

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

UNITED STATES OF AMERICA) Criminal No. 99-626
)
v.) Judge J. Curtis Joyner
)
ROBERT P. KRASS,) Filed: 10/18/99
)
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 P. Krass 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. Krass 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 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

In addition, an Information was filed on September 23, 1999 in the Eastern District of

¹ Although Showa Denko Carbon was sentenced after UCAR, the plea agreement and case filing predated the UCAR case.

Pennsylvania against Robert J. Hart (United States v. Robert J. Hart, Criminal No. 99-595, Judge James T. Giles). If the Plea Agreement with Mr. Hart is accepted, he will be sentenced to nine (9) months imprisonment and a fine of \$1 million. Mr. Hart was Mr. Krass's subordinate at UCAR International, Inc. ("UCAR").

The investigation is continuing against both individuals and corporations. Defendant Krass 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 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 in the United States and elsewhere.

Competitors in the graphite electrode industry talked among themselves about prices long before the charged conspiracy, but due to lack of discipline and industry overcapacity, price-fixing attempts were generally ineffective. Defendant Krass was not a party to these early efforts. By 1992, however, due to consolidation in the industry and restructuring at major producers such as UCAR and SGL Carbon Aktiengesellschaft ("SGL AG"), the cartel began to gel. A seminal event in the conspiracy was the installment of Robert J. Koehler as CEO of SGL AG. Mr. Koehler and Mr. Krass met in early 1992, exchanged marketing "philosophies," established a rapport, and agreed to continue further discussions. UCAR and SGL AG were by far the two largest graphite electrode producers in the world. The Krass-Koehler dialogue led to

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	1%

Over the course of the conspiracy, beginning in May 1992, graphite electrode prices in the United States increased over 60% through a series of collusive increases led by UCAR:

January 1992	\$.95/lb.	July 1994	\$1.26/lb.
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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 Carbon 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.	April 1995	\$1.33/lb.
January 1993	\$1.06/lb.	February 1996	\$1.43/lb.
June 1993	\$1.13/lb.	February 1997	\$1.56/lb.
January 1994	\$1.21/lb.		

Even greater price increases were achieved in other parts of the world.

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 group.” 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 possessing more intimate knowledge of pricing in particular countries and at particular accounts. The first top level meeting was in London in May 1992, and it was followed by more than a dozen top level and working group meetings in various countries during the course of the conspiracy.

In addition to meetings, Mr. Krass and Mr. Koehler (SGL AG) also discussed United States prices by telephone. Koehler had agreed that SGL AG would follow UCAR’s price lead in the United States. Krass communicated planned UCAR price increases to Koehler, and Koehler instructed SGL’s United States subsidiary, SGL Carbon Corp., to follow UCAR’s prices. Showa Denko Carbon and others also followed as per the agreement. Also, as agreed among the cartel members, discounting was virtually eliminated in the United States.

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.

A. Robert P. Krass

Robert P. Krass, age 63, has worked for several decades in the carbon and graphite industry. He held various positions in the UCAR Carbon Division when it was owned by Union Carbide. When UCAR Carbon became a joint venture of Union Carbide and Mitsubishi Corporation in 1990, Mr. Krass became the new company's CEO. In 1995, when UCAR International Inc. became a public corporation, Mr. Krass was its Chief Executive Officer and Chairman of the Board. He held these positions when the current investigation began.

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. Krass knowingly joined the conspiracy and participated in the cartel's top level meetings during the course of the conspiracy. He and Mr. Koehler led those meetings. Mr. Krass also attended other meetings and had phone conversations in furtherance of

the conspiracy. The defendant agreed on behalf of UCAR International to the tenets of the conspiracy, including the price increases imposed on customers in the United States. Finally, the United States would have proven that this worldwide cartel was 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. Krass jointly recommend that the Court impose a sentence of imprisonment on Mr. Krass of 17 months, to be served in a minimum security facility such as a prison camp. The United States and defendant Krass also recommend imposition of a fine of \$1.25 million, to be paid without interest over a period of five years, with \$100,000 due within 15 days of sentencing, \$150,000 due on the first anniversary of sentencing, and \$250,000 due on the second through fifth anniversaries.

