

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35291

STERLITE (USA), INC.—ACQUISITION AND OPERATION EXEMPTION—COPPER
BASIN RAILWAY, INC.

Decided: October 9, 2009

This decision denies a request to reject a notice of exemption to acquire and operate existing rail lines because rejection has not been shown to be warranted.

BACKGROUND

Sterlite (USA), Inc. (Sterlite), a noncarrier, has agreed to purchase the rail assets of the Copper Basin Railway, Inc. (CBRY), pursuant to a Settlement and Purchase and Sale Agreement dated March 6, 2009 (PSA) by ASARCO LLC, AR Silver Bell, Inc., CBRY, ASARCO Santa Cruz, Inc., Sterlite, and Sterlite Industries (India), Ltd. The PSA is part of a \$2.6 billion bankruptcy reorganization plan pursuant to which Sterlite would purchase, subject to court approval,¹ the mining operations of ASARCO Incorporated and Americas Mining Corporation (ASARCO). ASARCO is the debtor-in-possession and controls CBRY, through ASARCO LLC, which is the current owner of CBRY.² ASARCO also seeks to resume control of CBRY lines under a competing reorganization plan that is also pending before the bankruptcy court.

On August 14, 2009, Sterlite filed a verified notice of exemption under the Board's streamlined class exemption procedures at 49 CFR 1150.31, for authorization to acquire and operate all of CBRY's rail assets. Sterlite verifies that it does not propose any change in the operations of CBRY that would exceed the thresholds in the Board's environmental rules at 49 CFR 1105.7(e)(4) or (5), and that the proposed acquisition falls within 49 CFR 1105.6(c)(2)(i). That rule contains a presumption that there is not enough potential for

¹ The PSA, and therefore Sterlite's acquisition of CBRY, is subject to approval by the United States Bankruptcy Court for the Southern District of Texas and by the United States District Court for the Southern District of Texas in In re ASARCO LLC (Case No. 05-21207).

² CBRY principally transports sulfide copper and copper concentrates from ASARCO's copper mining operation and also carries sulfuric acid in tank cars to and from this copper mine, refinery, and smelter. CBRY also apparently transports lumber and plastics for unrelated shippers and military equipment for the U.S. Department of Defense.

significant impacts to warrant conducting a case-specific environmental review under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, et seq., or to require the filing of an Environmental Report containing the information set forth in 49 CFR 1105.7.³ Thus, Sterlite did not file any environmental documentation with its verified notice. Notice of the exemption was served and published in the Federal Register on August 28, 2009 (74 FR 44436). The exemption is scheduled to become effective on October 13, 2009.

On August 25, 2009, ASARCO filed a reply in opposition to Sterlite's notice of exemption, primarily on environmental grounds. ASARCO requested that the notice be rejected and that an Environmental Report be required because: (1) the proposed continuing operations of CBRY include transportation of hazardous materials, including sulfuric acid and copper ore; (2) Sterlite is inexperienced in managing a rail operation; and (3) Sterlite's corporate affiliates have an alleged history of environmental noncompliance in certain foreign operations. In support of its arguments, ASARCO submitted evidence indicating that CBRY had a derailment and spill of sulfuric acid in the 1990's (during ASARCO's control of CBRY), an unverified report alleging environmental noncompliance by Sterlite's affiliates in India, and a letter from the House of Representatives' Committee on the Judiciary to U.S. Attorney General Mukasey dated June 27, 2008, requesting that the Department of Justice consider Sterlite's, or any other bidder's, environmental track record before offering to support the bidder's acquisition of ASARCO's assets from bankruptcy, which includes CBRY.

On September 1, 2009, Sterlite responded that its notice is fully compliant with the Board's environmental rules and that there is no basis for rejecting the notice on environmental grounds. Sterlite explained that it does not intend to make any changes in the rail operations now conducted by CBRY. According to Sterlite, there will be no change in workforce, as it is contractually required to offer employment to all of CBRY's current employees.

PRELIMINARY MATTERS

Simultaneous with its notice of exemption, Sterlite filed a petition for waiver of the labor notice requirements set forth in 49 CFR 1150.32(e) so that the notice of exemption could become effective in 30 days rather than the 60 days required by the labor notice provision. In its reply dated August 25, 2009, ASARCO opposed the waiver and suggested that Sterlite's notice should be rejected for failure to have provided 60 days notice to CBRY's employees. By petition filed

³ Where the Board is concerned that a particular action that falls within 1105.6(c)(2)(i) has the potential for significant environmental impacts, it can make an exception and require an Environmental Report or conduct a case-specific environmental review under NEPA. See 49 CFR 1105.6(d). However, the party seeking such an exception bears the burden of demonstrating that an exception is warranted in that particular case. See generally, Missouri Min., Inc. v. ICC, 33 F.3d 980, 983 (8th Cir. 1994); City of New York v. ICC, 4 F.3d 181 (2d Cir. 1993).

on September 1, 2009, however, Sterlite sought leave to withdraw its petition for waiver, noting that its reorganization plan is not likely to receive final confirmation before October 13, 2009, 60 days from Sterlite's notice to employees and certification of that notice to the Board. In these circumstances, the requested withdrawal is granted.

In a supplemental reply filed on August 31, 2009, ASARCO argued that Sterlite's notice is defective and should be rejected because Sterlite improperly attempted to amend its verified notice with an unverified letter. But in the letter at issue, dated August 19, 2009, Sterlite simply provided an explanation to the Board for why the PSA does not trigger the requirement in 49 CFR 1150.33(h) for information regarding interchange limitations. Therefore, ASARCO has not shown that Sterlite's notice is defective or that its letter should have been verified. Accordingly, ASARCO's request to reject the notice of exemption on these grounds is denied.

