

DATE: July 17, 2007

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results of the New Shipper Review of Stainless Steel Bar from Germany

Summary

We have analyzed the comments in the case and rebuttal briefs submitted by interested parties in the new shipper review of stainless steel bar from Germany. We recommend that you approve the positions described in the Discussion of the Issues section of this memorandum. Below is a complete list of the issues in this new shipper review for which we have received comments from the parties:

Bona Fide Nature U.S. Sale

Comment 1: Quantity, Pricing and Terms of Sale Differences

Comment 2: Principal/Agent Relationship

Comment 3: Mill Certificates

Comment 4: Communication with U.S. Customer

Home Market Date of Sale

Comment 5: Home Market Date of Sale

Background

On March 19, 2007, the Department of Commerce (“the Department”) published the Preliminary Results of this new shipper review of stainless steel bar (“SSB”) from Germany.¹ Verification of the respondent, Schmiedewerke Groditz GmbH (“SWG”) took place April 16 through 18, 2007, and the Verification Report was issued on May 18, 2007.² The period of review (“POR”) covers March 1, 2005, through February 28, 2006. We invited parties to comment on the Preliminary Results. The petitioners³ submitted a case brief and SWG submitted a rebuttal brief. A public hearing was not requested by either party.

Discussion of the Issues

Comment 1: Quantity, Pricing and Terms of Sale Differences

Petitioners’ Argument: Petitioners contend that SWG’s U.S. sale during the POR is neither commercially reasonable nor *bona fide* and, therefore, that it should be included with post-POR U.S. sales reported by SWG in the next administrative review. The petitioners argue that SWG’s POR U.S. sale is not *bona fide* because of alleged quantity, pricing and terms of sale differences between the POR U.S. sale and SWG’s post-POR sales. Consequently, petitioners argue that the Department should terminate the new shipper review.

Petitioners claim that the quantities shipped differ between the POR U.S. sale and SWG’s post-POR U.S. sales. Petitioners note that post-POR sales had changes in the order quantity that exceeded the industry-accepted weight tolerance of +/- 10 percent.⁴ In contrast, petitioners assert that the POR U.S. sale did not have changes in quantity outside this weight tolerance. Consequently, petitioners claim that the POR U.S. sale is aberrational in terms of quantity changes.

Petitioners further contend that the manner in which the product was priced for the POR U.S. sale is substantially different from that for the post-POR U.S. sales. Petitioners note that the alloy surcharge for certain post-POR U.S. sales was not embedded in the initial price quote, as was done for the POR U.S. sale. Instead, petitioners note that the alloy surcharge was separately established at the time of invoice.⁵ In addition, petitioners purport that SWG offered different

¹ See Stainless Steel Bar from Germany: Preliminary Results of New Shipper Review, 72 FR 12765 (March 19, 2007) (“Preliminary Results”).

² See Memorandum to The File entitled, “Verification of the Sales Response of Schmiedewerke Groditz GmbH in the Antidumping Duty New Shipper Review of Stainless Steel Bar from Germany,” (May 18, 2007) (“Verification Report”).

³ The petitioners in this proceeding are Carpenter Technology Corporation, Valbruna Slater Stainless, Inc., and Electralloy Corporation, a Division of G.O. Carlson, Inc.

⁴ See Petitioners’ Case Brief, at 3 (May 25, 2007) (“Petitioners’ Case Brief”) citing to Verification Report, at 6.

⁵ See Petitioners’ Case Brief, at 6 and 7.

terms of sale for the POR U.S. sale, as compared to the post-POR U.S. sales, which resulted in SWG incurring significantly lower expenses on the POR U.S. sale.⁶ Therefore, petitioners argue that the POR U.S. sale is atypical because: (1) the single POR U.S. sale does not fully capture the manner in which SWG priced the subject merchandise to the U.S. customers in the post-POR period; and (2) the alleged different terms of sale ultimately have an effect of minimizing any finding of dumping in the new shipper review.

Respondent's Rebuttal: SWG contends that petitioners rely upon highly selective and misleading comparisons between the reported POR U.S. sale and post-POR U.S. sales to argue that the POR U.S. sale was atypical and, therefore, not *bona fide*. SWG notes that petitioners' position appears to be that unless the POR U.S. sale is identical in every respect to each and every post-POR U.S. sale, the sale is rendered atypical and, thus, not commercially reasonable. SWG argues that the record evidence demonstrates that the reported POR U.S. sale is similar to the post-POR U.S. sales in all material respects and that the minor differences that do exist in no way call into question the *bona fide* nature of the POR U.S. sale.

