

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35291

**STERLITE (USA), INC.
– ACQUISITION AND OPERATION EXEMPTION –
COPPER BASIN RAILWAY, INC., LINE
IN PINAL AND GILA COUNTIES, AZ**

**REPLY OF STERLITE (USA), INC.,
TO
PETITION OF ASARCO INCORPORATED
AND AMERICAS MINING CORPORATION
TO REJECT NOTICE OF EXEMPTION**

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Dated: September 1, 2009

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SURFACE TRANSPORTATION BOARD**

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– ACQUISITION AND OPERATION EXEMPTION –
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AND AMERICAS MINING CORPORATION
TO REJECT NOTICE OF EXEMPTION**

On August 25, 2009, ASARCO Incorporated and Americas Mining Corporation (together, “Parent”) filed a document in this proceeding, styled as “Reply in Opposition of ASARCO Incorporated and Americas Mining Corporation to Sterlite (USA), Inc. – Acquisition and Operation Exemption – Copper Basin Railway, In., Line in Pinal and Gila Counties, AZ, Verified Notice of Exemption of Sterlite (USA), Inc. Pursuant to 49 C.F.R. § § 1150.31-1150.34.” The rules governing notices of exemption (such as the one filed in this case by Sterlite (USA), Inc. (“Sterlite”), regarding its proposed acquisition of the rail assets of Copper Basin Railway, Inc. (“CBRY”)) establish an accelerated, summary procedure that does not provide for the filing of “replies in opposition” to notices. In filing its Reply, Parent appears instead to have assumed the existence of a notice and comment procedure of the kind that the Board’s predecessor, the Interstate Commerce Commission, specifically rejected when it adopted the class exemption.¹ The Board should therefore reject Parent’s Reply.

¹ See *Class Exemption for the Acquisition & Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810, 816 (1985) (“We conclude that there has been no showing of a benefit from a notice and comment period that outweigh the benefit of expeditious handling. Doing so

An examination of Parent's filing, however, indicates that what Parent appears to be seeking is rejection of Sterlite's Notice of Exemption. If the Board should determine to treat Parent's submission as a petition for rejection, Sterlite hereby replies to Parent's reply as though it were a "Petition" (and accordingly refers to it as such herein).

DISCUSSION

I. THE BOARD SHOULD STRIKE OBJECTIONABLE MATERIAL THAT DELIBERATELY MISCHARACTERIZES STARLITE'S POSITION WITH REGARD TO THE BOARD'S JURISDICTION.

At the outset, however, Sterlite must address a false and scandalous statement by Parent that Sterlite cannot allow to go unchallenged. In the first sentence to the introduction to the "Petition", Parent states: "Having refused to stipulate to STB's jurisdiction over Sterlite's attempted purchase of the Copper Basin Railway ('CBRY'), Sterlite now acknowledges STB's jurisdiction and is attempting to hurry STB's jurisdiction and is attempting to hurry STB approval through a Notice of Exemption filed August 14, 2009" ("Petition" at 1). This is the latest of many misrepresentations by Parent, both before this Board and before the bankruptcy court, regarding Sterlite's intentions and conduct, and should not be permitted to remain on the record.

In its Petition for Declaratory Order in STB Finance Docket No. 35286, Parent claimed that "Sterlite asserts that the STB has no jurisdiction over this purchase."² Parent cited no actual statements by Sterlite to that effect; nor could it, because Sterlite has never made such an assertion. In the same petition, Parent referred to "Sterlite's statements ... indicat[ing] a

would be inconsistent with the intent of this class exemption – to streamline current procedures."), *aff'd sub nom. Illinois Commerce Comm'n. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (unpublished table decision).

² Petition for Declaratory Order of ASARCO Incorporated and Americas Mining Corporation at 4, *ASARCO Inc. – Petition for Declaratory Order*, STB Finance Docket No. 35286 (filed Aug. 7, 2009) (Exhibit A hereto).

complete disregard for the STB’s jurisdiction over the transaction.”³ Again, Parent cited no such statements, for there were (and are) none.⁴ Finally, on the basis of nothing but Parent’s own speculation, Parent asserted that “Sterlite proposes to operate the CBRY, by this sale, without seeking appropriate review by the STB.”⁵

Even if there had been some excuse, at the time Parent filed its petition or declaratory order, for its statements mischaracterizing Sterlite’s intentions, once Sterlite had filed its reply to that petition, Parent could no longer pretend to make such statements in good faith. Sterlite clearly stated that it acknowledged the Board’s jurisdiction over the proposed acquisition and that “it intend[ed] to make all filings with the Board needed to obtain regulatory authority for that acquisition.”⁶ Parent nevertheless characterizes Sterlite as having “refused to stipulate to STB’s jurisdiction over Sterlite’s attempted purchase of the Copper Basin Railway (‘CBRY’), ‘Petition’ at 1, even though Sterlite had stipulated to precisely that proposition, and cited its stipulation as the reason no declaratory order was necessary. Parent’s statement, directly contrary to the truth regarding Sterlite’s position, is “scandalous matter” that should not be

³ *Id.*

⁴ Parent claimed that “[d]ocuments produced in discovery state that Sterlite does not believe that STB approval is necessary,” *id.* at 7, but as Sterlite explained in its reply to the petition or declaratory order, the document Parent cited was one that had been produced by ASARCO, LLC, not by Sterlite, and Parent provided “no evidence regarding the authorship of that document, the purpose for which it was created, or what it indicate[d] about Sterlite’s past or current intentions.” Reply of Sterlite (USA), Inc., to Petition for Declaratory Order of ASARCO Incorporated and Americas Mining Corporation at 2-3 n.2, *ASARCO Inc. – Petition for Declaratory Order*, STB Finance Docket No. 35286 (filed Aug. 11, 2009) (Exhibit B hereto). In the absence of such evidence, Parent had no basis for drawing any conclusions from that document regarding Sterlite’s intentions.

