

ILLINOIS POLLUTION CONTROL BOARD
July 30, 1992

IN THE MATTER OF:)
)
TRADE SECRET CLAIM BY,) PCB 92-110
THE GRIGOLEIT COMPANY, an) (Trade Secret)
Illinois Corporation,) (also see PCB 90-135)
)

OPINION AND ORDER OF THE BOARD (by J. Anderson):

On July 20, 1992, The Grigoleit Company (Grigoleit) filed before the Board a trade secret Statement of Justification (Statement). The Statement was filed in response to the Board Order of June 4, 1992, in PCB 90-135. The Board hereby incorporates by reference the Board's PCB 90-135 Opinion and Order of June 4, 1992 and dismissal Order of today, July 30, 1992; also, pursuant to the June 4, 1992 dismissal Order, the Board also directs the Clerk to physically transfer the Material Safety Data Sheets (MSDSs), the documents being claimed as trade secret, from the PCB 90-135 record into this record. Because of the unusual history surrounding Grigoleit's trade secret documents, and because of the problems that have already arisen over applying the trade secret regulations, the Board will specifically repeat significant portions of those two Board actions here to assist in clarifying the issues involved.

The Illinois Environmental Protection Agency (Agency) filed a response on July 27, 1992 requesting that the Board deny trade secret status to the MSDSs. The Board cannot consider the response. Part 120 does not provide for filing of such responses; we note the short timeframe of 10 working days for Board decision. We will retain the filing for the record.¹

The applicable Board regulations regarding trade secrets are found at 35 Ill. Adm. Code 120.101 through 120.401. The time limit for the Board's determination is found at 35 Ill. Adm. Code 120.225, which states:

The agency shall determine whether the article represents a trade secret within 10 working days from the date of receipt of a complete statement of justification as prescribed in Section 120.202 (whether such justification is submitted as a result of a

¹ We note that today Grigoleit filed a motion to strike the Agency's response after the Board meeting but before this Opinion and Order was formalized for the Clerk's signature. In that the Board will not consider the Agency's response, Grigoleit's filing is moot. We will retain the filing for the record.

request by the agency, a request by the public, or on the owner's initiative.) This time period may be extended for a second period of 10 working days, if within the first 10 day period, the agency demonstrates that the extension is necessary to make determination pursuant to Section 120.230 and notifies the owner and requester of the extension.

The Board's determination today is within the ten working days timeframe of Grigoleit's July 20, 1992 filing.

BACKGROUND

The MSDSs which comprise Grigoleit's trade secret claim were a part of various documents that had been seized on January 26, 1990 from the premises of Grigoleit's Decatur plant by the Agency under an administrative search warrant. On that same day, Grigoleit's president hand-delivered to Agency personnel at the Decatur plant site his personally signed trade secret claim letter and initial statement of justification, dated January 25, 1990. Throughout the subsequent series of events, this letter remained the sole claim letter provided by Grigoleit.

The Agency denied Grigoleit's trade secret claim, and on July 23, 1990, Grigoleit appealed to the Board. In response to a Board order, Grigoleit clarified the scope of its claim as encompassing only the some-200 MSDSs submitted by the Agency, filed and properly marked MSDSs in conformance with the Board's trade secret regulations.

In its June 4, 1992 Opinion and Order, the Board ruled that the Agency failed to make a timely trade secret determination. The Board also found that the Agency's default did not cause the MSDSs to be accorded trade secret protection by operation of law. The Board declined to make any further decision on Grigoleit's claim, concluding that "this record cannot be used as a basis for determining whether Grigoleit justified trade secret status" for the MSDSs (Board Op. p. 13; also see p. 11, 12 re: post-hearing briefs.) Instead, the Board concluded that the best remedy was to afford Grigoleit the opportunity to initiate a new claim directly before the Board, in that trade secret matters may be initiated before the Board as well as the Agency (and the Department of Energy and Natural Resources). (Board Op. pp. 13,14.)

The June 4, 1992 Order stated:

1. Because no timely determination by the Agency was made in this matter:
2. The Material Safety Data Sheets (MSDSs) shall continue to remain confidential. If, however, within 45 days, Grigoleit

fails to take action pursuant to paragraph 3, the documents will be subject by Board Order to placement in the public domain and this case will be dismissed.

3. If, within 45 days of the date of this order Grigoleit, pursuant to Section 120.201 of the Act, and with particular reference to Section 120.201(a)(3), either submits a Statement of Justification for the claim or, alternatively, a claim with a limited waiver, this case will be dismissed and the matter will be dealt with as a new case in a newly docketed proceeding before the Board. However, Grigoleit need not resubmit the documents which are in the Board's possession which the Board has previously found are properly marked.
4. The Board will retain jurisdiction in this matter. (Emphasis added)

As earlier noted, the Board is today dismissing PCB 90-135 in accordance with paragraph #3 of the above order, and proceeding with Grigoleit's new filing under the instant Docket PCB 90-135.