SWG contends that petitioners' reference to differences in post-order quantity adjustments shipped between the POR U.S. sale and post-POR sales is incorrect. SWG notes that the Department observed at verification that for one of the post-POR sales examined, there is a change in quantity between the order confirmation date and the invoice date that exceeds the industry weight tolerance of +/- ten percent.⁷ SWG contends that petitioners offer no compelling reason as to why this minor deviation from the standard weight tolerance for a single post-POR sale bears any relevance to the question of whether the POR U.S. sale is *bona fide*.

In addition, SWG claims petitioners misrepresent the Department's observation in the verification report concerning the quantity exception noted. SWG points out that the Department noted that "many of the {U.S.} sales after the POR were very similar to the one U.S. sale reported during the POR with one exception."⁸ SWG asserts that petitioners conveniently ignore the fact that the other post-POR U.S. sales examined by the Department show no quantity change outside of the standard +/- ten percent threshold. Moreover, SWG contends that, placed in context, the verification report accurately characterizes this one particular post-POR U.S. sale and not the reported POR U.S. sale, as the exception. Consequently, SWG argues that the petitioners' implication of a systemic difference between the POR U.S. sale and post-POR U.S. sales with respect to quantity changes from order confirmation to invoice is incorrect.

⁶ See *id.*, at 3 and 4.

⁷ See SWG's Rebuttal Brief, at 4 ("June 1, 2007") ("SWG's Rebuttal Brief").

⁸ See *id.*, at 4 and 5, citing Verification Report, at 6.

SWG further disagrees with petitioners' argument that the manner of pricing for the POR U.S. sale differs from that applicable to post-POR U.S. sales. SWG notes that petitioners base their assertion on the fact that for sales to one particular U.S. customer, SWG's pricing includes a separate alloy surcharge determined at the time of invoice. SWG points to the Department's verification report which notes that this particular U.S. customer prefers to do business based on an agreed upon price, plus an alloy surcharge determined at the time of invoicing.⁹ However, the POR U.S. sale (made to a different U.S. customer) is not subject to a later-determined alloy surcharge. Again, SWG points to the Department's verification report, which notes that all of SWG's sales made to its other U.S. customer, whether during or after the POR, are executed on a fixed price basis.¹⁰ SWG contends that SSBs are expensive, made-to-order articles that warrant SWG to accommodate the reasonable preference of its different U.S. customers. Therefore, SWG argues that its slightly different pricing mechanisms for different U.S. customers does not provide any basis for concluding that SWG's U.S. sale during the POR is not a *bona fide* U.S. sale.

Finally, SWG disagrees with petitioners' argument that different sales terms were offered for the POR U.S. sale as compared to the post-POR U.S. sales. SWG notes that U.S. entry and brokerage expenses are reported in SWG's U.S. sales database.¹¹ SWG contends that it paid these same expenses on the post-POR sales and, therefore, there is no difference in the expenses SWG is responsible for between the POR U.S. sale and post-POR U.S. sales.

The Department's Position: We find that SWG's POR U.S. sale is *bona fide*. As explained in our analysis of this sale for the Preliminary Results, the Department determines whether a sale in a new shipper review is "unrepresentative or extremely distortive" and, therefore, a non-*bona fide* sale based on the totality of the circumstances.¹² Further, in examining the totality of the circumstances, the Department examines whether the transaction is "commercially reasonable" or "atypical."¹³ Atypical or non-typical in this context means unrepresentative of normal business practice.¹⁴

⁹ See id., at 6, citing Verification Report at 6 and 7.

¹⁰ See id.

¹¹ See SWG's Rebuttal Brief, at 6 and 7, citing SWG's Section C Questionnaire Response, at C-19, (fields USDUTY and BROKEU) (July 13, 2006); and SWG's Supplemental Response, at 18 and 19, Exhibit C-2 and Exhibit A-23 (October 12, 2006) ("SQR").

¹² See Memorandum to The File, entitled "*Bona Fide* Nature of Schmiedewerke Groditz GmbH's Sales in the New Shipper Review for Stainless Steel Bar from Germany," at 2 (March 12, 2007) ("*Bona Fide* Sales Memorandum"), citing Glycine From The People's Republic of China: Rescission of Antidumping Duty New Shipper Review of Hebei New Donghua Amino Acid Co., Ltd., 69 FR 47405, 47406 (August 5, 2004).