⁵ Petition for Declaratory Order at 3.

⁶ Reply to Petition for Declaratory Order at 3.

allowed to remain on the record of this proceeding, but should be stricken pursuant to 49 C.F.R. § 1104.8.⁷

II. PARENT HAS PROVIDED NO VALID GROUNDS FOR REJECTION OF STERLITE'S NOTICE OF EXEMPTION.

Parent asserts two grounds which, it says, call for rejection of Sterlite's Verified Notice of Exemption: (1) Sterlite's failure to file "an Environmental Report pursuant to 49 C.F.R. § 1105 [sic],"⁸ and Sterlite's alleged noncompliance "with employee notice requirements under 49 C.F.R. § 1150.32(e)." Neither ground justifies rejection of the Notice.

A. Sterlite Was Not Required to File an Environmental Report Regarding its Proposed Acquisition, and its Notice of Exemption Was Therefore Not Deficient.

The Board's environmental rules provide that "[a]n applicant for an action identified in [49 C.F.R.] § 1105.6(a) or (b) must submit to the Board (with or prior to its application, petition or notice of exemption) ... an Environmental Report containing the information set forth in [49 C.F.R. § 1105.7(e)]." 49 C.F.R. § 1105.7(a). The actions described in 49 C.F.R. § 1105.6(a) and (b) are those for which environmental impact statements or environmental assessments, respectively, in accordance with its obligations under the National Environmental Policy Act of

⁷ As a further indication of Parent's cavalier approach to the facts in an effort to discredit Sterlite, Parent falsely informed the United States Bankruptcy Court for the Southern District of Texas that "the STB suspended its review of Sterlite's proposed purchase and operation of the CBRY," citing a Board decision that was allegedly served on August 19, 2009. Supplemental Memorandum of Law in Support of Confirmation of ASARCO Incorporated and Americas Mining Corporation's Seventh Amended Plan or Reorganization for the Debtors, as Modified on August 20, 2009, and in Opposition to Confirmation of Competing Plans at 31, *In re ASARCO LLC*, Case No. 05-21207 (Bank. S.D. Tex. filed Aug. 23, 2009) (Exhibit C hereto). In fact, the decision cited by Parent is entirely a product of Parent's imagination; no decision suspending the Notice of Exemption was served on August 19 or any other day.

In addition, Parent's submission to the bankruptcy court repeats the unsupported and false claim that Sterlite had, not merely failed to initiate regulatory proceedings regarding the CBRY acquisition, but had "refused" to initiate them. *Id.* at 32.

⁸ Parent presumably meant to refer either to "Part 1105" or to "§ 1105.7(a)."

1969, 42 U.S.C. §§ 4321 *et seq.* (“NEPA”). The only kind of rail acquisition listed in either 49 C.F.R. § 1105.6(a) or (b) is:

[a]n acquisition, lease or operation under 49 U.S.C. 10901 or 10910, or consolidation, merger or acquisition of control under 49 U.S.C. 11343, if it will result in either

(i) Operational changes that would exceed any of the thresholds established in § 1105.7(e)(4) or (5); or

(ii) An action that would normally require environmental documentation (such as a construction or abandonment).

49 C.F.R. § 1105.6(b)(4).

As Sterlite pointed out in its Notice of Exemption, Sterlite does not intend to make any operational changes on the subject rail lines that would exceed the thresholds established at 49 C.F.R. § 1105.7(e)(4) or (5). Notice at 1. In fact, as Sterlite explained in its Petition for Waiver of 49 C.F.R. § 1150.32(e), Sterlite has no plans to make *any* changes in rail operations now conducted by CBRY on its lines, but intends to continue operating those lines as they are currently operated, using the same workforce now employed by CBRY.⁹ Petition for Waiver at 2 & n.3. Nor is Sterlite’s proposed acquisition associated with any rail line construction or abandonment, or any other activity that normally would require preparation of environmental documentation (defined at 49 C.F.R. § 1105.4(e) such as an environmental impact statement or an environmental assessment). As explained in the Notice of Exemption, Sterlite’s proposed acquisition thus “falls within the category of transactions described at 49 C.F.R.

⁹ As Sterlite stated in its Petition for Waiver of 49 C.F.R. § 1150.32(e) (at 2), Sterlite is contractually required “to offer employment to CBRY’s non-union employees on terms that, in the aggregate, are substantially equivalent to those provided to such non-union employees prior to the closing.” Petition for Waiver at 2 n.3. This provision applies to all of CBRY’s employees.

§ 1105.6(c)(2)(i), for which environmental documentation is normally prepared and for which no environmental report is required under 49 C.F.R. § 1105.7(a).”¹⁰ Notice at 1.

Parent asserts that “[t]he language in 49 C.F.R. §1105.6(b) indicates that the STB may require a party filing [a] notice of exemption to submit [an environmental] report even when such a report is not ‘normally’ required.” “Petition” at 4 n.5. In fact, 49 C.F.R. § 1105.6(b) indicates no such thing. Parent presumably meant to cite 49 C.F.R. § 1105.6(d), which provides that, “[f]or actions that generally require no environmental documentation, the Board may decide that a particular action has the potential for significant environmental impacts and that, therefore, the applicant should provide an environmental report and either an [environmental assessment] or an [environmental impact statement] will be prepared.” The Board has not, however, reclassified the proposed transaction pursuant to this provision. Sterlite’s Notice is thus fully compliant with the Board’s environmental regulations, and there is no basis for rejecting the Notice on environmental grounds.¹¹

¹⁰ The listing in 49 C.F.R. § 1105.6(c) of categories of actions generally not requiring environmental documentation under NEPA is a “categorical exclusion” which is explicitly provided for in regulations of the Council of Environmental Quality implementing NEPA. 40 C.F.R. §§ 1507.3(b)(2)(ii), 1508.4.

