

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

UNITED STATES OF AMERICA) Criminal No. 99-595
)
v.) Chief Judge James T. Giles
)
ROBERT J. HART,) Filed: 10/19/99
)
Defendant.)

**GOVERNMENT’S SENTENCING MEMORANDUM
AND GOVERNMENT’S MOTION FOR A
GUIDELINES DOWNWARD DEPARTURE (U.S.S.G. § 5K1.1)**

I. BACKGROUND

The United States and Robert J. Hart have entered into a plea agreement pursuant to which the defendant will waive indictment and plead guilty to participating in a worldwide conspiracy to fix the price of graphite electrodes from at least July 1992 until at least June 1997. Both Mr. Hart and the United States request that the Court accept the plea and impose sentence at the time of arraignment.

To date, four corporations and one individual have pled guilty and been sentenced in this investigation. The pleas, all entered in the Eastern District of Pennsylvania, are:

<u>Defendant</u>	<u>Date</u>	<u>Sentence</u>	<u>District Judge</u>
Showa Denko Carbon, Inc.	9/8/98 ¹	\$32.5 million	Lowell A. Reed, Jr.
UCAR International Inc.	4/24/98	\$110 million	Charles R. Weiner
Tokai Carbon Co. Ltd.	5/20/99	\$6 million	Clarence C. Newcomer
SGL Carbon AG	5/4/99	\$135 million	Ronald L. Buckwalter
Robert J. Koehler	5/4/99	\$10 million	Ronald L. Buckwalter

¹ Although Showa Denko Carbon was sentenced after UCAR, the plea agreement and case filing predated the UCAR case. Similarly, although Tokai Carbon was sentenced after SGL Carbon AG and Robert J. Koehler, the Tokai plea agreement and case filing predated the SGL/Koehler case.

In addition, an Information was filed on September 30, 1999 in the Eastern District of Pennsylvania against Robert P. Krass , the former Chief Executive Officer of UCAR International Inc. (“UCAR”) (United States v. Robert P. Krass, Criminal No. 99-626, Judge J. Curtis Joyner). If the Plea Agreement with Mr. Krass is accepted, he will be sentenced to 17 months imprisonment and a fine of \$1.25 million. Mr. Hart, as Chief Operating Officer, was Mr. Krass’s subordinate at UCAR.

The investigation is continuing against both individuals and corporations. Mr. Hart has agreed to cooperate in the continuing investigation. His cooperation has already begun and forms the basis for the Government’s motion for a downward departure.

II. THE GRAPHITE ELECTRODES CARTEL

Graphite electrodes are electrical conductors used in the steel-making process. They are used primarily by “mini-mills” to melt scrap in electric arc furnaces (“EAF”) and to refine steel in ladle furnaces. The standard size electrode is 24" in diameter by 8' in length, but sizes vary. Some mini-mills use electrodes as large as 30" in diameter and others use much smaller electrodes. Electrodes are sold by weight, cost thousands of dollars, and are consumed in the steel-making process. The cartel affected sales of graphite electrodes worldwide, including the United States.

By early 1992, there had been some consolidation in the graphite electrode industry and restructuring at major producers such as UCAR and SGL Carbon Aktiengesellschaft (“SGL AG”). At that point in time, discussions between executives of several graphite electrode producers, particularly between Mr. Krass and Robert J. Koehler, the CEO of SGL AG, led to the formation of a cartel and the first organized cartel meeting in London in May 1992. At this

meeting, attended by representatives of SGL AG, UCAR, Showa Denko, Tokai and others, the conspirators agreed to the following:

- significant price increases would be implemented throughout the world;
- price increases would be initiated by “home market” leaders and followed by others;²
- all forms of discounts would be eliminated, including rebates and consumption guarantees; and
- existing market shares were to be respected, with conspirators reducing or eliminating exports to competitors’ home markets.

At the time the conspiracy was formalized, total graphite sales in the United States were approximately \$275 million per year. Market shares in the United States were approximately:³

UCAR International	34%
SGL Carbon	23%
Showa Denko	18%
Carbide Graphite ⁴	18%
Others	6%
Tokai Carbon	1%

Over the course of the conspiracy, beginning in May 1992, graphite electrode prices in the United States increased over 50% through a series of collusive price increases led by UCAR:

² Home markets were locations in which conspirators had production plants. UCAR was to lead the United States price increase because it was the largest United States producer and had the largest market share in the United States.

³ While these market shares are approximations, they do reflect accurately the relative positions of the companies.

⁴ The Carbide Graphite Group cooperated in the investigation pursuant to the Antitrust Division’s Corporate Leniency Policy. Although its United States market share appears significant, it was not considered a particularly significant competitor in the worldwide market.

