responses indicate that small volumes are generally less than 1,000 net tons (4 to 5 miles of track), medium volumes are generally between 3,000 and 10,000 net tons (13 to 50 miles of track), and large volumes are generally greater than 10,000 net tons (50 miles of track).

After a class I railroad or a transit authority has determined the amount and types of rail needed, it solicits quotes from several rail producers. Solicitations usually contain two or three types of rail and are made approximately 6 months prior to actual need. The rail producers estimate the likely production costs for the length and type of track and submit a quote or bid, offering a quantity and price commitment to obtain all or a portion of the contract. Typically, a quote or bid takes 1 to 2 months to prepare.

After reviewing the quotes, a railroad will generally contact the producer with the higher quote to see whether it wants to be more competitive. Further negotiations on aspects of the quote, such as changes in rail requirements and types of rail, can also occur before a final price is agreed upon. Generally, the railroad does not reveal the names of the competing firms to each other, but since there are so few suppliers, supplying firms usually know who their competitors are. The producer with the lowest quote does not necessarily receive the contract if it cannot deliver the steel rails at the times required. The railroad usually chooses several producers to supply the rail.

Transit authorities usually set a specific date that sealed bids should be received from all competitors, and there are no second or revised bids. Selection is based upon price unless the delivery schedule cannot be met by the lowest bid producer. When the delivery schedule cannot be met, the firm that made the next lowest bid receives the contract.

To be chosen to supply steel rails, a producer must first be an approved supplier who is qualified by the customer's purchasing and engineering departments. The customer will then purchase a small sample of rail product from a supplier, approximately 1,000 to 2,000 net tons, for actual testing on a major line. If the sample performs adequately, the supplier is qualified to achieve higher levels of business with the company. Once a supplier has been approved, it achieves the same status as all other approved suppliers.

1/ Heat-treated rails are about 15 percent more expensive to produce than head-hardened rails. Conference transcript, p. 87.

2/ Telephone conversation * * *. Also, telephone conversations with * * * confirmed that they make a distinction between head-hardened and heat-treated rail.

Quote competition for sales to class I railroads. 1/--U.S. producers and importers of steel rails were requested to provide information on all their quotes to class I railroads between January 1986 and June 1988. Class I railroads were requested to provide all quotes received on their steel rail business awarded to domestic and Canadian suppliers. All three U.S. producers and both Canadian producers submitted information on the quote process and provided detailed information on specific projects. In addition, 10 class I railroads provided purchaser questionnaire responses.

Table 16 indicates the winners of the major contracts for production of new steel rails during the period of investigation and the value of the quotes. Aggregate quote information to class I railroads is presented by producer and year. The two Canadian producers, Algoma and Sydney, reported that they quoted to * * * different class I railroads in the United States during the period specified and were awarded a portion of business from *** railroads. * * * received a portion of *** railroads' business during January 1986-June 1988, representing *** tons. However, *** tons of this amount consisted of trial purchases by the railroads for on-track testing. 2/ * * * received a portion of *** class I railroads' business during the period of investigation, representing *** tons. However, *** tons of this amount was for on-track testing, and *** tons were sold * * *. The U.S. producers, Bethlehem Steel, and CF&I, received at least a portion of the business from almost all the class I railroads.

Information on the competition between U.S. and Canadian producers for rail sales to class I railroads is summarized in tables 17-22. Because transactions are generally made with class I railroads through quote competition and subsequent negotiations, the discussion of prices is organized according to the railroad requesting the quote. The following information describes specific projects which were quoted from January 1986 to June 1988 and involved both U.S. and Canadian suppliers of steel rails.

Quote information supplied by class I railroads is only presented when there is a discrepancy with producer or importer responses that could not be resolved. Most railroads that supplied questionnaires to the Commission did not indicate the quotes of foreign suppliers in countries other than Canada.

* * *.--* * * reported awarding *** tons of new steel rails during January 1986 to June 1988 to a Canadian rail supplier, * * *. This represented approximately *** percent of all rail purchases by * * *. Algoma

1/ Lost sales and lost revenues were alleged based on the quotes to the class I railroads. Tables 17-22 indicate the winners of the contracts for production of new steel rails during the period of investigation, the value of the quotes, and the amount quotes were lowered in order to obtain a contract.

2/ Algoma also received an award for *** tons by * * * that was also used for on-track testing.

Table 16

New steel rails: Aggregate quote information to class I railroads submitted by U.S. and Canadian producers, January 1986-June 1988

| Year, country, and producer | Class one railroads quoted | Awarded portion of quote | Awarded all of quote | Volume | |
|--------------------------------|----------------------------------|--------------------------------|----------------------------|----------------|---------------|
| | | | | quoted | awarded |
| | | | | -----Tons----- | |
| 1986: | | | | | |
| U.S.: | | | | | |
| Bethlehem..... | *** | *** | *** | *** | *** |
| CF&I..... | *** | *** | *** | *** | *** |
| Wheeling..... | *** | *** | *** | *** | *** |
| Canada: | | | | | |
| Algoma <u>1/</u> | *** | *** | *** | *** | *** |
| Sydney..... | <u>2/</u> | *** | <u>2/</u> | <u>2/</u> | <u>3/</u> *** |
| 1987: | | | | | |
| U.S.: | | | | | |
| Bethlehem..... | *** | *** | *** | *** | *** |
| CF&I..... | *** | *** | *** | *** | *** |
| Wheeling..... | *** | *** | *** | *** | *** |
| Canada: | | | | | |
| Algoma..... | *** | *** | *** | *** | *** |
| Sydney..... | *** | *** | <u>4/</u> *** | *** | *** |
| 1988 (Jan.-June): | | | | | |
| U.S.: | | | | | |
| Bethlehem..... | *** | *** | *** | *** | *** |
| CF&I..... | *** | *** | *** | *** | *** |
| Canada: | | | | | |
| Algoma <u>5/</u> | *** | *** | *** | *** | *** |
| Sydney..... | *** | *** | *** | *** | *** |

1/ * * *2/ * * *3/ * * *4/ * * *5/ * * * * * * * *

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

was awarded *** tons of business in July 1988. * * *'s aggregate purchases of new steel rails from U.S. producers during January 1986 to June 1988 were *** tons. 1/

1/ This volume represents * * *'s response to the questionnaire request for its purchases of imported and domestic product. * * *'s total domestic purchases of *** tons differs from the sum of the awards reported by producers listed in table 17; this total was *** tons. One reason for this difference is that some of the volume awarded may have been shipped in the next year.