¹¹ Parent (ignoring the fact that Sterlite has no plans to change rail operations on CBRY’s lines, but rather intends to continue them, using the same employees (including management employees) now working on those lines) asserts that CBRY’s “operations, especially in the hands of an inexperienced manager, pose significant risks to the environmental and to public health” and that it would therefore “be appropriate under federal regulations to require Sterlite to vet and disclose potential hazards related to operations of the CBRY through an Environmental Report.” “Petition” at 3. Similarly, it claims that an alleged “record of environmental degradation” resulting from foreign operations of Sterlite affiliates “warrant[s] the exercise of STB discretion provided by the language in 49 C.F.R. § 1105.6(b) [sic] to ensure that environmental implications of rail operation is given adequate consideration.” “Petition” at 4. Even if these were valid considerations (a question that need not be addressed in the context of this “Petition”), they would at most be a ground for reclassifying the acquisition, not for rejecting the Notice.

B. Sterlite Has Complied with the Labor Notice Requirement of 49 C.F.R. § 1150.32(e), and Its Request for Waiver of the 60-Day Waiting Period Under That Provision Does Not Warrant Rejection of the Notice of Exemption.

Parent suggests, as a second ground for rejecting the Notice of Exemption, that “Sterlite has not complied with employee notice requirements under 49 C.F.R. § 1150.32(e) as it has not yet provided 60 days notice to CBRY employees.” “Petition” at 2. Parent fails to support this suggestion with any argument, apparently intending to rely on arguments appearing in its Reply in Opposition to Sterlite (USA), Inc. – Acquisition and Operation Exemption – Copper Basin Railway, Inc., Line in Pinal and Gila Counties, AZ, Petition for Waiver of 49 C.F.R. §1150.32(e) (“Reply”), which it filed simultaneously with its “Petition”.

Contrary to Parent’s claim, Sterlite did comply with 49 C.F.R. § 1150.32(e), by causing the notice required by that section to be posted at the CBRY workplace on August 14, 2009, and by certifying on that day that it had done so.¹² Notice at 2.

Parent suggests that Sterlite’s Notice is deficient because Sterlite “has not yet provided 60 days notice to CBRY employees.” “Petition” at 2. But Sterlite made it clear that, unless the Board were to grant its Petition for Waiver of 49 C.F.R. § 1150.32(e), the exemption applicable to Sterlite’s proposed acquisition could not become effective any earlier than October 13, 2009, or 60 days from Sterlite’s notice to employees and certification of that notice to the Board, and that Sterlite would not consummate the acquisition before the exemption takes effect. Notice at 4.

Moreover, since the filing of the Notice of Exemption and the Petition for Waiver, it has become apparent that no reorganization plan is likely to receive final confirmation before October 13, 2009. In order to avoid unnecessary expenditure of resources by the Board and the

¹² The requirement of 49 C.F.R. § 1150.32(e) that a copy of the notice be served “on the national offices of the labor unions with employees on the affected line(s)” does not apply to this case, because none of CBRY’s employees are represented by labor unions.

parties, Sterlite has therefore filed, simultaneously herewith, a Petition for Leave to Withdraw its Petition for Waiver. Sterlite would therefore not consummate its proposed acquisition any earlier than October 13, 2009, and there can no longer be any suggestion that Sterlite has failed to comply fully with the 60-day notice period.

CONCLUSION

The Board should reject Parent's Reply. If it chooses not to do so, but instead treats the Reply as a petition for rejection, then it can be confident that Parent has cited no valid grounds for rejection of Sterlite's Notice of Exemption; in that event, for the reasons stated above, the Board should (1) strike the sentence in the "Petition" that falsely characterizes Sterlite as "[h]aving refused to stipulate to STB's jurisdiction over Sterlite's attempted purchase of the Copper Basin Railway ('CBRY')," and (2) deny the "Petition".

Respectfully submitted,



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Dated: September 1, 2009

EXHIBIT A

225503

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August 7, 2009

VIA HAND DELIVERY

The Honorable Anne K. Quinlan
Secretary
Surface Transportation Board
395 E. Street, S.W.
Washington DC, 20423

ENTERED
Office of Proceedings

AUG 7 - 2009

Part of
Public Record

FILED

AUG 7 - 2009

SURFACE
TRANSPORTATION BOARD

Re: Petition for Declaratory Order of ASARCO Incorporated and
Americas Mining Corporation
Docket No. FD 35286

Dear Secretary Quinlan:

Enclosed please find an original and ten (10) copies of the Petition for Declaratory Order of ASARCO Incorporated and Americas Mining Corporation. Also enclosed is a check for \$1,400.00 to cover the filing fee.

Very truly yours,

Gregory Evans
Gregory Evans

FEE RECEIVED
AUG 7 - 2009

SURFACE
TRANSPORTATION BOARD

Enclosures



BEFORE THE SURFACE TRANSPORTATION BOARD

ASARCO Incorporated and Americas Mining Corporation, Petitioners

DOCKET NO. FD 35286

**PETITION FOR DECLARATORY ORDER
OF ASARCO INCORPORATED AND AMERICAS MINING CORPORATION**

ENTERED
Office of Proceedings

AUG 7 - 2009

Part of
Public Record

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FILED

AUG 7 - 2009

**SURFACE
TRANSPORTATION BOARD**

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**SURFACE
TRANSPORTATION BOARD**

ASARCO Incorporated and

Americas Mining Corporation

PETITIONERS

BEFORE THE SURFACE TRANSPORTATION BOARD

ASARCO Incorporated and Americas Mining Corporation, Petitioners

DOCKET NO.: _____

**PETITION FOR DECLARATORY ORDER
OF ASARCO INCORPORATED AND AMERICAS MINING CORPORATION**

Petitioners, ASARCO Incorporated and Americas Mining Corporation hereby petition the United States Surface Transportation Board (“STB”) for a Declaratory Order asserting the STB’s jurisdiction over the proposed purchase and operation of the Copper Basin Railway (“CBRY”) by Sterlite (USA), Inc. (“Sterlite”). Sterlite is a wholly owned subsidiary company created by its parent, Sterlite Industries (India) Ltd., for purposes of this purchase.