Mr. Krass has agreed to cooperate fully with the United States in the conduct of the present investigation of the graphite electrode industry 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 electrode 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. Krass 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. Krass 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, which limit the sentencing discretion of the Court, 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. Krass have pled guilty and have been sentenced pursuant to Rule 11(e)(1)(C).⁵

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 Krass 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

⁵ Type “C” agreements have become prevalent in international cartel cases largely because the United States lacks jurisdiction over the many defendants, and their willingness to submit to jurisdiction is conditioned on the certainty of the sentence they will receive.

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 Krass's offense level under the Sentencing Guidelines as follows:⁶

Base Offense Level (U.S.S.G. § 2R1.1)	10
Volume of Commerce (>\$100 million) (U.S.S.G. § 2R1.1(b)(2))	+7
Role in the Offense (U.S.S.G. § 3B1.1(a))	+4
Acceptance of Responsibility (U.S.S.G. § 3E1.1)	<u>-3</u>
Total Offense Level	18

A. Imprisonment

The base offense level for an antitrust offense is 10 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. Pursuant to § 3B1.1, four points are added to the level 17 because Mr. Krass was an organizer or leader of the conspiracy to fix the price and allocate the volume of graphite electrodes sold in the United States and elsewhere, a criminal activity that involved five or more participants. Mr. Krass qualifies for a three point downward adjustment for acceptance of responsibility, bringing his total offense level to 18.

Mr. Krass has no prior criminal record. Accordingly, pursuant to Guideline § 4B1.1, his criminal history is a level I. At offense level 18, Mr. Krass's imprisonment range is 27 to 33 months.

⁶ The United States and Mr. Krass have entered no stipulation regarding these Guidelines factors.

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. Mr. Krass was Chief Executive Officer of UCAR International Inc., whose volume of commerce of graphite electrodes in the United States affected by the conspiracy was \$713 million. Accordingly, Krass'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. Even a nominal overcharge to customers of five percent⁷ would, when doubled, provide for a maximum fine under the alternative sentencing provision of approximately \$170 million. Thus, the parties agree that double the gain or loss would exceed the agreed-upon fine of \$1.25 million.

VII. GOVERNMENT'S SENTENCING RECOMMENDATION

Based upon a total offense level of 18 and a criminal history level I, the Guidelines range of imprisonment for Mr. Krass is 27 to 33 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. Krass's substantial assistance in the continuing investigation of Sherman Act violations by other individuals and companies involved in this

⁷ Numerous civil suits have been settled by members of the graphite electrodes conspiracy reflecting overcharges in excess of five percent.

matter. The United States recommends a sentence of 17 months imprisonment and a fine of \$1.25 million. The agreed upon penalty is a deservedly strong sentence for an antitrust offense, while still a departure from Krass's minimum Guidelines range. The following factors, in the Government's opinion, warrant the agreed upon sentence.

A. Leader of Criminal Activity

Defendant Krass was the CEO of the largest graphite electrode producer in the world and no cartel could have succeeded without his active support and participation.⁸ While Mr. Krass was initially hesitant about joining the cartel, he soon took a leadership role in the conspiracy. When he believed conspirators were straying from the tenets of the conspiracy, Mr. Krass reminded them of the conspiracy's benefits and of his company's ability (combined with SGL) to punish those who did not adhere to agreements. Mr. Krass was a chief proponent of new price hikes and urged adherence to no discounting. Mr. Krass participated in cartel meetings with as many as five other graphite electrode producers over a span of five years. He also had meetings with less than the full cartel group and had many phone calls in furtherance of the conspiracy.

B. Appreciation of Wrongdoing

Mr. Krass spent his entire career at Union Carbide and UCAR International Inc. Both are large corporations with antitrust compliance programs. Mr. Krass was very well aware of the illegality of his actions. Krass' activity was not a mistake, faulty interpretation of the Sherman Act, or an isolated act. He consciously broke the law and involved himself and his company in illegal price fixing.

⁸ SGL Carbon AG was close in size to UCAR in worldwide sales of graphite electrodes. The Government views Mr. Krass' culpability as equal to that of Mr. Koehler of SGL AG. As noted earlier, Koehler, a German citizen, has plead guilty and is cooperating in the investigation.

C. Success of the Conspiracy

The graphite electrode cartel was an unusually successful price fixing scheme. Over the course of the five year conspiracy, prices in the United States were increased by the cartel in excess of 60 percent. In addition, all forms of discounts which had been available to consumers pre-conspiracy, were virtually eliminated from the market. Many customers complained about these price increases (and some suspected collusion), but due to the discipline of the cartel, the increases held.

