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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 677

COMMON CARRIER OBLIGATION OF RAILROADS

COMMENTS OF THE CALABRIAN CORPORATION

I. INTRODUCTION

The Surface Transportation Board's ("STB" or "Board") instituted a proceeding and announced a public hearing regarding the common carrier obligation of railroads in a decision served February 22, 2008 ("Decision") in the above docket. The Calabrian Corporation ("Calabrian") filed a notice of intent to participate on March 25, 2008. In a decision served on April 3, 2008, the Board granted the President of Calabrian, Charles Cogliandro, ten minutes of speaking time at the hearing on April 24.

With this filing, Calabrian hereby submits its written comments regarding the common carrier obligation of the nation's railroads. I will summarize these written comments in my presentation on April 24, and I will be available to take any questions from the Board at that time.

II. THE CALABRIAN CORPORATION

Calabrian Corporation is a small family-owned chemical manufacturer located in Port Neches, Texas, producing sulfur chemicals that are used primarily for municipal and industrial wastewater treatment, food preservation, and various applications in the paper industry. Liquid sulfur dioxide is a critical and strategic product for many U.S. companies and municipalities.

Calabrian began producing sulfur dioxide in the early 1990's and, by 2004, had become the largest producer of this vital chemical in the United States. Today, Calabrian is the only major domestic manufacturer of commercial sulfur dioxide in North America with the remaining two major producers being Canadian. Unlike Calabrian's Canadian competitors which produce sulfur dioxide as a byproduct from smelting operations, Calabrian produces sulfur dioxide using an environmentally-clean process with zero emissions. This primary production, while at a higher cost, plays an important role in U.S. industry, because of its certainty and reliability of supply compared to that of byproduct streams which are often times unavailable.

Calabrian has the capacity and permits to produce 150,000 tons of sulfur dioxide annually, but it currently only produces between 50,000 to 100,000 tons of sulfur dioxide per year because of various competitive factors, including (and most importantly), dramatically increasing transportation costs. Calabrian ships less than 400 railcars per year and, thus, Calabrian is a very small shipper in terms of overall volumes from the railroads' perspective. In addition, Calabrian's customers are located throughout the United States which means that Calabrian has dynamic and broadly distributed shipping patterns. Furthermore, the Calabrian facility in Texas is solely served by the Kansas City Southern Railway ("KCS"), but nearly all sulfur dioxide shipments by Calabrian travel over the KCS and one or more other railroads. As described in more detail below, this means that Calabrian is essentially rail captive and without any effective avenue of relief.

Sulfur dioxide is transported as a compressed gas. It is considered a hazardous material that is toxic by inhalation ("TIH"). The vast majority of sulfur dioxide produced by Calabrian is transported to Calabrian's customers by rail, which is the safest and most

effective mode of transportation. Virtually all of Calabrian's customers prefer to receive sulfur dioxide by rail due to their facility configuration and/or because they use the tank cars for short-term storage. The product not moved by rail is only moved very short distances.

Calabrian has made substantial investments in rail fleet in order to ship this commodity. Calabrian equips its railcars with superior (and expensive) valving to enhance safety during transport and unloading. In recognition of its dedication to safety, Calabrian has received, on four separate occasions, a "Hazardous Chemicals Safety Award" from the railroads.

III. RAILROAD RATE INCREASES THREATEN CALABRIAN'S EXISTENCE

A. Railroads have imposed steep rate increases on Calabrian's traffic

Until roughly 2005, Calabrian was expanding its business and shipping increasing quantities of sulfur dioxide by rail. The railroads had encouraged Calabrian's growth, and, by 2005, Calabrian had built a substantial tank car fleet and was shipping over 50,000 tons of sulfur dioxide per year, primarily to US municipalities and industries who rely on the product to dechlorinate their wastewater. Starting in 2005, the railroads transporting sulfur dioxide for Calabrian began imposing severe rate increases every six months, resulting in many rates that are now double or even two-and-a-half times their level just three years ago. This has hit Calabrian particularly hard because Calabrian must enter into long term contracts with its customers due to the three-to-five year lease requirements for specialized railcars; hence, Calabrian typically cannot pass on increased transportation costs. Some sample percentage increases for the rail rates charged to Calabrian are listed below:

Rate ¹	Percentage increase from 2005 to 2008
Rate #1	114%
Rate #2	99%
Rate #3	156%
Rate #4	98%
Rate #5	71%

Two additional examples highlight the severe nature of the rates currently paid by Calabrian. First, the current rate for transportation of sulfur dioxide from Port Neches, TX to one Calabrian customer means that 72% of the destination price of sulfur dioxide consists of the transportation rate. Second, Calabrian ships both sulfur dioxide and sodium bisulfite to another of its customers and both commodities are hazardous liquids. While sodium bisulfite is slightly easier to handle, the current sulfur dioxide rate before fuel surcharges is roughly double the rate for sodium bisulfite. Both shipments travel in near identical tank cars and weigh roughly the same. Until February of this year, Calabrian was still paying a fuel surcharge (of several thousand dollars per car) which was assessed as a percentage of the rate. Due to the use of a percentage fuel surcharge, the additive for fuel costs for the sulfur dioxide movement was roughly double that for the sodium bisulfite movement, even though the same amount of fuel was used. As rate terms expired, a mileage-based fuel surcharge, as required by the STB, was assessed on the new rates but the old surcharges were “baked” into the new rates and, in every case, the base rates are now dramatically higher.² With the new mileage-based surcharge added, the total cost per car is now equal to or higher than under the previous rate

¹ To protect confidentiality, the rates and destinations remain undisclosed.

² Calabrian's transportation rates are generally “take-it-or-leave-it” un-negotiated rates regardless of the label that may be assigned to the document by the railroad.

structure. Instead of the expected reductions, Calabrian is paying the same high freight rates with essentially no relief. In sum, the railroads' revenue enhancement strategies are destroying Calabrian's business.

These rate increases have caused Calabrian to lose significant business to its Canadian competitors. In many cases, Canadian-produced sulfur dioxide initially travels on Canadian railroads, whose ownership and rail routes extend well into the United States and whose transportation rates have not increased at nearly the pace seen here in the U.S. In addition, the Canadian commodity price is likely deflated because the Canadian sulfur dioxide is produced as a byproduct of smelting that needs to be disposed of rather than as a reliable primary domestic producer such as Calabrian. As a result, American businesses, and, increasingly, municipalities, are buying more imported sulfur dioxide, thus hurting the national economy and U.S.-based manufacturers such as Calabrian.

Numerous conversations with the railroads regarding the devastating effect of these dramatic rate increases on Calabrian have been fruitless. Calabrian also contacted the STB's Office of Congressional and Public Services in October 2006. Calabrian's discussions with the STB led Calabrian to believe that it was "legally" stuck with no effective avenue of relief. Over the last three years, Calabrian has been told repeatedly by several major U.S. railroads that they prefer not to haul sulfur dioxide at all. With the dramatic rate increases seen recently, the railroads are effectively making that happen – they are ignoring their common carrier obligation under 49 USC § 11101, driving production of sulfur dioxide out of the domestic market, and putting Calabrian's long-term existence into doubt.

B. The railroads are violating the common carrier obligation

There is no other method of land transportation that is as efficient, safe, and appropriate for the long-haul transport of sulfur dioxide and many other essential hazardous chemicals. Rail transportation of vital hazardous materials such as sulfur dioxide benefits the entire public and the United States due to the safety advantages of rail over other transportation methods. According to CSX, motor carriers are 10 times more dangerous than railroads for transportation of hazardous materials.³ Similarly, Norfolk Southern's most recent Annual Report states that "no mode of transportation is safer than rail" for transporting chemicals.⁴ As mentioned earlier, Calabrian's customers prefer to receive shipments by rail. Despite all these advantages, however, the railroads are effectively putting Calabrian out of the sulfur dioxide business by raising the rates so high that rail transport is unfeasible.