This represented *** percent of all rail purchases by * * *. * * * also purchased *** tons (***) percent) of steel rail business from non-Canadian foreign suppliers (Japan, Germany, Luxembourg, and the United Kingdom).

* * *, director of purchasing for * * *, reported that both purchases of Canadian product represented samples for on-track testing, the second stage of * * *'s qualification procedure.

Information submitted by U.S. and Canadian firms (table 17) indicates that of the *** quotes by Canadian suppliers to * * * during the period, *** were higher than the lowest initial quote by U.S. producers and *** matched the lowest quote submitted by a U.S. producer. For example, for 132 RE standard carbon rail during January-June 1988, * * * initially quoted \$*** per ton. * * *, which quoted prices for two different quantities of 132 RE, reduced its initial quotes from \$*** to \$*** per ton and from \$*** to \$*** per ton. * * * received all of the volume offered for the \$*** quote, or *** tons and received *** tons out of *** tons on the \$*** quote. * * * reported being awarded *** tons of 132 RE at \$*** per ton. ^{1/} However, * * * reported that of the quotes it received for 132 RE rail, * * *, a supplier of German rail, provided the lowest initial quote at \$*** per ton.

Table 17

New steel rails: Quote information to * * * that involved competition between U.S. and Canadian steel rail producers, by submission source, January 1986-June 1988

* * * * *

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

* * *.--* * * reported awarding only one order of *** tons of steel rails to a Canadian producer, * * *, during the investigation period. This represented approximately *** percent of * * *'s rail purchases in 1987. * * * purchased *** percent of its rail requirements (***) tons) from U.S. producers in 1987. * * * purchased *** percent of its purchases (***) tons) from non-Canadian foreign suppliers (Luxembourg, Germany, the United Kingdom, and Japan) in 1987.

* * * reported that * * * purchased *** tons of a combination of sizes of its standard carbon rail at a price of \$*** per ton in 1987 for on-track testing (table 18). * * * also reported an award of *** tons priced at \$*** per ton, also for a combination of sizes of its standard carbon rail.

^{1/} * * * was awarded *** tons at \$*** per ton, which, as noted previously, was for on-track testing.

Table 18

New steel rails: Quote information to * * * that involved competition between U.S. and Canadian steel rail producers, by submission source, January 1986-June 1988

* * * * *

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

* * * reported that it paid \$*** per ton for the ***-ton order. * * * was awarded a number of contracts for various size rails at prices ranging from \$*** per ton for 122 CB rail to \$*** per ton for 115 RE rail. * * * reported that in each instance it reduced the value in its second quote. * * * received one contract in 1987 for *** tons at \$*** per ton.

* * *, vice president for purchasing and materials for * * *, reported that * * * bases its purchasing decisions on quality, engineer preference, price, and the ability of the supplier to meet delivery schedules. * * * always purchases rail from several suppliers rather than from a single source. * * * stated that * * *, * * *, * * *.

* * *.--* * * reported purchasing *** tons of steel rail from Canada during January 1986-June 1988. This represented approximately *** percent of * * *'s rail purchases during this period. * * * purchased *** tons of steel rail from U.S. producers, representing *** percent of all its rail purchases. * * * purchased *** tons from non-Canadian foreign suppliers, representing *** percent of its rail purchases.

Quote information submitted by U.S. and Canadian producers (table 19) shows that * * * purchased a sample of *** tons from a Canadian producer, * * *, for on-track testing in * * * 1987. The price was \$*** per ton higher than the price charged by * * * for the sale of *** tons. * * * also purchased *** tons of steel rail from * * * in * * * 1987 at \$*** per ton, a reduction from its initial quote of \$*** per ton but \$*** per ton higher than its previous sale value. The price for * * * rail was \$*** below the quote offered by * * *, but * * * was awarded business of three times the volume awarded to

Table 19

New steel rails: Quote information to * * * that involved competition between U.S. and Canadian steel rail producers, by submission source, January 1986-June 1988

* * * * *

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

* * *. The other *** quotes awarded to * * * in 1987 were for product sold at reduced prices owing to off-specifications and a trade-in of other rail material.

* * *, assistant vice president of purchasing for * * *, reported that * * * bases its purchasing decisions on quality, price, delivery, and longevity. It purchases premium hard-headed rail, which accounts for * * * of its rail requirements, from domestic and foreign suppliers. * * * rail but, according to * * *, because of capacity constraints will only sell a specific amount to * * * that is pegged to * * *. 1/ Although * * * purchased *** tons of * * * premium rail in 1987, * * * had quality problems with rail purchased from * * * during that year because of * * *.

* * *.--* * * reported purchasing *** tons of Canadian rail during January-June 1988. No U.S.-produced rail was purchased during the entire period of investigation. * * * purchased an additional *** tons of rail from a supplier of rail produced in Luxembourg. The three factors that * * * considers in its purchasing decisions are quality, price, and delivery. * * *. This accounts for * * *'s * * * purchases of new steel rails over the period of investigation.

Quote information submitted by * * * (table 20) shows that for the *** quotes involving domestic and Canadian competition, the prices quoted by the Canadian supplier were below the prices offered by the domestic producers. * * * received the award for *** tons of standard rail. * * * offered a price quote for the standard rail that was \$*** per ton below * * *'s quote and \$*** per ton below * * *'s quote, although it was \$*** per ton higher than the lowest bidder, * * *, which also offered Canadian product. * * * was not selected because it could not meet * * *'s delivery schedule.

Table 20

New steel rails: Quote information to * * * that involved competition between U.S. and Canadian steel rail producers, by submission source, January 1986-June 1988

* * * * * * *

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

In the other bid involving Canadian competition, the lowest bidder, * * *, a supplier of Luxembourg-produced rail, received the award of *** tons. * * *'s price quote was \$*** per ton below the price offered by * * *.

* * *.--* * * reported that it did not purchase any rails produced in Canada during the period under investigation. All rail purchases since 1986 have been from a U.S. supplier, * * *. Quote information submitted by U.S. and

1/ * * *, assistant sales manager for * * *, reports that * * * has in the past pegged sales of * * *, but this system is no longer in effect.

Canadian producers (table 21) shows that in the *** inquiries involving domestic and Canadian competition, the U.S. producer, ***, provided the lowest quote on *** occasions and received the order from ***. In each instance, *** reduced the value of its initial quote in its final quote. In *** 1987, ***'s final quotes for 115RE and 136RE were *** and *** percent below its initial quotes. In *** 1987, ***'s final quotes for 115RE and 136RE were *** and *** percent below its initial quotes.