¹³ See *Bona Fide* Sales Memorandum, at 2, citing Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty New Shipper Review and Final Rescission of Antidumping Duty New Shipper Review, 68 FR 1439, 1440 (January 10, 2003).

¹⁴ See *Bona Fide* Sales Memorandum, at 2, citing Am. Silicon Techs. v. United States, 110 F. Supp. 2d 992, 995 (CIT 2000) ("Silicon Techs").

The Department considers a number of factors in its *bona fides* analysis, “all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise.”¹⁵ These factors include, but are not limited to: (1) the timing of the sale; (2) the price and quantity; (3) the expenses arising from the transaction; (4) whether the goods were resold at a profit; and (5) whether the transaction was made on an arms-length basis.¹⁶ In the instant case, we disagree with petitioners that the POR U.S. sale is unrepresentative or extremely distortive based on quantity, pricing, and terms of sale differences between the POR U.S. sale and post-POR sales.

As SWG points out in its rebuttal brief, petitioners’ assertion that the Department found quantity differences between the order confirmation and the invoice for post-POR sales is incorrect.¹⁷ Instead, the Department reports that many of the post-POR U.S. sales are very similar to the POR U.S. sale with only one exception.¹⁸ At verification, the Department identified one post-POR sale in which the quantity change between order confirmation and invoice was outside of the standard +/- ten percent quantity threshold.¹⁹ We do not find this one exception to be a compelling reason to determine that the POR U.S. sale is aberrational in any way. The POR U.S. sale and many of the post-POR sales showed no quantity changes outside the standard +/- ten percent quantity threshold. Therefore, we continue to find that the POR U.S. sale is representative in terms of quantity.

We further disagree with petitioners’ argument that the manner in which the product was priced for the POR U.S. sale was substantially different than that for post-POR U.S. sales. Petitioners note that for post-POR U.S. sales to a particular U.S. customer, which is not the U.S. customer for the POR U.S. sale, SWG’s pricing included a separate alloy surcharge determined at the time of invoicing. SWG explained that this particular U.S. customer preferred to structure transactions differently (*i.e.*, agreed upon price, plus an alloy surcharge determined at the time of invoicing).²⁰ Conversely, the U.S. customer for the POR U.S. sale, which also had post-POR U.S. purchases, preferred to have the alloy surcharge built into the initial price quote. The Department reviewed the POR U.S. sale and post-POR sales made to the same customer and concluded that for all sales to this customer, the alloy surcharge was built into the initial price of the product and did not change between the order date and the invoice date.²¹ Clearly, SWG offered different pricing mechanisms to two different U.S. customers. However, we do not find

¹⁵ See Hebei New Donghua Amino Acid Co., Ltd. v. United States, 374 F. Supp. 2d 1333, 1342, (CIT 2005) (citing Fresh Garlic from the PRC: Final Results of Administrative Review and Rescission of New Shipper Review, 67 FR 11283 (March 13, 2002), and accompanying Issues and Decision Memorandum).

¹⁶ See Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States, 366 F. Supp. 2d 1246, 1249 CIT 2005), (citing Silicon Techs., 110 F. Supp. 2d at 995).

¹⁷ See SWG’s Rebuttal Brief, at 4.

¹⁸ See Verification Report, at 6.

¹⁹ See *id.*

²⁰ See *id.*, at 6 and 7.

²¹ See *id.*, at 6.

this fact alone to be sufficient for the Department to conclude that the POR U.S. sale is atypical. As explained above, the pricing mechanism is the same for the POR U.S. sale and the post-POR sales made to the same customer. Consequently, we continue to find that the POR U.S. sale is representative in terms of pricing.

Finally, we disagree with petitioners' argument that the terms of sale for the POR U.S. sale are substantially different than those for post-POR U.S. sales, which resulted in SWG incurring significantly less expenses on for the POR U.S. sale as compared to post-POR U.S. sales. As with the pricing mechanism, the terms of sale are identical for the POR U.S. sale and the post-POR sales made to the same customer.²² Further, SWG reported paying U.S. entry and brokerage expenses for the POR U.S. sale, as well as for sales to both post-POR U.S. customers. Consequently, we continue to find that the POR U.S. sale is not atypical with regard to the terms of sale. Based on the totality of the circumstances, the Department continues to find the POR U.S. sale to be *bona fide*.

