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BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34133

S.D. WARREN COMPANY, d.b.a.  
SAPPI FINE PAPER NORTH AMERICA  
ACQUISITION AND OPERATION EXEMPTION  
PURSUANT TO 49 C.F.R. §1150.31(a)(1) & (4)



MOTION OF S.D. WARREN COMPANY, d.b.a.  
SAPPI FINE PAPER NORTH AMERICA  
TO DISMISS NOTICE OF EXEMPTION

ENTERED  
Office of Proceedings

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Part of  
Public Record

Briana K. O'Regan  
Sappi Fine Paper North America  
225 Franklin Street  
Boston, MA 02110  
Tel: (617) 368-6594  
Fax: (617) 368-6580

*Attorney for:*  
*S.D. Warren Company d.b.a*  
*Sappi Fine Paper North America*

Dated: July 2, 2002

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SURFACE TRANSPORTATION BOARD**

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**I. INTRODUCTION**

Pursuant to a Joint Operating Agreement (the "Agreement") by and between the S.D. Warren Company d.b.a. Sappi Fine Paper North America ("Sappi"), a non-carrier, and the Maine Central Railroad Company and the Springfield Terminal Railway Company (collectively "Guilford"), Sappi will be acquiring certain joint operating rights over the Guilford main line of railroad between milepost 8.55 and milepost 9.80 in Skowhegan, Maine (the "Subject Line").<sup>1</sup> The total distance of operating rights to be acquired over the Subject Line is approximately 1.25 route miles.

The joint operating rights being acquired by Sappi will be limited to moving its own traffic to, from and on the Subject Line. These operations will be limited solely to traffic originating and terminating at the Sappi facility in Skowhegan, Somerset County, Maine ("Somerset facility"), and Sappi will not be holding itself out as a common carrier on the Subject Line, nor are there any other rail customers on the Subject Line. Moreover, Sappi will receive no

compensation under the Joint Operating Agreement, it being Sappi's sole intent to expedite and improve efficiency of switching cars to and from its Somerset facility.

Sappi has filed concurrently herewith a Verified Notice of Exemption (the "Notice") pursuant to 49 C.F.R. §1150.31 *et seq.* to acquire these joint operating rights over the Subject Line and hereby moves the Surface Transportation Board (the "Board") to dismiss the Notice. Sappi submits that, because of the nature and terms of the proposed transaction as described in the Notice and Joint Operating Agreement attached thereto, the transaction is not subject to Board approval. 49 U.S.C. §10906.

## **II. FACTS**

### **A. The Parties and Freight Operations on the Subject Line**

Sappi is a manufacturer of pulp and paper with manufacturing facilities located throughout the United States. Sappi understands that the Maine Central Railroad Company and the Springfield Terminal Railway Company are Class II carriers that, in conjunction with their affiliates, own and operate railroad lines in the northeastern United States.

As stated in the Verified Statement of Robert Nichols attached hereto as Exhibit A and hereby made a part hereof, Sappi is the only customer on the Subject Line, and is served by Guilford on a daily basis. Presently, Guilford's service consists of the movement of empty and loaded cars between Guilford's Waterville, Maine yard and tracks located entirely within the Somerset facility. Under the Agreement, Sappi would obtain rights to perform two distinct operations on the Subject Line. First, after the Guilford train delivers cars inbound to Sappi to a designated location on the Subject Line, Sappi would have access to the Line to move those cars

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<sup>1</sup> The Joint Operating Agreement is attached as Exhibit A to the Notice of Exemption filed simultaneously with this Motion.

into its facility. Second, Sappi would also have access to the Subject Line to drop off cars outbound from Sappi for movement by Guilford to its Waterville yard, where these cars would be incorporated into through train service.

Pursuant to Section 3 of the Joint Operating Agreement, Sappi will maintain control of the Subject Line by means of a derail or similar device, which is locked and unlocked by Sappi's contractor and should isolate the Subject Line from the remainder of Guilford's trackage. However, because Sappi has agreed to not allow its switching operations to interfere with Guilford's railroad and maintenance obligations, Sappi will remove the blocking device at the request of Guilford.

Sappi seeks these joint operating rights to expedite and improve the overall efficiency of rail movements into and out of its Somerset facility. By retrieving and placing cars on the Subject Line, Sappi will be able to enhance its ability to switch cars within the facility, thereby improving the flow of cars into and out of the facility. Currently, Sappi has an agreement with a third party contractor to provide services on tracks owned wholly by Sappi, including the movement of cars, delivered to and from Guilford's rail line, on the tracks located within the Sappi facility.<sup>2</sup> Also, by utilizing these operating rights to place cars on the Subject Line for further movement by Guilford, thereby removing the necessity of Guilford's operations on the tracks owned by Sappi, this transaction is expected to decrease the overall dwell and transit times for this traffic, as well as demurrage charges.