Table 21

New steel rails: Quote information to *** that involved competition between U.S. and Canadian steel rail producers, by submission source, January 1986-June 1988

* * * * *

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

.-- reported that it has traditionally purchased nearly all its requirements from U.S. suppliers. Quote information from U.S. and Canadian producers (table 22) indicates that in the *** inquiry reported involving competition between domestic and Canadian suppliers, the low quote was submitted by a U.S. producer, ***, who received the award of *** tons after lowering its quote. ***, vice president of purchasing for ***, stated that *** has purchased its rail requirements from a single source because it receives a better overall price by combining orders of standard and premium rail with one supplier. *** also commented that in 1988 *** had quality problems with rail produced by ***.

Table 22

New steel rails: Quote information to *** that involved competition between U.S. and Canadian steel rail producers, by submission source, January 1986-June 1988

* * * * *

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

.-- reported in its purchaser questionnaire that it purchased *** tons of Canadian product in 1985. It purchased only domestic product in 1987. ^{1/} Quote information submitted by *** (table 22) shows that while the quote offered by *** for the Canadian product was the low quote, *** selected ***, who supplied a U.S.-produced rail. *** quoted a price \$*** per ton higher than *** and received the order for *** tons.

^{1/} *** only reported new steel rail purchases in 1985 and 1987.

* * *.--Quote information submitted by U.S. and Canadian producers to * * * (table 22) shows that * * *, who provided the lowest quote, was awarded standard rail business totaling *** tons. The final prices offered by * * * were approximately \$*** per ton lower than the price initially offered by * * * and also lower than * * *'s initial quote. * * * also won a small premium contract of *** tons for approximately \$*** per ton less than the Canadian firm's initial quotes, although * * *'s initial price was \$*** per ton above the price offered by the Canadian firm. * * * provided the lowest quote at \$*** per ton.

Bid competition with transit authorities.--U.S. producers and importers of steel rails were also requested to provide information on all bids to transit authorities, won or lost, between January 1986 and June 1988 that involved competition between U.S. and Canadian suppliers. All three U.S. producers and both Canadian producers submitted information on the bid process. Aggregate quote information to transit authorities is presented by producer and year in table 23.

Table 23

New steel rails: Aggregate bid information to transit authorities by U.S. and Canadian producers, January 1986-June 1988

* * * * *

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Both Canadian producers reported that they * * *. * * * reported that it does not actively pursue this market because most U.S. transit systems follow buy-American policies. Transit authorities that receive Federal funds are often subject to buy-American policies that require the purchase of domestic product unless the price of the foreign rail is 25 percent below the price of the domestic product. In New York State, the foreign price must be 7 percent below the domestic bid price to allow foreign purchases. * * *. * * *. * * *. * * *.

* * *. Over the 2-1/2 year period, * * * reported being awarded *** tons of rails by transit authorities. This represented over *** percent of all transit business reported. * * * was awarded business by only one transit authority during the period under investigation. * * *.

Exchange rates

Quarterly data reported by the International Monetary Fund indicate that during January 1985-June 1988 the nominal value of the Canadian dollar

appreciated 10.0 percent relative to the U.S. dollar (table 24). 1/ Adjusted for movements in producer price indices in the United States and Canada, the real value of the Canadian currency registered an overall appreciation equivalent to 15.4 percent as of April-June 1988 relative to that of January-March 1985.

Table 24

U.S.-Canadian exchange rates: 1/ Nominal exchange-rates of the Canadian dollar in U.S. dollars, real exchange-rate equivalents, and producer price indicators in the United States and Canada, 2/ indexed by quarters, January 1985-June 1988

| Period | U.S. Producer Price Index | Canadian Producer Price Index | Nominal exchange- rate index ---US dollars/Can\$--- | Real exchange- rate index <u>3/</u> |
|--------------------|---------------------------------|-------------------------------------|--|---|
| 1985: | | | | |
| January-March..... | 100.0 | 100.0 | 100.0 | 100.0 |
| April-June..... | 100.1 | 100.5 | 98.8 | 99.3 |
| July-September.... | 99.4 | 100.5 | 99.5 | 100.7 |
| October-December.. | 100.0 | 101.3 | 98.1 | 99.4 |
| 1986: | | | | |
| January-March..... | 98.5 | 102.3 | 96.4 | 100.2 |
| April-June..... | 96.6 | 100.8 | 97.8 | 102.0 |
| July-September.... | 96.2 | 101.0 | 97.7 | 102.6 |
| October-December.. | 96.5 | 101.6 | 97.7 | 102.9 |
| 1987: | | | | |
| January-March..... | 97.7 | 102.1 | 101.2 | 105.8 |
| April-June..... | 99.2 | 103.4 | 101.5 | 105.8 |
| July-September.... | 100.3 | 104.9 | 102.4 | 107.0 |
| October-December.. | 100.8 | 106.0 | 103.2 | 108.6 |
| 1988: | | | | |
| January-March..... | 101.2 | 106.4 | 106.8 | 112.2 |
| April-June..... | 102.5 | <u>4/</u> 107.5 | 110.0 | <u>4/</u> 115.4 |

1/ Exchange rates expressed in U.S. dollars per Canadian dollar.

2/ Producer price indicators--intended to measure final product prices--are based on average quarterly indices presented in line 63 of the International Financial Statistics.

3/ The indexed real exchange rate represents the nominal exchange rate adjusted for relative movements in Producer Price Indices in the United States and Canada. Producer prices in the United States increased 2.5 percent during the period January 1985 through June 1988 compared with a 7.5-percent increase in Canadian prices during the same period.

4/ Data are derived from Canadian Producer Price Indices reported for April-May only.

Note.--January-March 1985=100.0.

Source: International Monetary Fund, International Financial Statistics, July 1988.



A-1

APPENDIX A
FEDERAL REGISTER NOTICES

[Investigations Nos. 701-TA-297 (Preliminary) and 731-TA-422 (Preliminary)]

New Steel Rails from Canada

AGENCY: United States International Trade Commission.

ACTION: Institution of preliminary countervailing and antidumping investigations and scheduling of a conference to be held in connection with the investigations.

SUMMARY: The Commission hereby gives notice of the institution of preliminary countervailing duty investigation No. 701-TA-297 (Preliminary) under section 703(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a)) to determine whether there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Canada of new steel rails¹ that are alleged to be subsidized by the Government of Canada.

The Commission hereby also gives notice of the institution of preliminary antidumping investigation No. 731-TA-422 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) to determine whether there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Canada of new steel rails¹ that are alleged to be sold in the United States at less than fair value.

As provided in §§ 703(a) and 733(a), the Commission must complete preliminary countervailing and antidumping investigations in 45 days, or in these cases by November 10, 1988.