I. Background

Sterlite proposes to purchase and operate the CBRY, a regulated railroad operating in the United States, without STB review or approval. Sterlite is attempting to avoid STB scrutiny by purchasing the CBRY within the context of a larger asset purchase, now pending within the United States Bankruptcy Court.

In that case, *In re ASARCO LLC, et al.*, Case No. 05-21207, ASARCO LLC (the “Debtor”) filed its voluntary petition for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas, Corpus Christi Division. ASARCO LLC is a fully integrated miner, smelter,

and refiner of copper in the United States, which remains in possession of its property and is operating its business as a Debtor-in-possession, pursuant to §§ 1107 and 1108 of the Bankruptcy Code. Among its many assets, ASARCO LLC currently owns and operates the CBRY, which operates in southern Arizona, including between ASARCO LLC's operating facilities in Arizona.

A. The CBRY

The CBRY's main line runs from Magma to Winkelman, Arizona, a distance of 54 miles. A branch line runs 7 miles, from Ray Junction to Ray, Arizona. The CBRY connects with the San Manuel Arizona Railroad (the "SMA") at Hayden, Arizona and handles SMA traffic from Hayden to interchange with the Union Pacific ("UP") main line track at Magma, Arizona.

The CBRY transports sulfide copper and copper concentrates from the Debtor's copper mining operations at the Ray Mine to the Hayden Smelter and also carries sulfuric acid in tank cars from the Hayden facility to the Debtor's leaching operations at the Ray Mine. The CBRY serves as an important conduit of raw materials or ore between these points. It also transports sulfuric acid in tank cars from the Hayden facility to the UP main line track for shipment on the UP to purchasers of this high grade sulfuric acid. The CBRY transports copper anodes and cathodes to Magma, Arizona, where they are transloaded onto other railcars for transportation to the ASARCO refinery in Amarillo, Texas.

In addition to the copper concentrates, ore, finished and unfinished copper, and sulfuric acid transported by the CBRY, the CBRY transported and may still transport

lumber and plastics for unrelated shippers, and military equipment for the United States Department of Defense and its contractors.

B. The Proposed Sale of the CBRY to Sterlite

As part of its effort to conclude its bankruptcy, the Debtor filed a proposed Sixth Amended Joint Plan of Reorganization for the Debtors Under Chapter 11 of the United States Bankruptcy Code, as Modified (the “Debtors’ Plan”). The Debtors’ Plan proposes to sell the Debtor’s operating assets – including the CBRY – to Sterlite, as memorialized in a Settlement and Purchase and Sale Agreement Among ASARCO LLC, AR Silver Bell, Inc., Copper Basin Railway, Inc., ASARCO Santa Cruz, Inc., Sterlite (USA), Inc. and Sterlite Industries (India) LTD (the “Purchase and Sale Agreement”), into which the Debtor entered in March 2009.

Under Federal law, Sterlite is required to submit the proposed purchase and related operations of the CBRY to the STB for approval. The concurrent purchase, sale, and operation of the CBRY is not permitted by law without STB approval. However, Sterlite proposes to operate the CBRY, by this sale, without seeking appropriate review by the STB. Sterlite asserts that the STB does not have jurisdiction over this transaction.

II. Relevant Law

The STB has exclusive jurisdiction over the transfer of ownership and operation of rail services between the owner or operator of that rail service and a non-carrier. *See* 49 U.S.C. 10901(a). The STB’s jurisdiction extends to the transfer of ownership and operation of smaller regulated railroads. *See* 49 C.F.R. § 1150 *et seq.*

The STB also retains jurisdiction over transactions where a proposed transferor of rail ownership and operations has filed for reorganization under the Bankruptcy Code.

See 49 C.F.R. § 1180.20; *see also In re Boston & Maine Corp.*, 484 F.2d 369, 372 (1st Cir. 1973) (noting that the bankruptcy code “does not contemplate that a court will make, as a matter of course, an unaided judgment on reorganizability before the [Interstate Commerce Commission (the “ICC”), predecessor agency to the STB] has considered the matter”); *In re Penn Cent. Transp. Co.*, 363 F. Supp. 1263, 1265 (E.D. Pa. 1973) (Prior to a bankruptcy court’s review of a plan of reorganization involving a regulated rail service, the ICC, now the STB, must review such a plan). Thus, because the STB’s jurisdiction is plenary - *even within the context of a bankruptcy* - there is no need for a prospective transferee of a railroad held by a bankrupt transferor to wait until the termination of bankruptcy proceedings to initiate STB approval processes.

Despite this clear mandate, Sterlite asserts that the STB has no jurisdiction over this purchase. Sterlite’s statements and its failure to initiate any sort of proceeding before the STB regarding its proposed purchase and operation of the CBRY indicates a complete disregard for the STB’s jurisdiction over the transaction.