Therefore, as more particularly described in the Agreement, the use of the Subject Line by Sappi will be limited to placing and receiving its own traffic on the Subject Line. As a result, the common carrier rights and obligations on the Subject Line will remain with Guilford and

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<sup>2</sup> Although the actual switching services are expected to be provided by Sappi's contractor, Sappi is acquiring the joint operating rights, and does not intend to transfer those rights to the contractor.

Sappi's right to use the Subject Line will not interfere with those rights and obligations. Finally, Sappi does not intend to become a common carrier, nor will Sappi hold itself out to be a common carrier.

### III. ARGUMENT

#### A. This Transaction is Excepted from Board Authority Pursuant to 49 U.S.C. §10906

Pursuant to 49 U.S.C. Section 10906, a rail carrier providing transportation subject to the jurisdiction of the Board may enter into arrangements for the joint use of spur, industrial, team, switching or side tracks without Board approval. In making a determination whether the Board has authority over these arrangements, the focus is upon the status of the trackage subject to any agreement. *Chevron, U.S.A., Inc.—Lease and Operation Exemption—Richmond Belt Railway*, Finance Docket No. 32352, STB Served: June 12, 1995 (1995 WL 348739 (ICC)) (“*Richmond Belt*”). Where operating rights are acquired for switching purposes only, the acquisition of such rights is not subject to Board jurisdiction. *Richmond Belt*. Moreover, in any analysis to decide whether the agreement involves the acquisition or operation of trackage requires Board approval, the determining factor is the intended use of the trackage by the entity acquiring the operating rights. See *Nicholson v. I.C.C.*, 711 F.2d 364, 367 (D.C. Cir. 1983); *Brotherhood of Locomotive Engineers v. United States*, 101 F.3d 718, 726 (D.C. Cir. 1996) (“Accordingly, although the tracks at issue were main-line Union Pacific tracks, because the tenant carriers used them solely for switching, the Commission ruled the agreements beyond its jurisdiction.”) Finally, where two entities enter into an agreement to share the use of trackage, the tenant's use is the controlling factor in determining the character of the track. *Brotherhood of Locomotive Engineers v. United States*, 101 F.3d at 727.

In this instance, Sappi is acquiring joint operating rights on the Subject Line, which Guilford presently operates as a "rail line" pursuant to 49 U.S.C. section 10901. However, as in *Richmond Belt*, the operating rights to be acquired by Sappi (as Guilford's tenant) are limited to the performance of moving its own rail cars into and out of property owned wholly by Sappi. (Agreement, §§3 & 5) Further, Guilford will retain its common carrier rights and obligations over the Subject Line, and will continue to operate over the Subject Line to deliver and retrieve Sappi's shipments and will also continue to maintain the Subject Line. (Agreement, §§3 & 4) Sappi is not intending to become a common carrier or hold itself out as providing common carriage, and its use of the Subject Line will be limited to Sappi's obligation to obtain and control a derail or similar device to limit access to and from the Subject Line during its operations. (Agreement, §3) Because of this limitation and the fact that Sappi is the only customer on the Subject Line, Sappi will not have the ability to perform additional operations, including extensions into new territory, nor does it seek such rights. Moreover, in order to prevent interference with Guilford's common carrier operations on the Subject Line, Sappi has agreed to remove the blocking device at the request of Guilford. (Agreement, §§2(c) & 3(i-iii)) Finally, the Agreement provides for termination by either party upon thirty (30) days notice, with or without cause, allowing Guilford to reclaim control over the Subject Line in the event that the joint operations unduly interfere with Guilford's ability to perform its common carrier duties. (Agreement, §8)

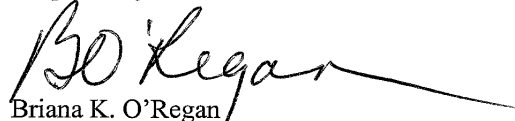
#### **IV. CONCLUSION**

While the Subject Line is a "rail line" pursuant to 49 U.S.C. section 10901, this designation is limited to Guilford's operations as a common carrier over the Subject Line. 49

*U.S.C. §§10901, 10102(5), (6)(B).* The present transaction, however, will provide Sappi with operating rights on the Subject Line that will be used solely for moving its own traffic to enhance switching of cars to and from Sappi's Somerset facility. Because Sappi, as the tenant on the Subject Line, will not have the ability to perform additional operations, including extensions into new territory, this transaction is properly classified as an arrangement for joint operating rights on switching trackage, and is therefore not subject to Board approval. *49 U.S.C. §10906.* Accordingly, for the reasons set forth herein, Sappi respectfully requests that the Board dismiss the Notice of Exemption filed simultaneously with this Motion.

Dated: July 2, 2002

Respectfully submitted,

  
Briana K. O'Regan  
Intellectual Property & Legal Counsel

*Attorney for:*  
*S.D. Warren Company d.b.a.*  
*Sappi Fine Paper North America*

**CERTIFICATE OF SERVICE**

I certify that I this day have served copies of the foregoing  
Motion to Dismiss Notice of Exemption upon each of the parties by mailing a  
copy by prepaid first class U.S. Mail.