¹ For the purposes of these investigations, "new steel rails" include rails, whether or not of alloy steel, provided for in items 610.20, 610.21, and 608.42 of the Tariff Schedules of the United States (subheadings 7302.10.10, 7302.10.50, and 8548.00.00 of the Harmonized Tariff Schedule of the United States). Specifically excluded from the scope of these investigations are imports of "light rails," which are 60 pounds or less per yard, such as are used in amusement park rides. "Relay rails," which are used rails that have been taken up from a primary railroad track and are suitable to be reused as rails (such as on a secondary rail line or in a rail yard), are also excluded.

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 207, subparts A and B (19 CFR Part 207) (see commission interim rules (53 FR 33034, August 29, 1988)), and Part 201, subparts A through E (19 CFR part 201).

EFFECTIVE DATE: September 26, 1988.

FOR FURTHER INFORMATION CONTACT: Tedford Briggs (202-252-1181), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-252-1000.

SUPPLEMENTARY INFORMATION:

Background. These investigations are being instituted in response to a petition filed on September 26, 1988, by Bethlehem Steel Corporation, Bethlehem, PA.

Participation in the investigations. Persons wishing to participate in these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules (19 CFR 201.11), not later than seven (7) days after publication of this notice in the Federal Register. Any entry of appearance filed after this date will be referred to the Chairman, who will determine whether to accept the late entry for good cause shown by the person desiring to file the entry.

Service list.—Pursuant to § 201.11(d) of the Commission's rules (19 CFR 201.11(d)), the Secretary will prepare a service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance. In accordance with §§ 201.16(c) and 207.3 of the rules (19 CFR 201.16(c) and 207.3), each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by the service list), and a certificate of service must accompany the document. The Secretary will not accept a document for filing without a certificate of service.

Limited disclosure of business proprietary information under a protective order.—Pursuant to § 207.7(a) of the Commission's rules (19 CFR 207.7(a)), the Secretary will make available business proprietary

information gathered in these preliminary investigations to authorized applicants under a protective order, provided that the application be made not later than seven (7) days after the publication of this notice in the Federal Register. A separate service list will be maintained by the Secretary for those parties authorized to receive business proprietary information under a protective order. The Secretary will not accept any submission containing business proprietary information with a certificate of service indicating that it has been served on all the parties that are authorized to receive such information under a protective order.

Conference.—The Director of Operations of the Commission has scheduled a conference in connection with these investigations for 9:30 a.m. on October 19, 1988, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Parties wishing to participate in the conference should contact Tedford Briggs (202-252-1181) not later than October 14, 1988, to arrange for their appearance. Parties in support of the imposition of countervailing and/or antidumping duties in these investigations and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference.

Written submissions.—Any person may submit to the Commission on or before October 21, 1988, a written brief containing information and arguments pertinent to the subject matter of the investigations, as provided in § 207.15 of the Commission's rules (19 CFR 207.15). A signed original and fourteen (14) copies of each submission must be filed with the Secretary to the Commission in accordance with § 201.8 of the rules (19 CFR 201.8). All written submissions except for business proprietary information will be available for public inspection during regular business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary to the Commission.

Any business information for which business proprietary treatment is desired must be submitted separately. The envelope and all pages of such submission must be clearly labeled "Business Proprietary Information." Business proprietary submissions and requests for business treatment must conform with the requirements of §§ 201.6 and 207.7 of the Commission's rules (19 CFR 201.6 and 207.7).

Parties which obtain disclosure of business proprietary information pursuant to § 207.7(a) of the Commission's rules (19 CFR 207.7(a))

may comment on such information in their written briefs, and may also file additional written comments on such information no later than October 24, 1988. Such additional comments must be limited to comments on business proprietary information received in or after the written briefs.

Authority: These investigations are being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.12 of the Commission's rules (19 CFR 207.12)).

By order of the Commission.

Kenneth R. Mason,
Secretary.

Issued: September 28, 1988.

[FR Doc. 88-22691 Filed 9-30-88; 8:45 am]

BILLING CODE 7020-02-M

DEPARTMENT OF COMMERCE

International Trade Administration

[A-122-804]

**Initiation of Antidumping Duty
Investigation: New Steel Rail, Except
Light Rail, From Canada**

AGENCY: Import Administration,
International Trade Administration,
Commerce.

ACTION: Notice.

SUMMARY: On the basis of a petition filed in proper form with the U.S. Department of Commerce, we are initiating an antidumping duty investigation to determine whether imports of new steel rail, except light rail, from Canada are being, or are likely to be, sold in the United States at less than fair value. We are notifying the U.S. International Trade Commission (ITC) of this action so that it may determine whether imports of this product materially injure, or threaten material injury to, a U.S. industry. If this investigation proceeds normally, the ITC will make its preliminary determination on or before November 10, 1988. If that determination is affirmative, we will make a preliminary determination on or before March 6, 1989.

EFFECTIVE DATE: October 21, 1988.

FOR FURTHER INFORMATION CONTACT:

Loc Nguyen or Charles Wilson, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 377-3530 or (202) 377-5288.

SUPPLEMENTARY INFORMATION:

The Petition

On September 26, 1988, we received a petition filed in proper form by Bethlehem Steel Corporation on behalf of the domestic industry engaged in the production of rail. In compliance with the filing requirements of 19 CFR 353.36, petitioner alleges that imports of new steel rail, except light rail, from Canada are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Tariff Act of 1930, as amended (the Act), and that these imports materially injure, or threaten material injury to, a U.S. industry.

If any interested party as described under paragraphs (C), (D), (E), or (F) of section 771(9) of the Act wishes to register support of or opposition to this petition, please file written notification with the Commerce official cited in the "For Further Information Contact" section of this notice.

United States Price and Foreign Market Value

Petitioner calculated U.S. price using various methodologies. U.S. price was based on Department of Commerce statistics on imports of the subject merchandise, Canadian export statistics, U.S. import statistics on a monthly basis, port by port, as well as specific prices from known import transactions obtained by petitioner from customers in the United States.

Petitioner also estimated Canadian foreign market value using several methodologies. Petitioner's calculations were based on list prices from the *American Metal Market*, various issues, as well as discounted list prices, adjusted according to the Eastern and Western spot market quotations recorded in *World Steel Intelligence*, *Pricetrack*. Furthermore, petitioner used the cost of production in Canada, based on its own production costs, U.S. exports to Canada (using Department of Commerce statistics), and petitioner's own prices for export to Canada as bases for calculating foreign market value.

Base on a comparison of United States price and foreign market value, petitioner alleges dumping margins ranging from 39.7% to 241.8%.