May 1992	\$1.00/lb.	July 1994	\$1.26/lb.
January 1993	\$1.06/lb.	April 1995	\$1.33/lb.
June 1993	\$1.13/lb.	February 1996	\$1.43/lb.
January 1994	\$1.21/lb.	February 1997	\$1.56/lb.

Throughout the conspiracy, prices were discussed, problems ironed out, discipline instilled and agreements reached through a series of meetings designated as “top level” and “working level.” Top level meetings were attended by company presidents, including Mr. Krass, and were held for the purpose of setting direction and resolving major disputes among the conspirators. Working level meetings, held to implement the agreement, were attended by subordinates more intimately familiar with pricing in particular countries and at particular accounts. As noted, the first top level meeting was in London in May 1992. It was followed by more than a dozen top level and working level meetings (which Mr. Hart did not attend) in various countries during the course of the conspiracy. In addition to the large cartel meetings, the graphite electrode executives (including Mr. Hart) discussed customers, prices and sales volumes in smaller, two-company meetings and in telephone conversations.

III. FACTUAL BASIS FOR THE PLEA

Section One of Title 15 (Sherman Act), 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 to be 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.

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

- (1) the conspiracy charged was formed, and it was in existence, at or about the time alleged;
- (2) the defendant 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.

Robert J. Hart, age 62, has worked for several decades in the carbon and graphite industry. He held various positions in the Carbon Products Division of Union Carbide when UCAR Carbon Company constituted the United States operations of that division. In 1990, just prior to the point when UCAR Carbon Company and all of Union Carbide's Carbon Products Division became a joint venture between Union Carbide and Mitsubishi Corporation, Mr. Hart became the Vice President and General Manager of UCAR Carbon Company, a position he held until leaving the company in 1998. When all of the various joint venture entities were placed under the umbrella of the newly created UCAR International in 1993, Mr. Hart became Vice President and General Manager of UCAR International as well. In May 1997, Mr. Hart was promoted to Senior Vice President and Chief Operating Officer of UCAR International.

Had this case gone to trial, the United States would have proven beyond a reasonable doubt that there was a price-fixing conspiracy among the major producers of graphite electrodes beginning as early as July 1992 and continuing until at least June 1997. The United States also would have proven that Mr. Hart knowingly joined the conspiracy and performed acts in furtherance thereof, although he was not aware of all of the participants nor all of the agreements. While Mr. Hart did not attend any of the top level or working level meetings, he was aware that Robert Krass of UCAR and Robert Koehler of SGL AG were talking about customers and pricing

within a short time after Mr. Koehler became the CEO of the newly formed company in early 1992. Mr. Hart understood that the companies were cooperating with each other on prices, and that in the United States, SGL AG would follow UCAR-led price increases. Mr. Hart acted in furtherance of the conspiracy by providing Mr. Krass with information regarding where UCAR was experiencing competitive difficulties at accounts all over the world, including the United States, for his use in discussions with Mr. Koehler. Mr. Hart also understood Mr. Krass was meeting and discussing pricing with Japanese producers in Japan. In addition, Mr. Hart had discussions in person and by telephone regarding customers, pricing and volume with H. Manfred Schuecker, who was SGL AG's senior marketing executive and regularly attended the larger cartel meetings. Furthermore, Mr. Hart was aware that Mr. Schuecker and Georges Schwegler, a mid-level, European-based marketing executive for UCAR, were meeting and exchanging sales and pricing data with each other as part of the conspiracy and with the Japanese producers and that the conspirators used code names. Finally, the United States would have proven that the conspirators' activities were within the flow of, or substantially affected, interstate commerce through the sales of graphite electrodes and payment therefor across state and country borders.

IV. PLEA AGREEMENT

Pursuant to the Plea Agreement, the United States and Mr. Hart jointly recommend that the Court impose a sentence of imprisonment on Mr. Hart of nine months, to be served in a minimum security facility such as a prison camp. The United States and Mr. Hart also recommend imposition of a fine of \$1 million, to be paid without interest over a period of three years, with \$250,000 due within 15 days of sentencing, and \$250,000 due on each of the first, second and third anniversaries of the date of sentencing.

Mr. Hart has agreed to cooperate fully with the United States in the conduct of the present investigation of the manufacture and sale of graphite and carbon products and in 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 his control; making himself available upon reasonable notice, not at the expense of the United States, for interviews at mutually agreed-upon locations; and responding fully and truthfully to all inquiries of the United States in connection with the present investigation of the graphite and carbon products industry and in any litigation or other proceedings to which the United States is a party resulting therefrom. Such cooperation also includes testifying truthfully in trial and grand jury proceedings. Mr. Hart already has begun cooperating in the investigation.

