

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE*IN THE MATTER OF*

STONE CONTAINER CORPORATION

DOCKET NO. C-3806

I have voted against the Commission's issuance of its complaint and final order in this case because I do not believe that the facts unearthed and presented in the investigation support the allegation that Stone Container ("Stone") invited its competitors "to join a coordinated price increase."

The Commission's complaint alleges that Stone took several actions in the second half of 1993 that amounted to an invitation to collude on linerboard prices. According to the complaint, Stone's invitation-to-collude strategy consisted at the outset of a plan "to take downtime at its plants, to reduce its production by approximately 187,000 tons, and contemporaneously to purchase 100,000 tons of linerboard from competitors and to reduce Stone Container's inventory by 87,000 tons." To carry out this plan, Stone allegedly "conducted a telephone survey of major U.S. linerboard manufacturers, asking competitors how much linerboard was available for purchase and at what price."

Pursuant to its scheme, Stone's "[s]enior officers" -- whose role in this regard is alleged to have been "outside the ordinary course of business" -- "contacted their counterparts at competing linerboard manufacturers to inform them of the extraordinary planned downtime and linerboard purchases." Stone "arranged and agreed to purchase a significant volume of linerboard from each of several competitors" and is alleged to have "communicated to competitors" -- both in private conversations and through public statements -- "its intention to take mill downtime and to draw down industry inventory levels, and its belief that these actions would support a price increase." The complaint asserts that Stone's communications with its competitors on these subjects were made with "[t]he specific intent . . . to coordinate an industry wide price increase" and that Stone's actions "were undertaken with anticompetitive intent and *without an independent legitimate business reason*" (emphasis added).

I have quoted at length from the complaint because it (together with the Analysis To Aid Public Comment that accompanied acceptance of the consent agreement) is the document in which the Commission sets forth its theory of violation and, to the extent permissible, the evidence underlying that theory. As I see it, the acts and communications of Stone alleged in the complaint, as well as other evidence in this case, do not sufficiently support the Commission's theory of violation.

As 1993 approached, Stone and other firms in the linerboard industry had been and were experiencing financial difficulties, including excess production capacity, alleged excess inventory, and depressed price levels. It should hardly be surprising that Stone chose mill downtime and inventory reductions as a normal competitive response to general industry conditions. "Extraordinary" as Stone's downtime and inventory purchases may have been, it is difficult to second-guess the rationality of those actions from a business perspective. The assertion in the complaint that Stone's actions "were undertaken with anticompetitive intent and without an independent legitimate business reason" is a considerable stretch.⁽¹⁾ If senior officials of Stone had been more circumspect in their statements -- particularly their public statements -- about Stone's reasons for its own downtime and purchase decisions, I doubt that the Commission would have considered this matter a worthy target of our scarce resources.

The Commission's Analysis To Aid Public Comment discussed explicit and implicit invitations to collude and placed the present situation in the latter category. I agree with that categorization as far as it goes, since no one from Stone is alleged to have contacted a competitor and baldly suggested a price increase or an output reduction (and thus this case is not a replay of *American Airlines*). Instead, it is the totality of Stone's *conduct* -- when judged against the backdrop of Stone's remarks concerning low prices, excess capacity, and possible inventory overhang -- that has led the Commission to conclude that Stone implicitly invited its competitors to collusively raise prices.⁽²⁾ I am unable to place on Stone's actions (and its explanations of them) the sinister characterization that would

permit me to condemn its otherwise justifiable actions. I am concerned that the Commission's decision in this case may deter corporate officials from making useful public statements (*e.g.*, in speeches to investors or presentations to securities analysts) that candidly address industry conditions, individual firms' financial situations, and other important subjects.

I respectfully dissent.

Endnotes

(1) In their Concurring Statement, my colleagues rely on the Analysis To Aid Public Comment in this case for the proposition that "it would have been more economical for Stone Container to keep its plants open than to purchase inventory from competitors . . ." With all due respect, it is precisely the truth of that assertion that I find insufficiently supported by the evidence.

(2) The Analysis To Aid Public Comment cited *Precision Moulding Co., Inc.*, Docket No. C-3682, as an example of an implicit invitation to collude. According to the Analysis, Precision Moulding "informed [its] competitor that its prices were 'ridiculously low' and that the competitor did not have to 'give the product away.'" I do not consider Stone's conduct and language to have communicated a message nearly as pointed as that conveyed by Precision Moulding.