Initiation of Investigation

Under section 732(c) of the Act, we must determine, within 20 days after a petition is filed, whether it sets forth the allegations necessary for the initiation of an antidumping duty investigation, and whether it contains information reasonably available to the petitioner supporting the allegations.

We examined the petition on new steel rail, except light rail, from Canada and found that it meets the requirements of section 732(b) of the Act. Therefore, in accordance with section 732 of the Act, we are initiating an antidumping duty investigation to determine whether imports of new steel rail, except light rail, from Canada are being, or are likely to be, sold in the United States at less than fair value. If our investigation proceeds normally, we will make our preliminary determination by March 6, 1989.

Scope of Investigation

The United States has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the U.S. tariff schedules will be fully converted to the *Harmonized Tariff Schedule* (HTS) and all merchandise entered or withdrawn from warehouse for consumption on or after this date will be classified solely according to the appropriate HTS item number(s). Until that time, however, the Department will be providing both the appropriate *Tariff Schedules of the United States Annotated* (TSUSA) item number(s) and the appropriate HTS item number(s) with its product descriptions. As with the TSUSA, the HTS item numbers are provided for convenience and customs purposes. The written description remains dispositive as to the scope of the product coverage.

We are requesting petitioners to include the appropriate HTS item number(s) as well as the TSUSA item number(s) in all petitions filed with the Department through the end of this year. A reference copy of the HTS is available for consultation in the Central Records Unit, Room B-699, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington DC 20230. Additionally, all U.S. Customs officers have reference copies, and petitioners may contact the Import Specialist at their local customs office to consult the schedule.

The product covered by this investigation is new steel rail, except light rail, currently provided for under TSUSA item numbers 610.2010, 610.2025, 610.2100, 688.4280 and currently classifiable under HTS item numbers 7302.10.1020, 7302.10.1040, 7302.10.5000, and 8548.00.0000.

Steel rail, whether of carbon, high carbon, alloy or other quality steel, includes, but is not limited to, standard rails, all main line sections (over 60 pounds per yard), heat-treated or head-hardened (premium) rails, transit rails, contact rail (or "third rail") and crane rails. Rails are used by the railroad industry, by rapid transit lines, by subways, in mines and in industrial applications.

Specifically excluded from this investigation are light rails which are 60 pounds or less per yard. Also excluded are relay rails which are used rails taken up from a primary railroad track and relaid in a railroad yard or on a secondary track.

Notification of ITC

Section 732(d) of the Act requires us to notify the ITC of this action and to provide it with the information we used to arrive at this determination. We will notify the ITC and make available to it all nonprivileged and nonproprietary information. We will allow the ITC access to all privileged and business proprietary information in our files, provided it confirms in writing that it will not disclose such information either publicly or under administrative protective order without the written consent of the Assistant Secretary for Import Administration.

Preliminary Determination by ITC

The ITC will determine by November 10, 1988, whether there is a reasonable indication that imports of new steel rail, except light rail, from Canada materially injure, or threaten material injury to, a U.S. industry. If its determination is negative, the investigation will be terminated; otherwise, it will proceed.

according to the statutory and regulatory procedures.

This notice is published pursuant to section 732(c)(2) of the Act.

Jan W. Mares,
Assistant Secretary for Import Administration.

October 17, 1988.

[FR Doc. 08-24421 Filed 10-20-88; 8:45 am]

BILLING CODE 3510-DS-M

[C-122-805]

Initiation of Countervailing Duty Investigation: New Steel Rail, Except Light Rail, From Canada

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: On the basis of a petition filed in proper form with the U.S. Department of Commerce, we are initiating a countervailing duty investigation to determine whether manufacturers, producers, or exporters in Canada of new steel rail, except light rail (steel rails), as described in the "Scope of Investigation" section of this notice, receive benefits which constitute subsidies within the meaning of the countervailing duty law. We are notifying the U.S. International Trade Commission (ITC) of this action, so that it may determine whether imports from Canada materially injure, or threaten material injury to, a U.S. industry. If this investigation proceeds normally, we will make our preliminary determination on or before December 20, 1988.

EFFECTIVE DATE: October 21, 1988.

FOR FURTHER INFORMATION CONTACT: Roy Malmrose or Barbara Tillman, Office of Countervailing Duty Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 377-2815 and (202) 377-2438.

SUPPLEMENTARY INFORMATION:

The Petition

On September 26, 1988, we received a petition in proper form from Bethlehem Steel Corporation, filed on behalf of the U.S. industry producing steel rails. In addition to the petitioner, the only remaining producer of steel rails in the United States is CF&I Steel Corporation. In compliance with the filing requirements of § 355.26 of the Commerce Regulations (19 CFR 355.26), the petition alleges that manufacturers, producers, or exporters of steel rails in

Canada receive subsidies within the meaning of section 701 of the Tariff Act of 1930, as amended (the Act).

Since Canada is a "country under the Agreement" within the meaning of section 701(b) of the Act, Title VII of the Act applies to this investigation, and the ITC is required to determine whether imports of the subject merchandise from Canada materially injure, or threaten material injury to, the U.S. industry.

Petitioner has alleged that it has standing to file the petition. Specifically, petitioner has alleged that it is an interested party as defined under section 771(9)(C) of the Act and that it has filed the petition on behalf of the U.S. industry manufacturing the products that are subject to this investigation. If any interested party as described under paragraphs (C), (D), (E) or (F) of section 771(9) of the Act wishes to register support of or opposition to this petition, please file written notification with the Commerce official cited in the "For Further Information Contact" section of this notice.

Initiation of Investigation

Under section 702(c) of the Act, we must make the determination on whether to initiate a countervailing duty proceeding within 20 days after a petition is filed. Section 702(b) of the Act requires the Department to initiate a countervailing duty proceeding whenever an interested party files a petition, on behalf of an industry, that (1) alleges the elements necessary for the imposition of a duty under section 701(a), and (2) is accompanied by information reasonably available to the petitioner supporting the allegations. We have examined the petition on steel rails from Canada and have found that for most of the programs alleged the petition meets these requirements. Therefore, we are initiating a countervailing duty investigation to determine whether Canadian manufacturers, producers, or exporters of steel rails, as described in the "Scope of Investigation" section of this notice, receive subsidies. However, we are not initiating an investigation for certain programs because the petition failed to allege the elements necessary for the imposition of a duty or in some instances failed to provide the necessary supporting information. If our investigation proceeds normally, we will make our preliminary determination on or before December 20, 1988.