DISCUSSION

In this instant case, Grigoleit's sole filing consists of its 1 and 1/2 page July 20, 1992 Statement of Justification, without attachments or incorporations; as noted in the June 4, 1992 Order, Grigoleit was not required to refile the MSDSs, filed as Joint Exhibit #2 in PCB 90-135. The MSDSs are now part of the record in this case (See p. 1 of this Opinion). Grigoleit's support of its claim was brief. Grigoleit states in essence that it believes it "has previously submitted sufficient Statements (sic) of Justification .." and:

"... wishes to stand on the document previously submitted to the Illinois Environmental Protection Agency as and for its Statement of Justification, i. e., the letter/memorandum directed to the Illinois Environmental Protection Agency dated January 25, 1990". (Statement, p. 1, 2; July 20, 1992.)

Grigoleit did not incorporate or attach any of the prior record, including the January 25, 1992 "letter/memorandum" (id.) to which the Statement refers, or even identify the letter by Exhibit number or other means. We assume that Grigoleit is referring to the letter which is identified in the Board's PCB 90-137 Opinion, p. 5. The Opinion notes that the letter, which was hand-signed and hand-delivered, cites 7 and 7.1 of the Environmental Protection Act (Act), claims the documents as trade secrets, and states that the letter constitutes Grigoleit's initial statement of justification. The PCB 90-135 Opinion then

quotes the following paragraph of Grigoleit's January 25, 1992 letters:

1. The Company does not disclose information to any persons outside the Company and provides only limited access to certain management employees concerning its products, processes, equipment, materials, components, etc., on a "need to know" basis only. The Grigoleit Company further certifies that it has no knowledge that any such records have ever been published, disseminated or otherwise become a matter of general public knowledge. The above articles represent a combination of years of experience, practical application, innovation and in-house technology which have been applied in such a manner as to make the Company's production processes unique and have enabled the Company to maintain a competitive edge and provide the highest quality product.

The procedures applicable to Grigoleit's claim are found in 35 Ill. Adm. Code Subpart B, and specifically in Sections 120.201 and 120.202, which state:

Section 120.201 Claim That Article Represents A Trade Secret

- a) An agency shall consider any article submitted to or otherwise obtained by the agency as claimed to present a trade secret and shall protect such article from disclosure pursuant to Subpart C of this Part, only if the agency is provided with the following:
 - 1) A claim letter which clearly states that the article is claimed to represent a trade secret, as defined in these rules and the Act, and names and briefly describes the article; and
 - 2) A copy of the article marked as provided in Section 120.305; and
 - 3) Either a Statement of Justification for the claim meeting the requirements of Section 120.202 or a limited waiver of the statutory deadlines for any agency decision as provided in Section 120.203.
- b) The owner of an article in the possession of the agency may claim that the article represents a trade secret by providing the agency with the information listed in subsection (a) at any time.

Section 120.202 Contents of Statements of Justification

A statement of justification shall contain the following:

- a) A detailed description of the procedures used by the owner to safeguard the article from becoming available to persons other than those selected by the owner to have access thereto for limited purposes; and
- b) A detailed statement identifying the persons or class of persons to whom the article has been disclosed; and
- c) A certificaion that the owner has no knowledge that the article has ever been published, disseminated or otherwise become a matter of general public knowledge; and
- d) A detailed discussion of why the owner believes the article to be of competitive value; and
- e) Any other pertinent information which will support the claim.

Next, 35 Ill. Adm. Code 120.230 articulates the standards for the Board's trade secret determination, as follows:

Section 120.230 Standards For Agency Determination

- a) An article shall be determined to represent a trade secret if and only if:
 - 1) The owner has substantially complied with the procedures for making a claim and justification as prescribed by this Part; and
 - 2) The statement of justification demonstrates that:
 - A) The article has not been published, disseminated or otherwise become a matter of general public knowledge; and
 - B) The article has competitive value.
- b) There shall be a rebuttable presumption that an article has not been published, disseminated or otherwise become a matter of general public knowledge, if:
 - 1) The owner has taken reasonable measures to prevent the article from becoming available to persons other than those selected by the owner to have access thereto for limited purposes; and

- 2) The statement of justification contains a certification that the owner has no knowledge that the article has ever been published, disseminated, or otherwise become a matter of general public knowledge.
- c) The agency may determine that any page, part or portion of the article represents a trade secret which meets the requirements of subsection (b).