Also pursuant to the Plea Agreement, the United States agrees, subject to his continuing full cooperation, not to bring further criminal proceedings against Mr. Hart for any act or offense committed prior to the date of the Plea Agreement undertaken in connection with any antitrust conspiracy involving the manufacture or sale of graphite and carbon products.

V. RULE 11(e)(1)(C) AGREEMENT

The Plea Agreement presented to the Court was entered pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C) which provides that the Government may “agree that a specific sentence is the appropriate disposition of the case” and that the defendant may withdraw his plea if the agreement is not accepted by the Court. Such plea agreements are used by the Antitrust Division in unusual circumstances where certainty around sentencing is a key issue in reaching any plea agreement at all. Type “C” plea agreements have been used widely by the Division in international cartel cases and have been accepted by the courts. All of the defendants previously

charged with participating in the conspiracy with Mr. Hart have pled guilty and have been sentenced pursuant to Rule 11(e)(1)(C).

International cartels often involve huge volumes of commerce and, thus, the stiffest penalties under the Antitrust Sentencing Guidelines. Faced with such significant penalties, defendants such as Mr. Hart often require the certainty of “C” agreements before waiving their right to trial. The prosecution of international cartels also presents other factors warranting the use of “C” agreements. Such trials require the Government to assemble witnesses from around the globe, creating risk in the ability of the Government to present effectively its case at trial. In addition, prosecution of international cartels can place huge demands on Court and Government resources. For these reasons, the Government has agreed to the Rule 11e(1)(C) agreement which is presented to the Court.

VI. THE SENTENCING GUIDELINES

The United States calculates Robert Hart’s offense level under the Sentencing Guidelines as follows⁵:

Base Offense Level (U.S.S.G. § 2R1.1)	10
Volume of Commerce (>\$100 million) (U.S.S.G. § 2R1.1(b)(2))	+7
Acceptance of Responsibility (U.S.S.G. § 3E1.1)	<u>-3</u>
Total Offense Level	14

A. Imprisonment

The base offense level for an antitrust offense is ten pursuant to § 2R1.1. An additional seven points is added to the base offense level because the volume of affected commerce for the period of the charged conspiracy, mid-1992 through mid-1997, is in excess of \$100 million.

⁵ The United States and Mr. Hart have not made any stipulation regarding the calculation of the Sentencing Guidelines.

Mr. Hart qualifies for a three point downward adjustment for acceptance of responsibility, bringing his total offense level to 14.

Mr. Hart has no prior criminal record. Accordingly, pursuant to Guideline § 4B1.1, his criminal history is a level I. At offense level 14 and criminal history level I, Mr. Hart's imprisonment range is 15 to 21 months.

B. Guidelines Fine Range

Pursuant to § 2R1.1(c), the Guidelines fine range for an individual is one to five percent of the volume of commerce. As Vice President and General Manager and subsequently Senior Vice President and Chief Operating Officer, Mr. Hart was the second highest ranking officer of UCAR International, whose volume of commerce of graphite electrodes in the United States affected by the conspiracy was \$713 million.⁶ Accordingly, Mr. Hart's Guidelines fine range is \$7.13 million to \$35.65 million. Because any Guidelines fine would exceed the \$350,000 statutory maximum fine for individuals under the Sherman Act, the fine must be supported by the alternative fine provisions of 18 U.S.C. § 3571(d). This statute provides that a defendant "may be fined not more than the greater of twice the gross gain or twice the gross loss . . ." (i.e., pecuniary loss caused to victims). The parties have not calculated the amount of the overcharge to customers. However, the total volume of affected commerce for the charged conspiracy period from all conspirators is close to \$1.7 billion. Mr. Hart has stipulated that a calculation of twice the gross loss would at least support the agreed-upon fine of \$1 million.

⁶ This figure reflects all of UCAR's sales of graphite electrodes in the United States during the charged conspiracy period. Mr. Hart has not stipulated that this is the "affected" volume of commerce.

VII. GOVERNMENT'S MOTION FOR A DOWNWARD DEPARTURE AND SENTENCING RECOMMENDATION

Based upon a total offense level of 14 and a criminal history level I, the Guidelines range of imprisonment for Mr. Hart is 15 to 21 months and the minimum Guidelines fine is \$7.13 million. Pursuant to U.S.S.G. § 5K1.1, the United States moves for a downward departure from the Guidelines sentence based on Mr. Hart's substantial assistance in the continuing investigation of Sherman Act violations by other individuals and companies involved in this matter. The United States recommends a sentence of nine months imprisonment and a fine of \$1 million.⁷ The agreed-upon penalty is a deservedly substantial sentence for a relatively less active participant in this antitrust offense, while still a departure from Mr. Hart's minimum Guidelines range.