DISCUSSION AND CONCLUSIONS

ASARCO fails to support its claim that the notice of exemption should be rejected on environmental grounds. Nor does it show that the proposed acquisition should be reclassified as one that requires the preparation of a case-specific environmental review or the submission of an Environmental Report. It is undisputed that the thresholds in the Board's environmental rules that trigger the need for a case-specific environmental review will not be met here. Sterlite has explained that it does not intend to make any changes to rail operations as they are now conducted by CBRY. Sterlite states that it expects to hire most, if not all, of CBRY's current employees.

ASARCO raises general concerns about alleged "environmental challenges" posed by CBRY's operations in the past and suggests that more information is needed concerning Sterlite's ability to manage those challenges. To support this argument, ASARCO implies that there is a risk of significant environmental impacts from potential future releases of hazardous materials due to Sterlite's future operation of CBRY. However, such an assertion amounts to pure speculation. Under NEPA, the Board is only required to consider and document "reasonably foreseeable" environmental effects, not speculative effects. See 40 CFR 1508.8 (defining "effects" under NEPA). There is nothing in the record indicating that CBRY is currently operating in violation of any hazardous materials transport laws and regulations or that Sterlite's continued operation of CBRY will result in releases of hazardous materials. Indeed, Sterlite, like ASARCO before it, will be required to ensure that CBRY complies with all Federal laws pertaining to the handling and transport of hazardous materials, including laws implemented by the states. States and localities also retain their reserved police powers to

protect the health and safety of their citizens so long as their actions do not unreasonably burden interstate commerce or interfere with railroad operations.⁴

ASARCO notes that a sulfuric acid spill caused by a derailment on CBRY occurred at some point “in the 1990’s.” Reply in Opposition of ASARCO at 3 n.2. However, it is unclear how a spill of sulfuric acid caused by a derailment that took place so long ago indicates that there will be future derailments causing the release of hazardous materials, or how such an incident otherwise has any relevance to the environmental impacts of future operations on CBRY. In fact, the very evidence to which ASARCO cites, the deposition testimony of Thomas Aldrich (ASARCO, LLC’s Vice President of Environmental Affairs), acknowledges that this spill occurred “20 years ago” and that the spill had likely been remediated to the satisfaction of environmental regulators. See Deposition of Thomas Aldrich at 109:6-11 (Ex. A to Evans Decl. In Support of Opposition to Notice of Exemption). It is not reasonably foreseeable at present, based upon a reference to a 20-year-old derailment, that Sterlite will operate CBRY in a manner that will cause a derailment and that such a derailment will necessarily result in a release of hazardous materials causing significant environmental effects. In short, there is no logical connection between ASARCO’s reference to a 20-year-old derailment on CBRY lines and Sterlite’s proposed future operation of CBRY.

ASARCO’s reliance on alleged environmental practices and “noncompliance” by Sterlite’s corporate affiliates in a foreign country (India) is also unpersuasive. See Reply in Opposition of ASARCO at 3-4. It is entirely unclear how the environmental practices of Sterlite’s corporate affiliates, whether or not such practices amount to actual “noncompliance” with India’s laws or general social irresponsibility, have any bearing upon how Sterlite will operate CBRY in the United States. As noted, CBRY is subject to numerous Federal laws and regulations concerning the transport of hazardous materials. Moreover, the environmental “noncompliance” discussed in the article and letter (from Reps. John Conyers, Jr. and Lamar Smith) referenced by ASARCO (see Reply in Opposition of ASARCO at 3 n.3 and 4 n.4), involve the *mining* operations of these Sterlite affiliates. Neither the article nor the letter discusses any environmental “noncompliance” involving the operation of a railroad. Again, there is simply no logical connection between the information ASARCO has presented and how the CBRY lines are likely to be operated in the future.

Finally, ASARCO suggests that Sterlite, as a noncarrier, is too inexperienced to be authorized to manage a railroad operation without providing more environmental information. This argument assumes that Sterlite cannot or will not hire appropriately trained personnel to operate the railroad safely and in compliance with all laws and regulations concerning the handling and transport of hazardous materials. The record indicates, however, that Sterlite

⁴ See CSX Transp. Inc.–Pet. for Decl. Order, STB Finance Docket No. 34662 (STB served Mar. 14, 2005), reh’g denied (STB served May 3, 2005).

intends to operate CBRY “using the same workforce now employed by CBRY.” Reply of Sterlite (USA), Inc. to Petition to Reject Notice of Exemption, at 5.

The Board has a responsibility under NEPA to assure adequate consideration of environmental factors in the Board’s decision-making process. However, the Board must balance the level of scrutiny that is appropriate for a particular transaction with the evidence that has been presented. Here, Sterlite has provided all of the information required by the Board’s class exemption regulations and does not intend to make any operational changes on the CBRY lines. In opposition, ASARCO provided only information that is speculative and unconnected to the potential future operations on CBRY. Therefore, the record here does not trigger the Board’s responsibility to prepare an Environmental Impact Statement or Environmental Assessment under NEPA, nor does it support requiring Sterlite to prepare an Environmental Report under 49 CFR 1105.6(d).

The Board also must consider the impact of rejecting an otherwise routine transaction on the integrity of its class exemption procedures, based on non-specific, speculative allegations. If the Board were to reject every notice of exemption or reclassify every transaction upon such unsupported allegations, then the Board’s streamlined class exemption procedures could be circumvented at any time.

For all of these reasons, ASARCO’s requests to reject the notice and/or to reclassify the transaction and require an Environmental Report are denied.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Sterlite’s request for leave to withdraw its petition for waiver is granted.
2. ASARCO’s requests to reject the notice of exemption, or to reclassify the transaction and require an Environmental Report, are denied.
3. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Anne K. Quinlan
Acting Secretary