BOARD DETERMINATION

In summary, the Board finds that Grigoleit has failed to justify its trade secret claims. The Board has made every effort to fairly respond to the procedural breakdown before the Agency that left many unanswered questions, particularly those concerning whether circumstances might have frustrated Grigoleit's earlier efforts to make a proper trade secret claim. We remind Grigoleit that it had earlier never even specifically identified or properly marked what it was claiming as trade secrets until the case was before the Board on appeal. This omission was corrected only in response to a post-hearing Board Order. Also, even if the January 25, 1990 letter had contained a certification by the owner of no knowledge that the documents were in the public domain pursuant to Section 120.202(c) (we had found none), it turned out that the owner was laying claim to far more documents than the MSDSs at that time. As recounted in the PCB 90-135 Opinion, it was only later by stipulation at hearing that it was agreed that the remaining claim referred only to the MSDSs. We note that the Board, in "starting over" in PCB 90-135, took special pains in paragraph #3 of the Order to draw Grigoleit's attention specifically to what must be submitted and the justifications to be made under Sections 120.201 and Sections 120.202. We further remind Grigoleit that the Board has procedural rules in 35 Ill. Adm. Code 101 which are applicable to all Board proceedings, and which include rules concerning incorporations and filing of exhibits for the record. (See e.g. Sections 101.100, 101.103 and 101.106). The Board allowed only the MSDSs to become part of this record without refiling. Grigoleit, not the Board or the Agency, is responsible for complying with the regulations in justifying its claim. We note that Section 120.201(b) allows Grigoleit at any time to cure its filing and informational problems. Grigoleit has not done so.

Even if the Board were to at this juncture "waive" Grigoleit's failure to place the claim letter in the record of this proceeding, the claim letter, standing alone, provides insufficient justification. It neither clearly states what articles are claimed nor names nor briefly describes them; it was not made clear until the subsequent Board hearing and following briefs, none of which is in this record, that, while the MSDSs individually were admittedly of public record, what was being claimed as confidential and of competitive value was that public

access to them collectively would reveal the chemical "formulas" used in Grigoleit's processes. (See Section 120.201 (a)(1), and Sections 120.202 (d) and (e).)

Again, even assuming that the letter was in the record, the letter at best only by a list of general assertions, not by "detailed description", addresses the procedures used by the owner to safeguard the article (Section 120.202(a).) Also, as noted above, there is no formal certification, of the owner's assertion that he (not the Company as Grigoleit states) has no knowledge that the article is in the public domain as required by Section 120.202 (c).

The Board finds that Grigoleit, in its July 20, 1992 Statement of Justification, has not placed its January 25, 1990 claim letter into the record of this proceeding. The Board further finds that, even if it were to take notice of the contents of the January 25, 1990 letter, the letter would be insufficient to support a positive determination of trade secret status. Additionally, Grigoleit, in its Statement of Justification, has not identified or placed in the record of this proceeding any other portions of the record from the PCB 90-135 proceeding that might serve to clarify the deficiencies noted above.

Section 120.240 addresses the Board's actions following a negative determination.

In consideration of the Section 120.230 standards for its determination, and in reference to Section 120.240, the Board determines that neither the article, nor any page, part or portion thereof meets the standards specified in Section 120.230(a)(1) or (2). Therefore, the Board denies the claim for trade secret protection for the article and page, part or portion thereof. The owner has not substantially complied with the prescribed procedures for making a claim or justification (Section 120.230(a)(1); the Statement of Justification does not demonstrate that the article has not been in the public domain (Section 120.230(a)(2)(A); and the Statement of Justification does not demonstrate that the article has competitive value (Section 120.230(a)(2)(B).

In accordance with Section 120.240(b)(1), this opinion constitutes the Board's reasons for denying the claim.

ORDER

1. For the reasons stated above, the Board denies in its entirety the claim for trade secret protection by The Grigoleit Company for the Material Safety Data Sheets (MSDSs) seized by the Agency on January 26, 1990.

0135-0197

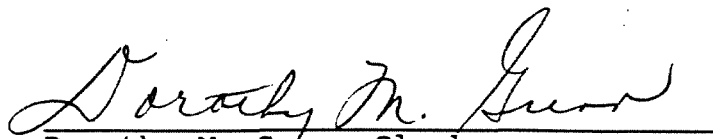
2. The Clerk is directed to give notification to Grigoleit by certified mail return receipt requested, in accordance with Section 120.240. In that the MSDSs are also in the possession of the Agency, the Clerk is also directed to send in the same manner a copy of this opinion and order to the Agency.
3. In accordance with 35 Ill. Adm. Code 120.240(c) and (d) and until further action of the Board, the Board directs the Clerk and the Agency to continue to protect as confidential the MSDSs.
4. In accordance with 35 Ill. Adm. Code 120.240(b)(3) Grigoleit is hereby notified that the agency will cease protecting the article, or the page, part or portion thereof, as a trade secret unless the Board is served with notice of the filing of a petition for review within 35 days from the date of notice to the owner.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1041, provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437).

B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 30th day of July, 1992, by a vote of 6-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board