As the STB is aware, a prospective railroad purchaser has an obligation to initiate proceedings before the STB whether or not the purchaser believes that the STB has jurisdiction. *See State of Maine*, 8 I.C.C. 2d 835, *6 (May 20, 1991). In *State of Maine* the ICC emphasized that jurisdictional questions are based upon specific facts of a transaction, and it cautioned that even seemingly minor rail purchases should be submitted for review so that it may accurately assess the facts and determine whether its jurisdiction is proper. *Id.*

Under 5 U.S.C. 554(e), the STB has broad discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty in the context of

railway transactions. *See Union Pacific Railroad Company – Petition for Declaratory Order*, STB Finance Docket No. 35219, * 3 (June 11, 2009) (citing *Boston & Main Corp. v. Town of Ayer*, 330 F. 3d 12, 14 n.2 (1st Cir. 2003)).

III. The STB Has Jurisdiction over the Proposed Transfer of Ownership and Operation of the CBRY between ASARCO LLC and Sterlite

It is beyond question that the STB has jurisdiction over the proposed transfer of ownership and operations of the CBRY. Sterlite apparently believes otherwise. Sterlite has and may continue to fail to seek appropriate review by the STB until a Declaratory Order is issued. It is important for the STB to assert its jurisdiction over this transaction because the purchase and operation of the CBRY by Sterlite presents a variety of important public interests, which interests are reviewed regularly by the STB, including environmental, union, and United States Department of Transportation (“DOT”) regulatory issues.¹

The STB has jurisdiction over the proposed purchase and operation of the CBRY from the Debtor to Sterlite. As Sterlite is a non-carrier, its proposed purchase and operation of the CBRY fall under the ambit of the 49 U.S.C. 10901(a) and supporting regulations, which require that it initiate proceedings for STB approval or exemption.

It is clear that under current ownership, the STB has asserted jurisdiction over this Class III Railroad. *See Class Exemption for Expedited Abandonment Procedure for Class II and Class III Railroads*, STB Ex Parte No. 647 (Jan. 19, 2006); *K. Earl Durden*,

¹ Moreover, as with all railroads, the CBRY’s operations also implicate the jurisdiction of the DOT, the DOT Federal Railroad Administration (the “FRA”) and the DOT Federal Highway Administration (the “FHWA”), where, as with the CBRY, highways and railroad intersect at the same grade. Further, specifically in Arizona, the Arizona Corporation Commission (the “ACC”), which assists the FRA in administering certain rail safety functions, also exercises regulatory authority over the railroads. The ACC also shares grade crossing safety responsibilities with the Arizona Department of Transportation (“ADOT”).

Rail Management Corporation, and Rail Partners, L.P.--Continuance in Control Exemption--Riceboro Southern Railway, L.L.C., STB Finance Docket No. 34252 (Sept. 2, 2004); *Class Exemption for Expedited Abandonment Procedure for Class II and Class III Railroads*, STB Ex Parte No. 647 (Aug. 13, 2003); *K. Earl Durden--Acquisition of Control Exemption-- Rail Partners, L.P.*, STB Finance Docket No. 32947 (June 27, 1996). It is equally clear that under current ownership, the CBRY is also regulated as a railroad by the Arizona Department of Transportation and subject to United States Railroad Retirement Board.² So, Sterlite's apparent claim that the STB has no jurisdiction or authority over its purchase is contrary to the readily available public record. The jurisdiction and regulation by other governmental agencies indicate that the CBRY is not simply a private, unregulated line; its operation, and any changes thereto may have an impact on interstate commerce and upon the public interest.

Additionally, a plan of reorganization does not eliminate or limit STB oversight over the railroad purchase by Sterlite. Here, regulations, enabling statutes, and case law prohibit Sterlite from using bankruptcy proceedings to shield acquisition of the CBRY from STB scrutiny. Thus, although Sterlite proposes to purchase the CBRY in the context of a Chapter 11 reorganization, Sterlite must nevertheless initiate proceedings before the STB.

Assuming, *arguendo*, that STB approval is not required for the purchase of the CBRY by Sterlite, the STB, and not Sterlite, must make this determination. *See State of Maine*, 8 I.C.C. 2d 835, *6 (May 20, 1991). Sterlite must file with the STB and submit

² See Arizona Department of Transportation, 2007 Railroad Inventory and Assessment, accessible at http://mpd.azdot.gov/transit/PDF/FINAL_2007_AZ_RR_Inv_Assess.pdf; see also U.S. Railroad Retirement Board, Statistical Notes, 2009, accessible at <http://www.rrb.gov>.

information to allow the STB, in the exercise of its plenary and exclusive jurisdiction, to make a proper review of the proposed sale.

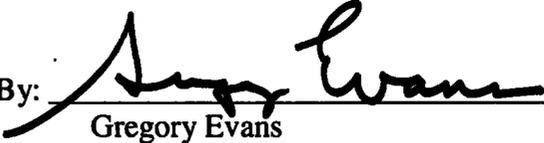
Documents produced in discovery state that Sterlite does not believe that STB approval is necessary. Therefore, without an order of the STB declaring its jurisdiction in this circumstance, Sterlite will continue to pursue this purchase without the required review of the STB. For example, the closing checklist to the Purchase and Sale Agreement contains a statement that STB approval of the CBRY transfer is “not necessary.”³

IV. Conclusion

Sterlite is not immune from STB review of its proposed purchase of the CBRY. It must initiate proceedings before the STB to satisfy requirements under the Interstate Commerce Act. The STB has and should assert its jurisdiction over this proposed railroad purchase and operation. Until now, Sterlite refuses to acknowledge the STB’s authority. It is not in the public interest to allow Sterlite to ignore the STB’s jurisdiction over this purchase. It is respectfully requested, therefore, that the STB issue a Declaratory Order announcing its jurisdiction over the CBRY purchase by Sterlite.