Scope of Investigation

The United States has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1,

1989, the U.S. tariff schedules will be fully converted to this Harmonized Tariff Schedule (HTS) and all merchandise entered or withdrawn from warehouse for consumption on or after this date will be classified solely according to the appropriate HTS item number(s). Until that time, however, the Department will be providing both the appropriate Tariff Schedules of the United States Annotated (TSUSA) item number(s) and the appropriate HTS item number(s) with its product descriptions. As with the TSUSA, the HTS item numbers are provided for convenience and customs purposes. The written description remains dispositive as to the scope of the product coverage.

We are requesting petitioners to include the appropriate HTS item number(s) as well as the TSUSA item number(s) in all new petitions filed with the Department through the end of this year. A reference copy of the HTS schedule is available for consultation in the Central Records Unit, Room B-099, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230. Additionally, all Customs Offices have reference copies and petitioners may contact the Import Specialist at their local Customs office to consult the schedule.

The product covered by this investigation is new steel rail, except light rail, currently provided for under TSUSA Item numbers 610.2010, 601.2025, 610.2100, 688.4280 and currently classifiable under HTS item numbers 7302.10.1020, 7302.10.1040, 7302.10.5000, and 8548.00.0000.

Steel rail, whether of carbon, high carbon, alloy or other quality steel, includes but is not limited to, standard rails, all main line sections (over 60 pounds per yard), heat-treated or head-hardened (premium) rails, transit rails, contact rail (or "third rail") and crane rails. Rails are used by the railroad industry, by rapid transit lines, by subways, in mines and in industrial applications.

Specifically excluded from this investigation are light rails which are 60 pounds or less per yard. Also excluded are relay rails which are used rails taken up from a primary railroad track and relaid in a railroad yard or on a secondary track.

Allegations of Bounties or Grants

Petitioner lists a number of practices by the Government of Canada, and the provincial governments of Ontario and Nova Scotia which allegedly confer subsidies on manufacturers, producers, or exporters of steel rails in Canada. We

are initiating an investigation of the following programs:

A. Federal Programs

1. Income Tax Exemption for Sysco.
2. Certain Investment Tax Credits.
3. Regional Development Incentive Program and Industrial and Regional Development Program.
4. Loans Under the Enterprise Development Program.
5. Defense Industry Productivity Program.
6. Promotional Projects Program.
7. Program for Export Market Development.
8. Federal Expansion and Development/Northern Ontario.

B. Joint Federal-Provincial Programs

1. Equity Infusions, Grants, Loans and Loan Guarantees Provided to Sysco.
2. Iron Ore Freight Subsidy to Algoma.
3. Mineral Development Agreement Benefits to Algoma.
4. General Development Agreements.
5. Economic and Regional Development Agreements.

C. Provincial Programs

1. Ontario Development Corporation Export Support Loans, Other Loans and Loan Guarantees.

2. Provision of Subsidized Electricity by Ontario Hydro to Algoma Steel.

Although not specifically alleged by petitioner, we are also investigating whether the manufacturers, producers or exporters of steel rails in Canada receive countervailable benefits under the following programs:

1. Community-Based Industrial Adjustment Program Grants.
2. Export Credit Financing.

We are not initiating an investigation of the programs listed below. Section 702(b) of the Act requires the Department to initiate a countervailing duty proceeding whenever an interested party files a petition, on behalf of an industry, that (1) alleges the elements necessary for the imposition of a duty under section 701(a), and (2) is accompanied by information reasonably available to the petitioner supporting the allegations. All the programs listed below were alleged to confer domestic subsidies. The elements which must be alleged for a domestic subsidy program are: (1) Specificity, (i.e., the program is limited to a specific enterprise or industry or group of enterprises or industries, and (2) provision of a benefit (i.e., a subsidy paid or bestowed directly or indirectly on the manufacturer, producer, or exporter of any class or kind of merchandise). For upstream subsidies, the initiation threshold is higher. Under section 701(e) of the Act,

the Department must have reasonable grounds to believe or suspect that an upstream subsidy, as defined in section 771A of the Act, is being paid or bestowed upon the merchandise under investigation. For the programs listed below, the requirements of section 702(b) or 701(e) of the Act were not fulfilled in the petition.

1. Provision of Subsidized Electric Energy by Hydro-Quebec

Petitioner alleges that an upstream subsidy is conferred upon Algoma in the form of low-cost electric energy. Specifically, petitioner alleges that Hydro-Quebec, a provincially-owned power company, is being subsidized and that the subsidy passes through Algoma's supplier of electricity, Ontario Hydro, to Algoma.

The provisions of section 771A(a) of the Act define an upstream subsidy as:

Any subsidy described in section 771(5)(B)(i), (ii), (iii), or (iv) by the government of a country that—

- (1) Is paid or bestowed by that government with respect to a product (hereinafter referred to as an "input product") that is used in the manufacture or production in that country of merchandise which is the subject of a countervailing duty proceeding;
- (2) In the judgment of the administering authority bestows a competitive benefit on the merchandise; and
- (3) Has a significant effect on the cost of manufacturing or producing the merchandise.

Petitioner maintains that Hydro-Quebec is primarily subsidized by reason of a contract it has for the purchase of electricity from the provincial power authority in Newfoundland. Assuming *arguendo* that electricity is an input as defined by the Act, petitioner has not provided any evidence which indicates that the contract between Hydro-Quebec and the Newfoundland power authority was not an arms-length contract made in the ordinary course of business. On the contrary, the information submitted tends to show that although the provisions of the contract may now favor Hydro-Quebec, at the time the contract was negotiated it was considered a mutually beneficial contract negotiated and agreed to at arms-length. Thus, petitioner's primary allegation regarding the subsidization of the input appears unsubstantiated.

Moreover, with respect to the competitive benefit to Algoma of the subsidized input, the petitioner alleges it can be measured by the incentive rates provided to large volume users by Ontario Hydro. We are initiating an investigation on the alleged provision of subsidized electricity by Ontario Hydro. Consequently, the alleged subsidy

provided by this program will be examined separately. Petitioner has not alleged or demonstrated any competitive benefit separate from the incentive rate structure.

Finally, we note that the Department has previously determined that the government of one political jurisdiction cannot subsidize production in another political jurisdiction [See *Initiation of Countervailing Duty Investigation of Carbon Steel Wire Rod From Saudi Arabia*, (50 FR-28231, 28232, July 11, 1985).] Although this determination was based on the language in section 303 of the Act, which defines a "bounty or grant," section 771(5) of the Act states that the term "bounty or grant" has the same meaning as the term "subsidy".

Based on the foregoing, we are not initiating on this upstream subsidy allegation because the petitioner has not provided reasonable grounds for the Department to believe or suspect that an upstream subsidy has in fact been paid or bestowed upon the production of steel rails in Canada.