Comment 2: Principal/Agent Relationship

Petitioners' Argument: The petitioners argue that the Department should find that the relationship between SWG and its U.S. customer during the POR constitutes a principal/agent relationship. Petitioners claim that SWG's U.S. customer acted as SWG's sales agent because the customer identified the U.S. end-user customer to SWG at the start of the sales process. In addition, petitioners contend that even if SWG and its U.S. customer are not principal and agent, the fact that SWG knows the name of the U.S. end-user customer provides SWG every incentive to by-pass the U.S. customer during the POR.²³

Respondent's Rebuttal: SWG contends that record evidence continues to support the Department's conclusion in the Bona Fide Sales Memorandum that SWG's relationship with its U.S. customer for the POR U.S. sale does not constitute a principal/agent relationship.²⁴ In addition, SWG notes that petitioners do not offer any record evidence to contradict the Department's conclusion. SWG asserts that petitioners simply argue that knowledge of the identity of the U.S. end-user customer necessarily establishes a principal/agent relationship between SWG and its U.S. customer. SWG argues that the petitioners' argument was properly rejected by the Department in the Preliminary Results and the Department should continue to find that a principal/agent relationship does not exist between SWG and its U.S. customer.

²² See SWG's Section A Questionnaire Response, at Exhibit 6 (June 9, 2006) ("AQR"); and SQR, at Exhibit A-23.

²³ See Petitioners' Case Brief, at 5.

²⁴ See SWG's Rebuttal Brief, at 7, citing *Bona fide* Sales Memorandum, at 5 and 6.

The Department's Position: As stated in the *Bona Fide Sale Memorandum*, principals and agents are affiliated under section 771(33)(G) of the Tariff Act of 1930, as amended, because, “by definition, a principal controls its agent.”²⁵ For the Preliminary Results, the Department first examined whether a principal/agent agreement exists between SWG and its U.S. customer. We concluded that no record evidence indicates that an explicit agreement exists. Instead, record evidence indicates that this U.S. customer is not obligated to sell SWG products nor is SWG obligated to sell through this U.S. customer.

The Department recognizes, however, that while agency relationships are “frequently established by a written contract, this is not essential.”²⁶ Consequently, the Department went on to examine a range of criteria, including but not limited to the following: (1) the foreign producer’s role in negotiating price and other terms of sale; (2) the extent of the foreign producer’s interaction with the U.S. customer; (3) whether the agent/reseller maintains inventory; (4) whether the agent/reseller takes title to the merchandise and bears the risk of loss; (5) whether the agent/reseller further processes or otherwise adds value to the merchandise; (6) the means of marketing a product by the producer to the U.S. customer in the pre-sale period; and (7) whether the identity of the producer on sales documentation inferred such an agency relationship during the sales transactions.²⁷

We noted record evidence indicating that SWG negotiated the terms of sale and set the price with its U.S. trading company customer, but had no knowledge of the price or terms of sale between its U.S. customer and the eventual U.S. unaffiliated end-user customer (*i.e.*, SWG’s U.S. customer’s customer).²⁸ Further, SWG confirmed that it did not pay a commission to its U.S. customer. SWG issues an invoice to its U.S. customer and ships the subject merchandise to its U.S. customer. SWG’s U.S. customer then assumes responsibility for delivery to the end-user customer, thereby passing title and risk of loss to SWG’s U.S. customer. Finally, SWG reported that, to the best of its knowledge, its U.S. customer does not maintain inventory or perform any further manufacturing of the products it purchased from SWG. The Department concluded that these facts do not indicate that a principal/agent relationship exists.²⁹

²⁵ See *Bona Fide Sale Memorandum*, at 5, citing Notice of Final Determination of Sales at Less than Fair Value: Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete, from Japan, 62 FR 24392, 24403 (May 5, 1997) (“Gas Turbo Compressors”).

²⁶ See Gas Turbo Compressors,” 62 FR at 24402-03 (expressing the principal/agent test); see also Stainless Steel Sheet and Strip in Coils From Taiwan: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 66 FR 41509, 41512 (August 8, 2001).

²⁷ See *Bona Fide Sale Memorandum*, at 5, citing Gas Turbo Compressors, 62 FR 24403; and Final Results and Partial Rescission of Antidumping Duty Review of Stainless Steel Sheet and Strip in Coils from Taiwan, 67 FR 6682 (February 13, 2002) and accompanying Issues and Decision Memorandum, at Comment 23.

