

ILLINOIS POLLUTION CONTROL BOARD  
September 6, 1972

ENVIRONMENTAL PROTECTION AGENCY        )  
  )  
  Complainant,        )  
  v.                        )               PCB 72-180  
  )  
MYSTIK TAPE, a division of BORDEN,     )  
INC.    )  
  Respondent.

Richard W. Cosby, Assistant Attorney General, for the Environmental Protection Agency;

James W. Kissel and Thomas M. McMahon for Respondent.

OPINION AND ORDER ON APPLICATION FOR NON-DISCLOSURE (by Mr. Parker):

Respondent, Mystik Tape division of Borden, Inc., has filed original and amended Applications for Nondisclosure, the latter being supported by the affidavit of Donald E. Wagstaff, an Assistant to the Group Vice President of the Chemical Division of Borden, Inc.

The Amended Application describes the documents sought to be shielded from public inspection as "current statements showing profit or loss and gross and net sales for the Mystik Tape division of Borden, Inc." (par. 2). It turned out at an oral hearing held before the Board on the Amended Application that only a single document is involved. That document sets forth certain data taken from the company records as to the Mystik Tape division's gross sales, net sales and an item described as "Project Group Margin". We understand that this document, which was shown to the Board at the hearing, was specially prepared for purposes of summarizing the information sought to be protected from public access.

Respondent contends that the sales and profit margin information set forth on the document shown to the Board constitutes "confidential data and/or a trade secret" (par. 3 of Amended Application). The further contention is made that Mystik's business is highly competitive and that disclosure of the information contained on the document to competitors "could...cause Mystik serious injury" (par. 4 of Amended Application). The affidavit states that the information "has always been treated as confidential and secret by the company", and that "employees who have access to such information must agree in the regular course of business to keep such material secret and confidential within the company" (Affidavit, par. 2). The affidavit also refers to "selling price attrition" in the industry due to foreign imports, and states that disclosure of the information sought to be protected from public access "could be sufficient to enable a competitor to engage in price cutting... and probably even force...[Mystik] from this business" (Affidavit, par. 3). Although the affiant is not shown to be an officer of Respondent, it

appears that he is in a position to speak responsibly for the company on the subject matter and we herewith treat his affidavit as containing representations made by and binding upon the company.

While profit or loss and sales information as to Borden, Inc. is presumably available to the public from the published company financial statements, the information involved here concerns a breakdown as to a single division (Mystik Tape) of the company. At the hearing before the Board, counsel for Respondent represented that the divisional information in the single document has not been published or otherwise disclosed to governmental agencies or others than those company employees bound to non-disclosure referred to in the affidavit (par. 2). We accept that representation and consider it to be a condition of the grant of the Amended Application made herein.

As discussed in our opinions dated August 10, 1972 and September 6, 1972 in Olin Corporation v. EPA, PCB 72-253, we are reluctant to enter non-disclosure orders except in instances where the subject matter is clearly within the statutorily protected categories and the likelihood of harm is both severe and reasonably certain. On the other hand, we are not disposed to second guess a company as to the probability of damage resulting from disclosures when it feels that substantial detriment would ensue.

We believe that Respondent's Amended Application, supporting affidavit and representations made to the Board are sufficient to justify a conditional non-disclosure order pursuant to Rule 107 pending the ultimate resolution of the case. If it appears that we will be obliged to make disclosure of any of the information contained in the document captioned for non-disclosure in order to render our decision, we will so advise the parties, at which time Respondent will be requested to decide whether to waive the non-disclosure status of the information.

This opinion constitutes the findings of fact and conclusions of law of the Board.

IT IS THE ORDER of the Pollution Control Board that Respondent's single document be designated as "not subject to disclosure" until prior to the rendition of the final order in this proceeding, at which time the Board will advise the parties whether the caption on the document must be lifted in order to allow the rendition of said final order on the state of the record as it then exists.

I, Christian Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion and Order on Application for Non-Disclosure was adopted on the 6<sup>th</sup> day of September, 1972 by a vote of 4 to 0.

