

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA)
) Criminal No. 02-193
) v.)
) Judge Stewart Dalzell
NIPPON ELECTRODE COMPANY, LTD.,))
) Filed: 04/01/02
) Defendant.)
)

GOVERNMENT’S RULE 11 MEMORANDUM

The United States and Nippon Electrode Company, Ltd. (NDK) have entered into a plea agreement, pursuant to which NDK will waive indictment and plead guilty to the captioned Information. The one-count Information charges NDK with a violation of the Sherman Act, 15 U.S.C. § 1. The purpose of this memorandum is to provide the Court with sufficient information to accept the plea by setting forth the violated statute, a description of the criminal Information, the terms of the Plea Agreement, and a preliminary statement of facts which supports the agreement.

I
STATUTE VIOLATED

A. 15 U.S.C. Section 1

Section One of Title 15, United States Code, provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

B. The Information

The Information charges NDK with participating in a conspiracy to suppress and eliminate competition by fixing the price of carbon cathode block sold in the United States and elsewhere in unreasonable restraint of trade and commerce from at least as early as February 1996 and continuing until at least December 1997.

C. Elements of the Offense

The elements of a Sherman Act offense, each of which the United States must prove beyond a reasonable doubt at trial, are:

- (1) the conspiracy charged was formed, and it was in existence at or about the time alleged;
- (2) the defendants knowingly formed or participated in that conspiracy; and
- (3) the activity which was the object of the conspiracy was within the flow of, or substantially affected, interstate or foreign commerce.

D. Maximum Penalty

The maximum penalty NDK may receive upon its conviction in this case is a fine in an amount equal to the largest of: (a) \$10 million; (b) twice the gross pecuniary gain derived from the crime; or (c) twice the gross pecuniary loss caused to the victims of the crime.

II FACTUAL BASIS

This statement of facts is intended to be used as a factual basis for the guilty plea of NDK. It is not intended to be exhaustive in terms of details surrounding the charged conspiracy.

A. Background

Carbon cathode block is a carbon product with great strength and resistance to heat and

chemical reaction and is used as a conductor of electricity to heat and melt scrap aluminum.

Because of its superior conductivity properties, it is commonly used in aluminum smelters or pots in the production of primary aluminum. There are three forms of cathodes. They are referred to in the industry generally as amorphous, graphitic and graphitized.

B. The Conspiracy

During the period covered by the Information, NDK was a Japanese corporation with its principal place of business located in Tokyo, Japan. As alleged in the Information, beginning at least as early as February 1996 and continuing through at least December 1997, NDK and certain other competitor companies entered into and participated in a combination to suppress and eliminate competition by fixing the price of carbon cathode block sold in the United States and elsewhere. The combination and conspiracy engaged in by the defendant and co-conspirators was in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

The conspiracy consisted of a continuing agreement, understanding, and concert of action among the conspirators, the substantial terms of which were to agree to fix and maintain prices and to coordinate pricing for the sale of carbon cathode block sold in the United States and elsewhere.

For the purpose of forming and carrying out the charged combination and conspiracy, the defendant and co-conspirators did what they combined and conspired to do, including:

- (1) participating in meetings and conversations in Asia and Europe to discuss the prices of carbon cathode block sold in the United States and elsewhere;
- (2) agreeing, during those meetings and conversations, to charge prices at certain levels and otherwise to increase and maintain prices of carbon cathode block sold

in the United States and elsewhere; and

- (3) exchanging sales and customer information for carbon cathode block for the purpose of monitoring and enforcing adherence to the terms of the agreement.

C. Interstate and Foreign Commerce

At all times during the conspiracy, the defendant and co-conspirators sold a substantial quantity of carbon cathode block to customers located in states or countries other than the states or countries in which the carbon cathode block was produced. Defendant's sales of carbon cathode block in the United States during the term of the conspiracy charged were approximately \$2,075,000. Defendant's sales were calculated by totaling the value, on an F.O.B. basis, of all contracts with customers in the United States that the defendant executed between March 1, 1996, and November 30, 1997.

III PLEA AGREEMENT

The guilty plea in this case will be entered pursuant to a Plea Agreement between NDK and the Antitrust Division. The Plea Agreement provides that NDK will enter a plea of guilty in the Eastern District of Pennsylvania pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, to a one-count criminal Information charging the company with participating in a conspiracy to restrict competition by fixing the price of carbon cathode block sold in the United States and elsewhere from at least as early as February 1996 and continuing until at least December 1997, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

Also pursuant to the Plea Agreement, the United States and NDK agree to jointly recommend that the Court impose a sentence requiring NDK to pay a Guidelines fine to the United States in the amount of \$450,000 as the appropriate disposition of the case. The fine is

due and payable on the date of the imposition of sentence or within seven days thereafter.

If the Court rejects the Plea Agreement, the United States and NDK further agree that the agreement shall automatically convert to a plea agreement pursuant to Rule 11(e)(1)(B), Fed.R.Crim.P., and the aforementioned sentence shall be the joint recommendation of the parties, although not binding on the Court. If the Court does not accept the parties' joint recommendation pursuant to Rule 11(e)(1)(B), Fed.R.Crim.P., NDK shall have no right to withdraw its plea. Finally, it is also agreed that the parties will not seek either an upward or a downward departure under the Sentencing Guidelines.

NDK, its parents and its subsidiaries have agreed to fully cooperate with the United States in the conduct of the present investigation of cathode block products used in the production of primary aluminum and any litigation or other proceedings to which the United States is a party resulting therefrom. Such cooperation includes, but is not limited to, the production of relevant documents under the control of NDK, its parents and its subsidiaries. NDK must also use its best efforts to secure, in connection with the present investigation and any litigation resulting therefrom, the full and truthful cooperation of all current and former directors, officers, employees and representatives of NDK, its parents and its subsidiaries with relevant information who are identified by the United States. Such cooperation includes testifying truthfully in trial and grand jury proceedings.

Also pursuant to the Plea Agreement, the United States agrees, subject to the continuing full cooperation of NDK, its parents and its subsidiaries, not to bring further criminal proceedings against NDK, its parents and its subsidiaries or any current or former director, officer or employee of NDK (excluding two individuals specified in Paragraph 15(a) of the Plea Agreement), for any act or offense committed prior to the date of the Plea Agreement undertaken in connection with

any antitrust conspiracy involving the sale or manufacture of any carbon cathode block products.

IV
JURISDICTION AND VENUE

Although we know of no specific sales of carbon cathode block or other acts in furtherance of the conspiracy which occurred in the Eastern District of Pennsylvania, the Information was filed in the Eastern District of Pennsylvania because the investigation of carbon cathode block grew out of the investigation of graphite electrodes and all the cases involving graphite electrodes were filed in the Eastern District of Pennsylvania. Further, as specified in Paragraph 2 of the Plea Agreement, NDK expressly waives all objections to venue and agrees voluntarily to consent to the jurisdiction of the United States to prosecute this case against it in the United States District Court for the Eastern District of Pennsylvania.

Dated:

Respectfully submitted,

EDWARD S. PANEK
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CERTIFICATE OF SERVICE

This is to certify that on the 1st day of April 2002, a copy of the Government's Rule 11
Memorandum has been faxed/mailed to counsel of record for the defendant as follows:

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