²⁸ See SQR, at 9 and 10.

²⁹ See *Bona Fide Sales Memorandum*, at 6.

We disagree with petitioners' argument that SWG knowledge of the end-user's identity necessarily establishes a principal/agent relationship. As the petitioners note in their case brief, SWG interacts with the end-user customer in limited instances.³⁰ SWG stated this interaction is necessary for SWG to identify the exact product specifications required by the end-user for this made-to-order sale.³¹ Further, SWG explained that it does not by-pass its U.S. customer to sell to the end-user customer because it has no sales experience with respect to the subject merchandise in the United States.³² Consequently, we continue to find that, based on the totality of the circumstances explained above, a principal/agent relationship does not exist between SWG and its U.S. customer.

Comment 3: Mill Certificates

Petitioners' Arguments: Petitioners claim that any post-POR re-prints of mill certificates provided by SWG at verification must be viewed with suspicion by the Department. Petitioners note the re-printed mill certificates are not SWG's official mill test certificates that were sent to the U.S. customer. In addition, petitioners believe that the re-printed mill certificates appear to be out of sequence. Petitioners contend that mill certificate numbers should be issued sequentially based on the order in which they are printed. Therefore, petitioners argue that the Department should find that the documentation for the POR U.S. sale does not withstand scrutiny and confirms that this sale is not a *bona fide* transaction.

Respondent's Rebuttal: SWG disagrees with petitioners' assertion that disputed mill certificate dates somehow demonstrate that the POR U.S. sale was orchestrated for the new shipper review. SWG contends that it already explained that a typographical error occurred when the person creating the mill certificate erroneously used a previous mill certificate as a template and failed to change the date.³³ Further, SWG notes that it demonstrated to the Department at verification that the original electronic inspection certificates that reside in SWG's production control system have the correct dates. These mill certificates were provided to the Department at verification. SWG disagrees with petitioners that the newly printed mill certificates provided to the Department at verification somehow raise further questions because, in petitioners' view, the mill certificate numbers appear to be out of sequence.

SWG contends that petitioners' assertion that the sequence of mill certificate numbers in this case is problematic rests on speculative and erroneous assumptions about how SWG's production control system assigns certificate numbers. Further, SWG notes that the actual certificate numbers for the three re-printed certificates are unchanged from the original-hard copy inspection certificates submitted with SWG's section A response. SWG points out that a mill certificate number is simply a sequential number that is established when a certificate is first

³⁰ See Petitioners' Case Brief, at 5.

³¹ See SQR, at 9 and 10.

³² See id.

³³ See SWG's Rebuttal Brief at 8, citing SQR, at 4; and the Verification Report, at 15.

created in the system, which is not necessarily the date on which the certificate is finalized (i.e., the date production and inspection is completed) or the date on which the certificate is printed in hard copy form. Therefore, SWG argues that there is nothing suspicious or unusual about the mill certificate numbers in this case and that these documents provide no basis for concluding that the POR U.S. sale is anything other than *bona fide*.

The Department's Position: We disagree with petitioners' argument that mill certificate dates demonstrate that the POR U.S. sale was orchestrated for the new shipper review. For the Preliminary Results, the Department inquired as to why a portion of the mill certificates relating to the POR U.S. sale were dated prior to the order confirmation date. SWG explained that a typographical error occurred when the person creating the mill certificate erroneously used a previous mill certificate as a template and failed to change the date.³⁴ During verification, SWG demonstrated to the Department that the original electronic mill certificates that reside in SWG's production control system identify the appropriate inspection dates.

In addition, we agree with SWG that petitioners' assertion that the sequence of mill certificate numbers somehow demonstrates that the U.S. sale is not a *bona fide* transaction is speculative in nature and strictly based on assumptions about how SWG's production control system assigns certificate numbers. We find SWG's explanation for how it assigns mill certificate numbers to be reasonable and consistent with what the Department observed during verification. Consequently, we find that mill certificate dates and the non-sequential numbers identified by petitioners do not provide a reasonable basis or a compelling reason for the Department to determine that the POR U.S. sale is not *bona fide*.