Dated at Boston, Massachusetts, this 2<sup>nd</sup> day of July, 2002.

  
Briana K. O'Regan  
Intellectual Property & Legal Counsel

**Exhibit A**  
**Verified Statement**  
**of**  
**Robert Nichols**

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**VERIFIED STATEMENT**

**OF**

**ROBERT NICHOLS**

My name is Robert Nichols. I am employed by S.D. Warren Company d/b/a Sappi Fine Paper North America ("Sappi") as Regional Transportation Coordinator at Sappi's pulp and paper facility located in Somerset County, Maine ("Somerset facility"). I have held my current position for five (5) years and have been employed by Sappi for twenty (20) years. As Regional Transportation Coordinator, my responsibilities include the management of all incoming and outgoing shipments for the paper mill side of the facility, including rail, truck, intermodal and ocean container shipments. This involves the management of incoming empty containers, trailers and rail cars and outgoing shipments of paper products to customers. I coordinate the activities of 26 carriers plus the rail carrier.

The Somerset facility is adjacent to and is served by the railroad line owned and operated by Maine Central Railroad Company and Springfield Terminal Railway Company (collectively "Guilford"). The Somerset facility is at the end of Guilford's railroad line, which in fact, stub ends on Sappi's property.

There is a spur from the main railroad line to the tracks owned by Sappi within the facility. The spur is approximately 400 feet long. A map showing the relationship between the main line and the spur is included with the Joint Operating Agreement attached as Exhibit A to the Notice of Exemption.

The manufacturing operations of Sappi require the movement of empty and loaded cars between Sappi's facility and Guilford's yard, and within Sappi's facility. Due to the space constraints of the spur, Guilford can only deliver or remove a maximum of 32 cars per train.

For normal operations, Sappi should have a minimum of 38 cars delivered per day, as follows: 7 log cars; 6 empty cars for pulp shipments; 2 cars containing pulping chemicals; 15 empty cars for paper shipments; and 8 cars containing chemicals used in paper manufacture.

The mill's requirements for cars are often subject to change. For instance, the shipping department may need additional empty cars or re-scheduling of the manufacture of paper grades on the paper machines may require the delivery of additional cars of chemicals. Usually Sappi needs more than 38 cars delivered per day. The ability to use a portion of Guilford's line to hold additional cars temporarily in accordance with the Joint Operating Agreement would expedite and enhance the efficiency of receiving and forwarding rail traffic at the Somerset facility.

The portion of Guilford's line that Sappi needs to use is between milepost 8.55 and milepost 9.80, and will be subject to the joint operating agreement. This segment holds approximately 60 cars. There are no other customers on this segment of Guilford's line. The segment would be used by Sappi exclusively for rail traffic to and from Sappi's facility. Because the segment connects directly to Sappi's spur, Sappi would use the segment as an extension of the spur.

Currently, Sappi starts to pay demurrage charges on incoming cars when they arrive at the Guilford yard located in Waterville, Maine, approximately 20 miles from the Somerset facility. Currently cars are being held at Guilford's Waterville yard because of the space limitations of Sappi's spur. Therefore, at all times when the cars are on this segment of Guilford's line, the cars are under demurrage. This demurrage arrangement would continue

under the joint operating agreement but Sappi would at least have access to the cars as demurrage charges were being incurred.

The ability to hold a greater number of cars at the Somerset facility on the segment is economically beneficial to Sappi because Sappi will be able to unload or load the cars at will rather than waiting for the next delivery of 32 cars. Faster turnaround of cars not only will improve operations at the facility by reducing scheduling complications but also will reduce the demurrage charges that Sappi incurs.

Currently Guilford performs no switching services for Sappi at the Somerset facility other than delivering and removing cars from the spur. Under the Joint Operating Agreement, Guilford would perform the same services – delivery and removal of cars from the jointly operated segment. In fact, use of that segment by Sappi as an extension of its spur will relieve congestion on the spur caused by Guilford's switching activities between its line and Sappi's spur.

Currently Sappi has an agreement with a third party to provide to Sappi intraplant services on the spur and tracks wholly owned by Sappi within its Somerset facility. Under the joint operating agreement, Guilford would deliver cars to and remove cars from the jointly used segment. The third party contractor would move the cars between that segment and Sappi's intraplant tracks. While the third party contractor handles the cars, the cars are under demurrage and are out of the stream of interstate commerce. The third party contractor only performs such switching services for Sappi and would not be providing similar services to others on the jointly used segment of Guilford's line.

The State of Maine

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SS:

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County of Somerset

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Robert Nichols, being first duly sworn, deposes and states that he has read the above document, knows the facts stated therein, and that the same are true as stated.

Robert H. Nichols

Robert Nichols

Sworn to before me this 25 day of  
June, 2002

Lynne A. Marshall  
Notary Public

My commission expires: 7/25/05