³ Project Centaur Closing Checklist, BB Comments. July 1, 2008, at 6. This document was obtained from Debtor through Discovery associated with the confirmation hearing.

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VERIFIED STATEMENT

I, Gregory Evans, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading.

Executed on August 6, 2009

By: 

Gregory Evans

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above and foregoing document by personal service on this 7th day of August, 2009 on all parties of record in this proceeding.



Marion Turner, Jr.

EXHIBIT B

225519

HARKINS CUNNINGHAM LLP

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August 11, 2009

BY E-FILING

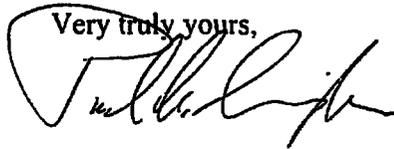
Anne K. Quinlan, Esquire
Acting Secretary
Surface Transportation Board
Office of the Secretary
395 E Street, S.W.
Washington, DC 20423-0001

Re: **ASARCO Inc. – Petition for Declaratory Order – Americas Mining Corporation**
(STB Finance Docket No. 35286)

Dear Ms. Quinlan:

Enclosed for filing in the above referenced docket please find the Reply of Sterlite (USA), Inc., to Petition for Declaratory Order of ASARCO Incorporated and Americas Mining Corporation.

Very truly yours,



Paul A. Cunningham

Enclosure

cc: Gregory Evans, Esquire
Robert Winter, Esquire

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35286

ASARCO INC.

- PETITION FOR DECLARATORY ORDER -

AMERICAS MINING CORPORATION

**REPLY OF STERLITE (USA), INC.,
TO PETITION FOR DECLARATORY ORDER OF
ASARCO INCORPORATED AND AMERICAS MINING CORPORATION**

Paul A. Cunningham
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202-973-7600

Counsel for Sterlite (USA), Inc.

Dated: August 11, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35286

ASARCO INC.

**– PETITION FOR DECLARATORY ORDER –
AMERICAS MINING CORPORATION**

**REPLY OF STERLITE (USA), INC.,
TO PETITION FOR DECLARATORY ORDER OF
ASARCO INCORPORATED AND AMERICAS MINING CORPORATION**

Sterlite (USA), Inc. (“Sterlite”), hereby responds to the Petition for Declaratory Order (the “Petition”) filed by ASARCO Incorporated and Americas Mining Corporation (together, “Petitioners”) in this proceeding on August 7, 2009. The Petition should be denied.

Under 5 U.S.C. § 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. *Union Pac. R.R. – Petition for Declaratory Order*, STB Finance Docket No. 35219, slip op. at 3 (STB served June 11, 2009). But there is no basis for exercise of that authority in this case, because there is no controversy to be terminated, and if there is any appearance of uncertainty, it exists only because Petitioners have created it.

Sterlite is party to the Settlement and Purchase and Sale Agreement (“PSA”), executed March 9, 2009, by ASARCO LLC; AR Silver Bell, Inc.; Copper Basin Railway, Inc. (“CBRY”); ASARCO Santa Cruz, Inc.; Sterlite; and Sterlite Industries (India), Ltd. The PSA provides,

among other things, for the acquisition by Sterlite of the rail assets of CBRY.¹ Because Sterlite is not a rail carrier subject to the Board's jurisdiction, the proposed acquisition of CBRY's assets is subject to 49 U.S.C. § 10901(a), which provides that a person other than a rail carrier may only "acquire a railroad line or acquire or operate an extended or additional railroad line" pursuant to regulatory authorization of the Board. Sterlite has never asserted anything to the contrary.

According to Petitioners, "[i]t is beyond question that the STB has jurisdiction over the proposed transfer of ownership and operations of the CBRY" (*id.* at 5). Sterlite agrees: it has never questioned that proposition. Petitioners, however, repeatedly misrepresent Sterlite's position and intentions in order to suggest that there is some question. While they state that "Sterlite asserts that the STB does not have jurisdiction over this transaction" and refer to "statements ... indicat[ing] a complete disregard for the STB's jurisdiction over the transaction" (*id.* at 4) and to "Sterlite's apparent claim that the STB has no jurisdiction or authority over its purchase" (*id.* at 6), they point to no statement in which Sterlite makes such an assertion. Nor can they, for Sterlite has never made it. They state categorically that "Sterlite proposes to operate the CBRY, by this sale, without seeking appropriate review by the STB" (*id.* at 3), without any basis for this claim other than their speculation about what "Sterlite apparently believes" (*id.* at 5).²

¹ Closing under the PSA cannot take place unless and until the Debtors' Sixth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, as Modified ("Debtors' Plan"), is approved by the United States Bankruptcy Court for the Southern District of Texas in the proceedings in *In re ASARCO LLC*, (Case No. 05-21207). There is no statutory or regulatory requirement that a transaction subject to 49 U.S.C. § 10901 must be authorized by the Board before the bankruptcy court may consider or confirm a plan that includes such a transaction.

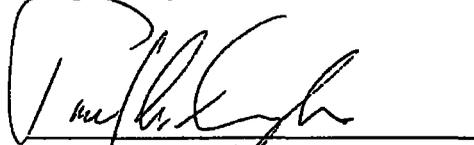
² Petitioners claim that "[d]ocuments produced in discovery state that Sterlite does not believe that STB approval is necessary" (Petition at 7), but the only document Petitioners cite in support of this claim states no such thing. While Petitioners correctly state that the document was provided in discovery by the Debtor in the pending bankruptcy proceedings (not by Sterlite),

Thus, despite Petitioners' efforts to create a controversy about the Board's jurisdiction over the proposed acquisition, there is none. Sterlite acknowledges that jurisdiction, and intends to make all filings with the Board needed to obtain regulatory authority for that acquisition. Petitioners are trying to create the false impression that there is such a controversy, in hopes they may thereby influence current proceedings in the bankruptcy court.³ This Board, however, should not allow its procedures to be abused and its resources (and those of Sterlite) to be wasted for that purpose. The decision to institute a declaratory order proceeding is within the discretion of the Board, and it should exercise that discretion here to deny the Petition.