Comment 4: Communication with U.S. Customer

Petitioners' Argument: Petitioners contend that, based on record evidence, SWG communicated with the U.S. customer prior to the earliest dated record evidence submitted and, therefore, SWG failed to provide the Department with all available information. Petitioners note that at verification SWG stated that "it has already submitted all documentation relating to communication with its customer."³⁵ Petitioners argue this statement should be interpreted by the Department as self-serving and, therefore, should conclude that SWG failed to provide the Department with requested information.

Respondent's Rebuttal: SWG disagrees with petitioners' assertion that SWG failed to provide the Department with all written sales documentation and communication with the U.S. customer concerning the POR U.S. sale. SWG asserts that it explained at verification that previous communications with the U.S. customer were made by telephone and that all written communications had been provided to the Department.³⁶ Therefore, SWG argues that petitioners' assertion of prior written communication is without merit.

³⁴ See SQR, at 4.

³⁵ See Petitioners' Case Brief, at 7, citing Verification Report, at 15.

³⁶ See SWG's Rebuttal Brief, at 9, citing Verification Report, at 15.

The Department's Position: During the course of this new shipper review, SWG fully responded to the Department's original questionnaire. In addition, SWG confirmed in its supplemental questionnaire response and during verification that all communications with its U.S. customer relating to the POR U.S. sale were submitted to the Department. Consequently, we find no reason to suspect that: (1) SWG's responses have been self-serving in nature; (2) SWG's responses have been anything but credible; and (3) SWG is withholding any requested documentation.

Comment 5: Home Market Date of Sale

The Petitioners' Argument: Petitioners argue that the Department should conclude that SWG reported the wrong home market date of sale and, as a result, the wrong population of home market sales. Consequently, petitioners contend that the Department should terminate the new shipper review. Petitioners note that SWG reported that the most appropriate home market date of sale is the invoice date because the alloy surcharge is not determined until the date of invoice.³⁷ Petitioners state that the Department verified that SWG and the home market customers agreed at the time of order confirmation that the alloy surcharge would be added to the price of goods.³⁸ Petitioners allege that SWG and its home market customers agreed that the alloy surcharge would be explicitly linked to a predictable third-party index that would be set at the time of shipment. Petitioners argue that SWG did not inform the Department of this critical fact regarding the alloy surcharge until verification.

Petitioners contend that the Department concluded in Hot-Rolled Steel from Brazil that it will not consider the imposition of alloy surcharges that are agreed to at the time of order as a change in the essential terms of sale, if the surcharges are explicitly linked to a "specific known formula or third-party source."³⁹ In the instant case, petitioners claim that SWG and its home market customers establish the price at the time of order confirmation because the alloy surcharge is "a published source outside the control of either party to the contract, such that there is nothing more the parties need to negotiate concerning the price of the goods sold."⁴⁰

Petitioners assert that the order confirmation date better reflects the date when the material terms of sale (i.e., price, quantity and alloy surcharge) are established. Further, home market sales do not undergo any meaningful change between the date of order confirmation and the invoice date. Petitioners claim that SWG should have reported order confirmation date as the date of sale.

³⁷ See Petitioners' Case Brief, at 7 and 8, citing SWG's Section B Questionnaire Response, at B-8 (July 13, 2006) ("BQR").

³⁸ See *id.*, at 8, citing the Verification Report, at 6.

³⁹ See *id.*, citing Notice of Final Results of Antidumping Duty Administrative Review: Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Brazil, 70 FR 58683, and the accompanying Issues and Decision memorandum, at Comment 1.

⁴⁰ See *id.*, citing Notice of Final Results of Antidumping Duty Administrative Review: Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Brazil, 70 FR 58683 (October 7, 2005) ("Hot-Rolled Steel from Brazil") (Comment 1) (citing Brass Sheet and Strip from France: Final Determination of Sales at Less Than Fair Value, 52 FR 812, 814 (January 9, 1987)).

Consequently, the Department should conclude that SWG reported the wrong population of home market sales and should terminate the new shipper review.