Calabrian submits that this behavior violates the common carrier obligation – the railroads are not truly offering transportation services to all customers, especially those (like Calabrian) who must rely on rail transport. These railroads clearly have an "undue concentration of market power" in violation of the national rail policy of 49 USC §10101(12). In short, the rates have effectively become a means to deny service in many instances.

Calabrian acknowledges that the Board issued "small" rate case rules in its *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646 (Sub-No. 1) (served September 5, 2007), which in theory should constrain Calabrian's transportation rates. Calabrian has retained legal and economic counsel to help it in evaluating these rules and

³ CSX Transportation, "Safety is a Way of Life", <http://www.csx.com/?fuseaction=general_csxo_safety> (visited April 9, 2008).

⁴ NS Annual Report 2007 at page 6.

Calabrian is watching with interest the pending *DuPont v. CSX* cases. However, it appears at this time that the Board's small rate case rules may not be small enough for shippers, like Calabrian, that send small quantities to dozens of different destinations across the United States. Moreover, the cost of accessing this relief seems out of reach for very small shippers like Calabrian particularly because of the uncertainty and ongoing expensive legal battles seen in cases like *DuPont's*.

C. Railroads with record profits cannot justify these rate increases

Calabrian is aware that the railroads contend these rate increases are necessary due to safety concerns and the increased costs of handling hazardous materials. Such justifications do not withstand scrutiny. The major railroads in the United States have enjoyed record profits in recent years - the same years in which Calabrian's rates have dramatically risen. Railroads enjoyed increasing revenue in 2007, while traffic volumes decreased.⁵ In contrast, Calabrian lost money in 2007 due to rail rates that drove away customers and increased Calabrian's costs. A closer inspection of the railroads' financial results reveals record operating income at CSX⁶, record revenue and free cash flow at BNSF⁷, record operating income at KCS⁸, record operating revenue and income from railway operations at NS⁹, and "record profits" at UP.¹⁰ The supposed crushing financial burden of hazardous materials transportation is merely an apparition. Now that railroads are earning record profits and are becoming "revenue adequate" under the Board's

⁵ See, e.g., CSX Annual Report 2006 at page 29 (showing chemical traffic down 1% but revenues up 11%), Norfolk Southern Annual Report 2007 at pages 1 and K5

⁶ CSX Annual Report 2006, "Financial Highlights" page (showing operating income four times higher than in 2003)

⁷ BNSF Annual Report 2007 at page 12.

⁸ KCS Annual Report 2007 at pages 1-2.

⁹ Norfolk Southern Annual Report 2007 at page 2

¹⁰ Union Pacific Annual Report 2007 at page 3

standards, the Board should carefully consider the extent to which continuing rate increases and de-marketing of certain commodities are lawful.

IV. THE COMMON CARRIER OBLIGATION INCLUDES HAZARDOUS MATERIALS

Recent attempts by railroads to limit or refuse service to shippers of hazardous materials are not new. Similar situations occurred in the 1970's and 1980's as railroads tried to avoid or limit transportation of radioactive materials, spent nuclear fuel, or extremely hazardous chemicals. Just as the ICC and the federal courts rejected those earlier efforts by the railroads, the Board should similarly reject the railroads' current attempts to avoid their common carrier obligations. As recognized in these earlier decisions, federal statutes do not limit the common carrier obligation to transport of non-hazardous materials.

For example, one court found that railroads have a duty not just to shippers but to the general public, and there is a public need for rail transportation of spent nuclear fuel because rail transportation is safer than transportation via motor carrier.¹¹ The Board should follow the reasoning of these earlier cases and enforce the common carrier obligation on transportation of hazardous materials such as sulfur dioxide.¹²

Statements by the Board in the ongoing DuPont rate reasonableness dispute suggest that the Board recognizes that railroads cannot ignore their common carrier obligations simply because hazardous materials are involved. In the DuPont cases, CSX had argued that transportation of hazardous materials should not be evaluated under a

¹¹ *The Akron, Canton & Youngstown Railroad Company v Interstate Commerce Commission*, 611 F.2d 1162, 1167-1168 (6th Cir. 1979).