2. Income Tax Exemption for Government-Owned Companies other than Sysco

Petitioner alleges that the tax exemption for Crown Corporations is "an important benefit in connection with the provision of subsidized electricity or coal to Canadian steel companies, because the Canadian provincial power companies are state-owned Crown Corporations". This statement raises the issue of whether an upstream subsidy is being provided to the producers of steel rail in Canada. However, petitioner has not made an upstream allegation regarding this program. Therefore, we are not initiating an investigation on the tax-exempt status of state-owned provincial power companies.

With respect to the Cape Breton Development Corporation (Devco), a supplier of coal to Sysco, we note that despite its status as a Crown Corporation, the supporting information provided by the petitioner states that Devco is not tax-exempt. Therefore, we are not initiating an investigation of the alleged tax-exempt status of Devco.

3. Special Tax Subsidy to Algoma

Petitioner alleges that a tax ruling with respect to a joint venture between Algoma Steel and its parent company, Canadian Pacific Railroad, was exceptional and not usually available under Canadian tax laws and constitutes *prima facie* preferential treatment countervailable under section 701 of the Act. Information in the petition indicates that the tax ruling

permitted the financing of a seamless tube mill. Petitioner alleges that, although earmarked for the tube mill, the money generated from the tax ruling in fact benefitted all of Algoma's investment programs, and in particular, permitted the modernization of its rail facilities.

Petitioner, however, has not alleged how this tax ruling confers a domestic subsidy. A specific allegation that this benefit is limited to a specific enterprise or industry or group of enterprises or industries was not made. Furthermore, petitioner has not provided any information to indicate that the tax ruling was mandated by the government rather than a neutral interpretation of Canadian tax law. Therefore, we have no basis on which to initiate an investigation on this program.

4. Other Investment Tax Credits

Petitioner alleges that a variety of investment tax credits provide a benefit to producers or exporters of steel rails in Canada. We are not initiating an investigation on the following types of investment tax credits.

- Tax credits for investment in "qualified property"—we are initiating an investigation on the tax credits given for investments in "qualified property" made in certain regions of Canada. Petitioner also argues, however, that we must make a determination of whether the basic tax credit rate of seven percent for investments in "qualified property" is limited to specific industries on a *de facto* basis. We have previously determined that the seven percent credit is not countervailable because it is not limited to a specific enterprise or industry or group of enterprises or industries. [See *Final Affirmative Countervailing Duty Determination: Certain Fresh Atlantic Groundfish from Canada* (51 FR 10041; March 24, 1986) (*Groundfish*) and *Final Affirmative Countervailing Duty Determination: Oil Country Tubular Goods from Canada* (51 FR 15037, April 22, 1986) (OCTG).] Absent the provision of new evidence, or an allegation of changed circumstances, we have no basis upon which to re-initiate an investigation of this type of investment tax credit.

- Tax credits for research and development expenses—In *OCTG*, we determined that investment tax credits of 10 percent of research and development expenses (20 percent for small businesses) were not countervailable because they are not limited to a specific enterprise or industry or group of enterprises or industries. Absent the provision of new evidence, or an allegation of changed circumstances, we have no basis upon

which to re-initiate an investigation of this type of investment tax credit.

5. Enterprise Development Program: Loan Guarantees and Grants

Availability of loan guarantees and grants through the Enterprise Development Program was investigated in *Groundfish*. We determined that the provision of loan guarantees and grants under this program was not limited to a specific enterprise or industry or group of enterprises or industries. Absent the provision of new evidence, or an allegation of changed circumstances, we have no basis upon which to re-initiate an investigation of the provision of loan guarantees and grants under this program.

6. Indirect Government Intervention

Petitioner alleges that, in 1982/1983, the federal and Nova Scotia governments agreed to share the cost of stockpiling rails produced by Sysco until the time they were needed by the purchaser, Canadian National Railroad (CNR), which is a Crown Corporation. However, petitioner has not made an allegation that this alleged benefit is limited to a specific enterprise or industry or group of enterprises or industries.

Petitioner also alleges that a recent agreement between Sysco and CNR, whereby CNR agreed to purchase 80 percent of its needs from Sysco, constitutes a countervailable subsidy benefiting a specific company. However, petitioner has not provided any evidence to indicate that this was a government provided or mandated benefit. Nothing in the petition indicates that this contract was not strictly commercial in nature and was not made at arms-length in the normal course of business.

7. Government Assistance to Algoma's Reduction in Force Program

Petitioner alleges that the government has assisted Algoma in directing laid-off workers towards retraining, relocation, alternate employment and other available programs and that this constitutes an assumption of cost by the government. However, petitioner has not provided any evidence that the government has assumed a pre-existing or contractual obligation of the company. Therefore, the elements of an assumption of cost subsidy do not appear to be present.

8. Cape Breton Development Corporation (Devco)

Petitioner alleges that Devco, a Crown Corporation sells subsidized coal to Sysco. Petitioner alleges that the sale of

subsidized coal to Sysco constitutes, either the provision of a good at a preferential rate, an assumption of cost by the federal government or an upstream subsidy. Petitioner provides evidence which indicates that Devco has incurred operating losses, and that it sells coal at below its cost. However, petitioner has not made any allegation that the subsidy is limited to a specific enterprise or industry or group of enterprises or industries. Furthermore, a sufficient upstream allegation has not been made by the petitioner in accordance with section 771A of the Act.

9. Other Mineral Development Agreements

As discussed above, the purpose of these agreements is to provide geoscience data, mining and mineral processing technology, and market and economic studies to the mining sector. This raises the issue of whether an upstream subsidy is being provided to producers or exporters of steel rail in Canada. However, a sufficient upstream allegation in this regard has not been made by the petitioner in accordance with section 771A of the Act. Petitioner also alleges that benefits under MDAs constitute an assumption of cost by the governments involved and the provision of goods at preferential rates. However, petitioner has not provided any evidence that the government assumed a pre-existing or contractual obligation, or that the government is providing goods or services to some industries at a lower price than to others. Therefore, we are not initiating an investigation of the MDAs except with respect to assistance under the MDAs provided to Algoma.

Notification of ITC

Section 702(d) of the Act requires us to notify the ITC of this action, and to provide it with the information we used to arrive at this determination. We will notify the ITC and make available to it all nonprivileged and nonproprietary information in our files, provided it confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Assistant Secretary for Import Administration.

Preliminary Determination by ITC

The ITC will determine by November 10, 1988, whether there is a reasonable indication that imports of steel rails from Canada materially injure, or threaten material injury to, a U.S. industry. If its determination is negative, this investigation will terminate; otherwise, this investigation will

continue according to the statutory procedures. This notice is published pursuant to section 702(c)(2) of the Act.