Mr. Hart's relative culpability is reflected in (1) the absence of any role in the offense adjustment as compared to the Government's recommendation regarding Mr. Krass and (2) the lesser sentence as opposed to the 17 months and \$1.25 million fine agreed-upon with Mr. Krass. The recommended sentence is still a significant one for an individual cooperating pre-indictment due to the massive volume of commerce involved in the graphite electrodes conspiracy.

⁷ The United States also recommends that the Court impose no order of restitution because Mr. Hart's former employer UCAR was sued by the victims of this conspiracy, all sophisticated companies represented by able private antitrust counsel. There have been both class actions and suits instituted by smaller groups of graphite electrodes customers, all seeking treble damages and attorneys fees as provided for persons damaged by violations of the antitrust laws under Section Four of the Clayton Act, 15 U.S.C. § 4. The Government understands that UCAR and most of the other corporate subjects of the investigation have settled with the plaintiffs paying huge sums in damages. Given the remedies afforded victims of antitrust crime and the active involvement of private antitrust counsel representing the many victims in this case, the need to fashion a restitution order is outweighed by the difficulty that would be encountered by the Court in attempting to determine the losses suffered by all of the many victims and the undue complication and prolongation of the sentencing process.

Furthermore, the graphite electrode cartel was an extremely effective scheme for raising prices to consumers. Over the course of the five year conspiracy, prices in the United States rose by over 50 percent. In addition, many discounts which had been available to consumers pre-conspiracy were eliminated from the market. Many customers complained about these price increases (and suspected collusion), but due to the strength of the cartel, the increases held, and they benefitted Mr. Hart. As the second highest officer of UCAR International Inc., Mr. Hart was a significant shareholder in the company who held UCAR stock and options worth millions of dollars at the time this investigation began. Finally, Mr. Hart was well aware of the illegality of his actions. He spent his entire career at Union Carbide and UCAR International Inc. - both are large corporations with antitrust compliance programs.

Nonetheless, the Government recommends a reduced sentence. While many of the investigation's subjects have entered into either cooperation or plea agreements with the Government, Mr. Hart's cooperation is still extremely valuable. The Government views Mr. Hart's agreement to plead guilty and cooperate as the catalyst for its plea agreement with Mr. Krass - an agreement that calls for stiffer penalties for Mr. Krass and cooperation which Mr. Krass is uniquely situated to provide. Mr. Hart already has begun cooperating in the grand jury investigation. To date, the Government has found him to be candid, and truthful. The substantial cooperation tendered and promised by Mr. Hart merits a significant downward departure as contemplated by § 5K1.1 of the United States Sentencing Guidelines.

As regards the agreed-upon fine, \$1 million is significantly below the minimum Guidelines fine of \$7.13 million. Nonetheless, assuming Mr. Krass's plea agreement is accepted, Mr. Hart's fine would be the third highest individual fine ever imposed in a criminal antitrust case and, after

Krass's, the second highest likely to be paid by an individual defendant.⁸

The Government has reviewed Mr. Hart's current financial condition and ability to pay. Mr. Hart's principal assets currently consist of approximately \$2.10 million in stock, \$600,000 in other savings, and a family home worth \$550,000. He also has made loans to a family friend and a family business totaling \$2.60 million against bank loans he owes totaling \$900,000. Mr. Hart is married and additional family assets such as a second family home are in Mrs. Hart's name. While he also receives a significant UCAR International pension of about \$18,000 per month, UCAR has taken the strong financial measure of revoking Mr. Hart's stock options (as well as forcing his retirement) due to his illegal activities. Mr. Hart also faces potential additional liability from civil litigation and attorney's fees, as well as additional financial penalties from UCAR.

While this is clearly not a science, a review of Mr. Hart's financial position indicates he does not have the ability to pay a minimum Guidelines fine. He can, however, pay a fine of \$1 million without interest over a three year period. This figure still represents a very serious punishment appropriate to the offense committed.

VIII. CONCLUSION

Because the agreement presented for the Court's consideration is a Rule 11(e)(1)(C) agreement which the Court must either accept or reject, the defendant and the Government have agreed to waive a pre-sentence report. This memorandum has been provided in support of our joint request to have sentence imposed on the day of arraignment.

⁸ As noted above, Mr. Koehler of SGL AG was sentenced to pay a fine of \$10 million (and no jail based on inability to reach or extradite him as a German citizen and resident), but the United States understands that the company intends to pay this fine for him as is permitted by German law.

The Government will, of course, provide any additional information or answer any questions the Court may have at arraignment on October 22, 1999.

Dated:

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 19th day of October 1999, a copy of the Government's Sentencing Memorandum has been faxed and mailed to counsel of record for the defendant as follows:

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