¹² Railroad attempts to avoid transportation of radioactive or hazardous materials were rebuffed in many other cases. See, e.g., *Radioactive Materials, Missouri-Kansas-Texas Railroad Company*, Docket 36307, 357 ICC 458 (1977), *Classification Ratings of Chemicals, Conrail*, April 30, 1986, Docket 9265, 3 ICC2d 331 (1986).

simplified rate methodology due to the “costs and complex issues involved,” but the Board disagreed. The Board found that governing statutes did not provide for differing treatment of hazardous materials.¹³ Calabrian implores the Board to continue its vigilance on such issues that ultimately impact whether a railroad is fulfilling its common carrier obligation and whether shippers like Calabrian will have an effective avenue for relief.

V. THE “DOOMSDAY SCENARIO” ALLEGED BY THE RAILROADS DOES NOT EXIST

A. The risk has been overstated

The railroads have claimed that their reluctance to transport hazardous materials, as evidenced in rate increases, is due to the “enormous risk” of such transportation, which allegedly creates the possibility of ruinous liability that cannot be covered by insurance.¹⁴

These claims are not supported by the facts. The CEO of the railroads’ own trade organization has noted that “[t]he rail hazardous materials safety record, like the overall safety record, is extremely favorable.”¹⁵ Moreover, 99.997% of rail shipments of hazardous materials reach their destination without incident, and rail accident rates

¹³ *E I DuPont De Nemours and Company v CSX Transportation, Inc* , Dockets 42099, 42100, and 42101 at pages 3 and 6 (served Dec 20, 2007)

¹⁴ See, e.g., Testimony of Edward Hamberger, President and CEO of the Association of American Railroads before the U S House of Representatives Committee on Transportation and Infrastructure (June 13, 2006), Opening Evidence of CSX in *E I DuPont De Nemours and Company v CSX Transportation, Inc* , Docket 42100 at pages 5-7 (filed Feb 4, 2008), statement of Norfolk Southern Chairman and CEO Wick Moorman, as quoted in The Virginian-Pilot, “After Breaches, Rail Industry Looks for Safer Way to Move Hazardous Chemicals” by Gregory Richards (Oct. 15, 2006)

¹⁵ Testimony of Edward Hamberger, President and CEO of the Association of American Railroads before the U S House of Representatives Committee on Transportation and Infrastructure at page 3 (June 13, 2006)

involving hazardous materials have decreased 26% since 1990 and 86% since 1980.¹⁶

Statements directed at investors and Wall Street are similarly sanguine.¹⁷

While the railroads contend that “ruinous liability” is risked every time hazardous materials are transported, recent examples of TIH derailments do not bear this out. While the Graniteville, SC derailment and subsequent release of chlorine was tragic, Norfolk Southern reports that the financial impact on NS was hardly ruinous. In its current Annual Report, NS stated that “NS’ commercial insurance policies are expected to cover substantially all expenses related to this derailment above NS’ self-insured retention, including NS’ response costs and legal fees.”¹⁸ The covered costs were estimated at \$38 million above the self-insured retention.¹⁹

As NS has reported to its shareholders that its expenses were largely covered by insurance, NS seems to have minimal financial exposure from the Graniteville accident. Even if its expenses had not been covered by insurance, the \$38 million represents just 0.4% of Norfolk Southern’s annual railway operating revenue (which was \$9.432 billion in 2007). Again, while this tragic and deadly accident resulted in the death of nine people, the reported financial impact is hardly ruinous. And while the NS suffered the direct monetary affect of the accident, other railroads have raised their rates to similar levels using the Graniteville accident in discussions with Calabrian as a basis to support their increases, even though they experienced no direct financial impact as a result.

¹⁶ Railroads: The Safe Way to Move at page 3, a publication of the Association of American Railroads (March 2008).

¹⁷ Norfolk Southern Annual Report 2007 at page 6 (“Chemicals are an essential ingredient in millions of consumer products and have a myriad of industrial applications. When it comes to shipping them, no railroad in North America is safer than Norfolk Southern.”)