CONCLUSION

For the reasons stated above, the Board should deny the Petition for Declaratory Order of ASARCO Incorporated and Americas Mining Corporation.

Respectfully submitted,



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Counsel for Sterlite (USA), Inc.

Dated: August 11, 2009

they provide no evidence regarding the authorship of that document, the purpose for which it was created, or what it indicates about Sterlite's past or current intentions.

³ On the same day they filed the Petition with the Board, Petitioners filed a Proffer by their expert witness (attached as Exhibit A hereto) in the bankruptcy proceeding, citing the Petition and claiming that "[b]ecause litigation has now been commenced before the STB, it is now my opinion that the initiated litigation and follow-on litigation challenging STB approval will prolong the STB approval process." Supplemental Proffer of Sidney I. Strickland, Jr. ¶ 6.

EXHIBIT A

SUPPLEMENTAL PROFFER OF SIDNEY L. STRICKLAND, JR.

In re ASARCO LLC, et al.,
Case No. 05-21207 (Bankr. S.D. Tex. filed Aug. 7, 2009)

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

In re:	§	Case No. 05-21207
	§	
ASARCO LLC, et al.,	§	Chapter 11
	§	
Debtors.	§	Jointly Administered
	§	

**SUPPLEMENTAL PROFFER OF SIDNEY L. STRICKLAND, JR. IN SUPPORT
OF ASARCO INCORPORATED AND AMERICAS MINING CORPORATION'S
MODIFIED SIXTH AMENDED PLAN OF REORGANIZATION FOR THE
DEBTORS UNDER CHAPTER 11 OF THE UNITED STATES
BANKRUPTCY CODE**

1. The information contained in this Supplemental Proffer is a true and accurate statement of my direct testimony as if I were called as a witness in open court in this case with respect to this Court's consideration of ASARCO Incorporated and Americas Mining Corporation's Modified Sixth Amended Plan of Reorganization for the Debtors Under Chapter 11 of the United States Bankruptcy Code, as well as the Debtors' Sixth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, as Modified, and the Second Amended Chapter 11 Plan filed by Harbinger Capital Partners Mater Fund I, Ltd. In this Supplemental Proffer, I provide my expert opinion regarding the federal regulatory approval necessary for the Debtors' proposed sale of the Copper Basin Railway ("CBRY") and its operations to Sterlite (USA), Inc. ("Sterlite").

2. This Supplemental Proffer is based upon my personal knowledge, experience, inquiry, and research. This Supplemental Proffer describes my analysis at this time based on the information currently available to me. To the extent additional or updated information is made available for review, and such information impacts my

findings, I will respectfully request the opportunity to supplement this Supplemental Proffer.

3. In addition to the opinions provided previously in my Proffer of July 22, 2009, Docket No. 12056, I provide this Supplemental Proffer based on newly acquired information. As noted in my original Proffer, I pledged to supplement my opinions for the Court should new, relevant information come to my attention.

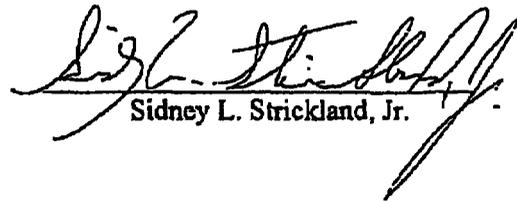
4. I have learned that today a Petition for Declaratory Order (the "Petition") was filed with the Surface Transportation Board ("STB"). *Petition for Declaratory Order of ASARCO Incorporated and Americas Mining Corporation*, STB Finance Docket No. 35286. The Petition contends that Sterlite continues to refrain from filing any sort of request for STB approval or review of its proposed purchase of the CBRY from the Debtors. *Id.* Accordingly, litigation has been commenced requesting that the STB assert and exercise its jurisdiction over the proposed railroad purchase.

5. I have verified the statements in the Petition. Specifically, I have checked with the STB for any filings regarding the CBRY transaction and see no activity involving Sterlite and CBRY. I continue to see no other action taken by Sterlite to initiate the legally required STB review and approval process of the proposed purchase of the CBRY.

6. Because litigation has now been commenced before the STB, it is now my opinion that the initiated litigation and follow-on litigation challenging STB approval will prolong the STB approval process. With this new information in mind, and based on my years of experience as Secretary of the Interstate Commerce Commission ("ICC") (predecessor to the STB), my work within the office of the General Counsel at the ICC,

and my subsequent work before the STB, it is my expert opinion that STB approval of the proposed transaction will be delayed. With due regard for the STB's authority, it is my expert opinion that Sterlite's continued failure to seek STB approval for the Sterlite purchase of the CBRY is greatly increasing the controversial nature of the proceedings that should ultimately be before the STB. This, in turn, foreshadows extensive and protracted litigation that will likely delay the STB approval process. Indeed, Sterlite's refusal to file with the STB is reflective of other proceedings in which there was a refusal to seek appropriate regulatory approval. Those cases took years to resolve.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of August, 2009 in Washington, D.C.


Sidney L. Strickland, Jr.