Respondent's Rebuttal: SWG contends that petitioners have misrepresented the Department's verification findings by claiming that the Department concluded that SWG and its home market customers agreed to a formula for determining the alloy surcharge. Rather, SWG notes that the Department found that SWG, as a matter of convenience, relies upon the Thyssen index to calculate the alloy surcharge it imposes at the time of shipment.⁴¹ SWG contends that nothing in the order confirmation or any other sales documentation requires SWG to use the Thyssen index or any other specific formula or benchmark, in calculating the alloy surcharge it imposes at the time of shipment. Alternatively, SWG notes that the Department observed during verification that the order confirmation merely states “{i}n addition to the price designated to each item, we will bill the alloying surcharge valid on the day of delivery.”⁴² SWG concedes that while this obligates SWG to use some reasonable basis for determining the alloy surcharge, it does not reference the Thyssen index or any other specific benchmark. SWG contends that if it were to determine that the Thyssen index did not accurately reflect SWG's true alloy costs, SWG would be entitled within its rights to use a different method for determining the alloy surcharge. Consequently, SWG argues that nothing in the order confirmation fixes the final price based on “a published source outside the control of either party to the contract, such that there is nothing more the parties need to negotiate concerning the price of the goods sold.”⁴³

SWG maintains that petitioners have mischaracterized the Department's decision in Hot-Rolled Steel from Brazil. SWG contends that contrary to the implications of petitioners, the Department determined in Hot-Rolled Steel from Brazil, because of alloying surcharges imposed by the seller at the time of shipment and invoicing, the correct date of sale was the invoice date, not purchase order date.⁴⁴ SWG notes that in the instant case, similar to Hot-Rolled Steel from Brazil, SWG did not notify customers in advance of future surcharge amount, let alone enter into any binding agreement on a specific formula or benchmark for determining the surcharge. Therefore, SWG argues that the Department should reach the same conclusion as it reached in Hot-Rolled Steel from Brazil and determine that petitioners have failed to overcome the regulatory presumption in favor of invoice date as the date of sale.

The Department's Position: We disagree with petitioners' argument that SWG reported the wrong home market date of sale and, as a result, the wrong population of home market sales. Pursuant to 19 CFR 351.401(i), the date of sale is normally the date of invoice unless satisfactory evidence is presented that the material terms of sale are established on some other date. We are not persuaded to change the date of sale from the invoice date because the record evidence does

⁴¹ See SWG's Rebuttal Brief, at 10, citing Verification Report, at 6.

⁴² See *id.*, citing AQR, at Exhibit A-7.

⁴³ See *id.*, at 11, citing the Petitioners' Case Brief at 8, quoting the Department's decision in the Hot-Rolled Steel from Brazil, Issues and Decision Memorandum, at Comment 1.

⁴⁴ See *id.*, citing Hot-Rolled Steel from Brazil, and the accompanying Issues and Decision Memorandum, at Comment 1.

not support petitioners' claim that material terms of sale, price and quantity, are established at the date of order confirmation.

In the instant case, SWG reported the invoice date as the date of sale in the home market because the final price is only known at the time of shipment (*i.e.*, when SWG issues the invoice) and includes an alloy surcharge that is based on current alloy costs at the time of shipment.⁴⁵ Specifically, because the alloy surcharge SWG imposes at the time of shipment is not explicitly linked to a specific known formula or third-party source, the surcharge is not outside the control of the parties to the sale. As the Department noted in Hot-Rolled from Brazil, "the customer could not have anticipated the amount due at any point in time prior to the date of shipment and invoicing" because the surcharge "changed frequently and {was} not explicitly linked to a specific known formula or third-party source."⁴⁶

Although record evidence shows that SWG relies upon a third-party price index to determine the alloy surcharge it imposes at the time of shipment, neither the order confirmation nor any other record evidence demonstrates that an explicit agreement exists between SWG and its home market customers that requires SWG to use a third-party price index or any other known formula to determine the alloy surcharge.⁴⁷ Further, the fact that SWG informed the Department of its reliance on a specific third-party price index does not invalidate its original response. Rather, record evidence suggests that SWG is entitled to use any method it deems appropriate to determine the alloy surcharge, which most accurately reflects SWG's alloy costs. Consequently, without an express agreement on the methodology for calculating the alloy surcharge, home market customers could not anticipate "the amount due at any point in time prior to the date of shipment and invoicing."⁴⁸ Therefore, we continue to find that SWG appropriately reported the invoice date as the date of sale.

⁴⁵ See AQR, at A-15 and A-17.

⁴⁶ See Hot-Rolled Steel from Brazil, and the accompanying Issues and Decision Memorandum, at Comment 1

⁴⁷ See Verification Report, at 6.

⁴⁸ See Hot-Rolled Steel from Brazil, and the accompanying Issues and Decision Memorandum, at Comment 1.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results in the Federal Register.

Agree _____

Disagree _____

David M. Spooner
Assistant Secretary
for Import Administration

Date