¹⁸ Norfolk Southern Annual Report 2007 at page K29

¹⁹ Norfolk Southern Annual Report 2007 at page K29

Morcover, the probable cause of the tragic Graniteville accident was employee error in not returning a switch to the normal position and excessive speed.²⁰ The cause was not any inherent characteristic of the chlorine being transported. It appears that the fact that a hazardous material was involved may be used to deflected attention away from the root cause of the accident in an effort to relinquish the railroads' common carrier obligation to transport hazardous materials.

To give this a different perspective, consider the case of a drunk driver that crashes his car into a parked car during a busy workday. The car hits with such tremendous impact that the gas tank ruptures and the vehicle explodes, killing the driver, two others and injuring six others who happen to be walking in the vicinity of the accident. In legal proceedings following the crash, the defense lawyers point out that the gasoline being carried in the car is extremely dangerous and poses an "enormous risk" to the public, arguing that the government should impose a \$10/gallon tax on the oil companies because their gasoline was responsible for killing and injuring all those people, even though the oil companies had absolutely no involvement with driving the car. And they argue that the oil companies should assume the cost of all future liability for the movement of any car. In this way, the attention is diverted away from real cause of the accident, the gross negligence of the driver, and the oil companies, even though the gasoline in a car presents minimal risk given the amount of cars on the road and frequency of such an accident, are forced to pay for the "grave potential risk" in the future.

²⁰ National Transportation Safety Board Railroad Accident Report, NTSB/RAR – 05/04, "Collision of Norfolk Southern Freight Train 192 with Standing Norfolk Southern Local Train P22 with Subsequent Hazardous Materials Release at Graniteville, South Carolina, January 6, 2005."

This example is not used to diminish the tragic consequences of a train or car accident. However, it is spurious for the railroads to rely on events like the Graniteville, Minot, and Macdona derailments as evidence that they should not have a common carrier obligation to transport hazardous materials.²¹ Those events were caused by railroad error (not by any inherent characteristic of the hazardous materials being transported), were largely covered by insurance policies, and did not result in ruinous liability. The Federal Railroad Administration has already taken steps to address the employee errors that have caused railroad accidents and derailments such as those at Graniteville and Macdona. See 73 Federal Register 8442 (Feb. 13, 2008).

Moreover, a crucial point ignored thus far is that all recent fatal railroad releases of hazardous materials have not involved sulfur dioxide. This fact is not entirely surprising, because sulfur dioxide dissipates quickly in the air and usually is not lethal unless released in a confined space.²² In fact, Calabrian is aware of no fatal railroad accidents involving releases of sulfur dioxide.

B. Insurance is available

The Graniteville example noted above shows that, to the extent that railroads wish to insulate themselves from the possible risks involved in the transportation services they provide, insurance can be used. Of course, any insurance coverage, in addition to whatever deductible may exist, does result in some cost. Based on Calabrian's

²¹ The probable cause of the Minot derailment was an ineffective railroad inspection and maintenance program. National Transportation Safety Board Railroad Accident Report, NTSB/RAR – 04/01, "Derailment of Canadian Pacific Railway Freight Train 292-16 and Subsequent Release of Anhydrous Ammonia Near Minot, North Dakota, January 18, 2002." For Macdona, the probable cause was train crew fatigue. National Transportation Safety Board Railroad Accident Report, NTSB/RAR – 06/03, "Collision of Union Pacific Railroad Train MHOTU-23 with BNSF Railway Company Train MEAP-TUL-126-D with Subsequent Derailment and Hazardous Materials Release, Macdona, Texas, June 28, 2004."

²² Chlorine was involved in the Graniteville accident, and CSX recently described what makes chlorine so lethal in a separate proceeding before the Board. CSX Rebuttal Evidence at pages 24-25, *E I DuPont De Nemours and Company v CSX Transportation, Inc.*, Docket 42100 (filed April 4, 2008).

experience even a complete pass-through of this cost would be much lower than the dramatic rate increases experienced by Calabrian. Calabrian itself has insurance coverage for its production and storage operations, and it has noticed premiums actually decreasing recently despite the damage caused by Hurricane Rita in 2005.