Jan W. Mares,
Assistant Secretary for Import Administration.

October 17, 1988.

[FR Doc. 88-24420 Filed 10-20-88; 8:45 am]

BILLING CODE 3510-05-M

B-1

APPENDIX B

LIST OF WITNESSES APPEARING AT THE COMMISSION'S CONFERENCE

CALENDAR OF PUBLIC CONFERENCE

Investigations Nos. 701-TA-297 (Preliminary)
and 731-TA-422 (Preliminary)

NEW STEEL RAILS FROM CANADA

Those listed below appeared at the United States International Trade Commission's conference held in connection with the subject investigations on October 19, 1988, in the Hearing Room of the USITC Building, 500 E Street SW., Washington, DC.

In support of the imposition of antidumping duties

Stewart and Stewart--Counsel
Washington, DC
on behalf of--

Bethlehem Steel Corp., Bethlehem, PA
Steelton Rail Products & Pipe Division, Steelton, PA

Timothy Lewis, President, Steelton Rail Products
& Pipe Division
Elden D. Johnson, Manager, Sales and Marketing
Thomas W. Sojda, Business and Marketing Manager
David E. Miller, Manager, Finance
Robert E. Watkins, Jr., Planning Manager

Eugene L. Stewart--OF COUNSEL

L. Charles Carrier, Economic Consultant, Stewart & Stewart

CALENDAR OF PUBLIC CONFERENCE--Continued

In opposition to the imposition of antidumping duties

Dow, Lohnes & Albertson--Counsel
Washington, DC
on behalf of--

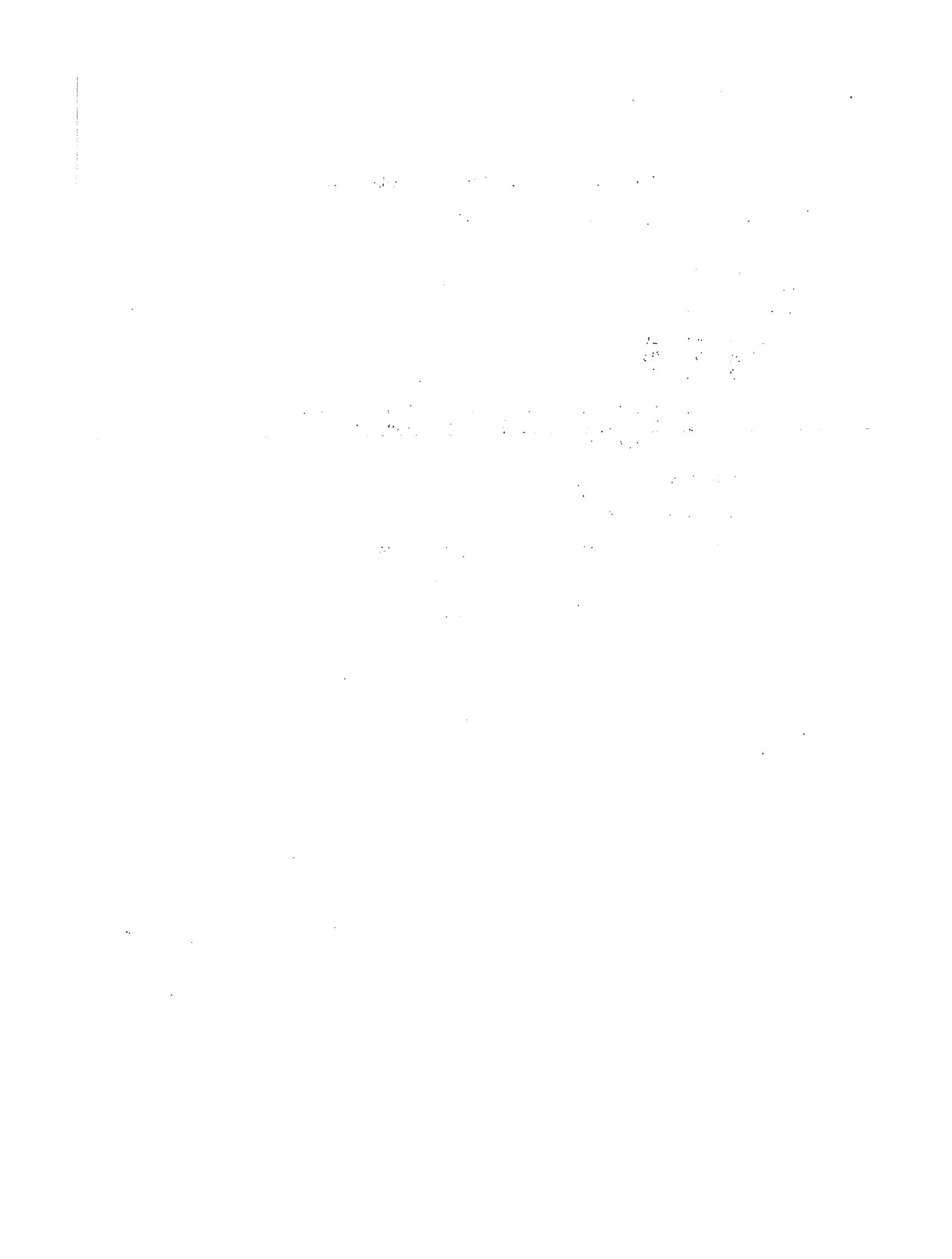
The Algoma Steel Corp., Ltd.
Sault Ste. Marie
Ontario, Canada

Alex Stewart, Marketing Manager - Shape Products
Robert Whitty, Manager, Quality Engineering
William Kissick

Sysco-Sydney Steel Corp.
Sydney
Nova Scotia, Canada

Dr. John Strasser, Vice President of Marketing

William Silverman)
Carrie A. Simon)--OF COUNSEL
Douglas J. Heffner)



APPENDIX C

IMPACT OF IMPORTS ON U.S. PRODUCERS' EXISTING DEVELOPMENT AND PRODUCTION
EFFORTS, GROWTH, INVESTMENT, AND ABILITY TO RAISE CAPITAL

Impact of Imports on U.S. Producers' Existing Development and Production Efforts, Growth, Investment, and Ability to Raise Capital

The Commission requested U.S. producers to describe and explain the actual and potential negative effects, if any, of imports of new steel rails from Canada on their firm's existing development and production efforts, growth, investment, and ability to raise capital. Their responses are shown below:

Bethlehem:

* * * * *

CF&I:

* * * * *

Wheeling:

* * * * *