D. Krass's Stake in the Cartel

As CEO and Chairman of the Board of UCAR International Inc., Mr. Krass was a very significant shareholder in the company, although the company has since stripped him of nearly all of his company stock and stock options. Mr. Krass had significant personal motive to see the conspiracy succeed; each inflated and fixed price increase benefitted no one more than himself.

Based on the above factors, Mr. Krass has earned well a 17 month sentence of imprisonment and \$1.25 million fine.

E. Mitigating Factors

The 17 month sentence and \$1.25 million fine is below Mr. Krass's minimum guidelines. The Government is requesting a downward departure and is recommending this sentence for the following reasons:

1. Substantial Assistance

Mr. Krass's cooperation is truly late in the day as almost all subjects have entered into either cooperation or plea agreements with the Government. Nonetheless, the grand jury is still active and pursuing significant subjects, and Mr. Krass has offered cooperation which he is uniquely situated to give.

Mr. Krass already has begun cooperating in the grand jury investigation. To date, the Government has found him to be candid, truthful and corroborated by other evidence developed. The cooperation tendered and promised by Mr. Krass merits a downward departure as contemplated by § 5K1.1 of the United States Sentencing Guidelines.

2. Sentence Relative to Foreign Defendants

Most of the individuals present at a cartel meetings were foreign citizens employed by either SGL AG, Showa Denko, Tokai or other Japanese manufacturers. These individuals are beyond the reach of the United States antitrust laws or current extradition treaties. During the investigation, numerous foreign cartel members have received non-prosecution protection in return for their cooperation and a plea by their company. Even Robert Koehler, a German citizen and co-leader of the conspiracy, plead guilty, but avoided a jail sentence.⁹ Only Mr. Krass and Robert Hart, also of UCAR, face jail sentences. The Government has recognized this fact in entering the agreement with Mr. Krass.

The non-jail agreements with foreign defendants is a compromise based on the reality that the United States has no jurisdiction over foreign citizens. Faced with the lack of cooperation by Mr. Krass and Mr. Hart and other difficulties in proving a covert international cartel, the Government granted non-prosecution protection to various foreign cartel members in return for their willingness to travel to the United States and cooperate.

Besides making such deals out of necessity due to a lack of jurisdiction, foreign cartel members are differently situated from defendant Krass in a least two other respects:

- (1) Lacking similar antitrust prosecutions in their home countries, foreign cartel

⁹ Mr. Koehler was sentenced to pay a fine of \$10 million, but his company has agreed to pay this fine for him as is permitted by German law.

members did not have the expectation that they could be imprisoned if caught;
and

(2) No other executive had even remotely the financial benefits realized by Mr. Krass.

Our capitalist system provides great rewards to successful business people, but those rewards are based on performing successfully in a competitive market, not on secretly conspiring with competitors in a cartel.

VIII. THE FINE

The recommended fine of \$1.25 million is significantly below the minimum Guidelines fine of \$7.13 million. Nonetheless, it is the second highest individual fine ever imposed in a criminal antitrust case and the highest likely to be paid by an individual defendant.

Although Mr. Krass would be an extremely wealthy individual had his crime gone undetected, UCAR has taken strong financial measures against Krass due to his illegal activities. Krass's stock and stock options have largely been revoked by the company, loans have been called and other financial measures taken. Consequently, Krass has already incurred significant financial penalties as a result of his cartel activities.

The Government has had financial experts review Mr. Krass's current financial condition and ability to pay. Mr. Krass's principal assets currently consist of approximately \$1.86 million in stock and \$785,000 in other savings. He also will receive a significant combined Union Carbide and UCAR International pension of over \$30,000 a month. Mr. Krass is married and additional family assets such as the family home are in Mrs. Krass's name.

Mr. Krass faces potential additional liability from civil litigation as well as attorney's fees.

While this is clearly not a science, a review of Mr. Krass's financial position indicates he

does not have the ability to pay a minimum Guidelines fine. He can, however, pay a fine of \$1.25 million without interest over a five year period. This figure still represents a serious punishment appropriate to the offense committed.

IX. 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.

The Government will, of course, provide any additional information or answer any questions the Court may have at arraignment on October 20, 1999.

Dated:

Respectfully submitted,

ROBERT E. CONNOLLY

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CERTIFICATE OF SERVICE

This is to certify that on the 18th day of October 1999, a copy of the Government's Sentencing Memorandum has been faxed to counsel of record for the defendant as follows:

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