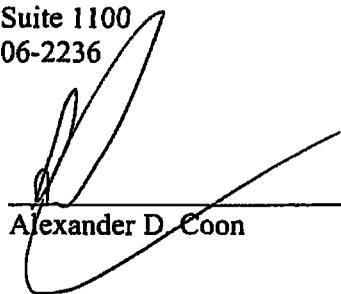
CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of August, 2009, served copies of the foregoing
Reply of Sterlite (USA), Inc., to Petition for Declaratory Order of ASARCO Incorporated and
Americas Mining Corporation by first-class mail upon

Gregory Evans
Robert Moore
Milbank, Tweed, Hadley & McCloy LLP
601 South Figueroa Street, 30th Floor
Los Angeles, California 90017-5735

and by hand upon

Robert Winter
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1850 K Street, N.W., Suite 1100
Washington, DC 20006-2236



Alexander D. Coon

EXHIBIT C

**IN THE UNITED STATES BANKRUPTCY COURT
OF THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

In re:	§	Case No. 05-21207
	§	
ASARCO LLC, et al.,	§	Chapter 11
	§	
Debtors.	§	Jointly Administered
	§	

**SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF
CONFIRMATION OF ASARCO INCORPORATED AND AMERICAS MINING
CORPORATION'S SEVENTH AMENDED PLAN OF REORGANIZATION FOR
THE DEBTORS, AS MODIFIED ON AUGUST 20, 2009, AND IN OPPOSITION
TO CONFIRMATION OF COMPETING PLANS**

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Co-Counsel to ASARCO Incorporated and Americas Mining Corporation

those sites. ASARCO's President and CEO, Joseph Lapinsky, has described the CBRY as "critical" to operations.²⁹ The characterization has been echoed by this Court.³⁰ Consequently, for at least one year, Sterlite will not profit as predicted. The Debtors' Plan is therefore not feasible.

1. The United States Transportation Board Has Suspended Sterlite's Purchase Approval Request

Since testimony on the issue of the CBRY transfer at the Confirmation Hearing on August 18, 2009, the STB suspended its review of Sterlite's proposed purchase and operation of the CBRY for failure to comply with reporting requirements under 49 C.F.R. § 1150.33(h). On August 14, 2009 Sterlite filed a Verified Notice of Exemption whereby it sought STB review for the proposed transfer. See Sterlite (USA), Inc. – Acquisition and Operation Exemption – Copper Basin Railway, Inc., Line In Pinal and Gila Counties, AZ, Verified Notice of Exemption of Sterlite (USA), Inc., Pursuant to 49 C.F.R. §§ 1110.31-1150.34, STB Finance Docket No. 35291 (STB served Aug. 14, 2009) (the "Notice of Exemption"). In its Notice of Exemption, Sterlite was required to provide the STB with certain information regarding potential effects on railroad transportation interchange. Because Sterlite failed to provide this information, the STB has indicated that it will suspend the effective date of its Notice of Exemption pending the correction of this issue. See Sterlite (USA), Inc. – Acquisition and Operation Exemption – Copper Basin Railway, Inc., Line in Pinal and Gila Counties, AZ, STB Finance Docket No. 35291 (STB served August 19, 2009).

Now that Sterlite's application for approval of the transaction has been suspended by the federal agency with plenary authority over the sale and operation of the CBRY, the long

²⁹ Asarco buys remainder of Copper Basin Railway, THE ARIZONA REPUBLIC (Phoenix) (Sept. 30, 2006).

³⁰ Order Authorizing Debtor (1) to Assume Stockholders Agreement and Related Contract For Sale, and (2) Purchase Remaining Shares of Copper Basin Railway, Sept. 12, 2006 (Docket No. 2980).

regulatory delay already established by testimony shall be even longer than estimated. Sterlite is not anywhere close to receiving federal regulatory approval (as distinct from “transfer of permits”) needed to lawfully operate a railroad that is vital to its mining operations.

2. Sterlite Must Receive Final STB Approval Prior to Purchasing and Operating CBRY

Evidence submitted during the Confirmation Hearing conclusively established that STB approval is required for Sterlite’s proposed purchase of the CBRY.³³ Pursuant to 49 U.S.C. § 10901, the STB is charged with presiding over any proposed transfer of ownership and operations of rail services. See 49 U.S.C. § 10901(a). The STB, in fact, has exclusive authority to certify such transactions. Id. Additionally, 49 C.F.R. § 1150, et seq., contain tailored procedures which must be followed by all potential rail purchasers and operators, including Sterlite.³⁴

Notwithstanding this uncontroverted evidence, Sterlite has, for an extended period of time, refused to initiate proceedings before the STB. The evidence shows that Sterlite had no intention of seeking STB approval.³⁵ A “closing checklist” shows that counsel for Sterlite and/or the Debtors believed that prior STB approval of purchase and operations of the CBRY was “not necessary.”³⁶ Moreover, Sterlite failed to initiate STB proceedings during the period in which it was previously obligated, through an executed purchase and sale agreement, to purchase the CBRY. It had not done so with respect to its current purchase and sale agreement, in relation to

³³ See Master Exhibit List, Aug. 18, 2009 (Docket No. 12434) (“Ex”), 115, Proffer of Sidney L. Strickland, Jr. In Support of ASARCO Incorporated and Americas Mining Corp.’s Modified Amended Plan of Reorganization for Debtors Under Chapter 11 of the United States, July 22, 2009 (Docket No. 12056) (“Strickland Proffer”), p. 6, ¶ 16. (“The concurrent purchase, sale, and operation of the CBRY is not permitted by law without STB approval.”)

³⁴ See id. at 5, ¶ 15.

³⁵ See Ex. 116, Project Centaur Closing Checklist, p. 5, ¶ 20.

³⁶ Id.

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of September, 2009, served copies of the foregoing Reply of Sterlite (USA), Inc., to Petition of ASARCO Incorporated and Americas Mining Corporation to Reject Notice of Exemption by e-mail upon the following:

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Alexander Coon