Calabrian recognizes that some railroads claim insurance coverage is not available or is too expensive. Before giving credence to these claims, the Board should require the railroads to substantiate the assertion that insurance coverage is unavailable or is so expensive as to justify massive rate increases. For example, based upon the average rate increase experienced by Calabrian, freight costs have increased approximately \$2.2 million per year. Calabrian doubts that any alleged increase in insurance premiums incurred by the railroads would come close to the overall rate increases imposed upon Calabrian. Furthermore, if the rate increase experienced by Calabrian were applied to the approximately 100,000 railcar shipments per year of *only* sulfur dioxide, chlorine and ammonia, the total revenue gain for the railroads would amount to approximately \$530 million annually, which certainly would dwarf any potential exposure and/or premium increase.

C. The alleged terrorism risk can be addressed with more common sense approaches to transport of hazardous materials

Railroads have asserted that terrorism is a grave danger that affects rail transportation of hazardous materials. The perceived risk can be dramatically reduced, for example, by eliminating the clear identification of hazardous materials on the exterior of tank cars. Instead, barcodes or computer identification chips can be scanned on tank cars, thereby providing railroads, emergency personnel, and others with all the necessary information in the event of an emergency response situation. In addition, while railroads

either maintain or have access to some level of insurance coverage for liability arising out of war or acts of terrorism, none of the railroads report these premiums as "material."²³ Furthermore, any perceived or alleged risk from terrorism from products like sulfur dioxide and chlorine are unfounded or are minimal, and certainly do not justify the \$30,000 per railcar expense currently being considered for railcar safety enhancement.²⁴

VI. OTHER INCIDENTS (NOT RELATED TO HAZARDOUS MATERIALS) RESULT IN GREATER LIABILITY FOR THE RAILROADS

While any loss of life is tragic, the railroads have wildly exaggerated the scale of the risk incurred by them in transporting hazardous materials. The Minot derailment in 2002 resulted in one death, the Graniteville, SC accident in 2005 resulted in nine deaths, and the Macdona, TX accident in 2004 resulted in three deaths. These figures are dwarfed by other railroad accident deaths. For example, railroad-street crossing accidents have recently resulted in roughly 300-400 deaths each year in the United States.²⁵ Secondly, employee-related injuries and claims actually make up a large portion of all railroads' casualty expense. The most recent CSX Annual Report includes an extensive discussion of employee claims with virtually no mention of liability for transporting hazardous materials.²⁶ Similarly, the NS Annual Report emphasizes the large impact of employee claims, noting that "[t]he rail industry remains uniquely susceptible to litigation involving job-related accidental injury and occupational claims because of the Federal Employers' Liability Act."²⁷ Just as the costs associated with

²³ See Norfolk Southern Annual Report 2007 at page K14

²⁴ See The Virginian-Pilot, "After Breaches, Rail Industry Looks for Safer Way to Move Hazardous Chemicals" by Gregory Richards (Oct 15, 2006)

²⁵ *Railroad-Highway Grade Crossing Handbook*, U.S. Department of Transportation, Federal Highway Administration (revised second edition, Aug. 2007), Railroads: The Safe Way to Move at page 2, a publication of the Association of American Railroads (March 2008)

²⁶ CSX Annual Report 2006 at pages 71-76.

²⁷ Norfolk Southern Annual Report 2007 at page K29.

these claims could not justify a railroad abrogating its common carrier obligation, the costs associated with the transportation of sulfur dioxide and other commodities should not be used to shield any railroad from its common carrier obligation to move such commodities at a reasonable price.

VII. CONCLUSION

Calabrian appreciates this opportunity to express its views on the common carrier obligation of the nation's railroads. Vigilant enforcement of the common carrier obligation by the Board is necessary for Calabrian to survive in a competitive world business environment. I look forward to my appearance before the Board on April 24 and will gladly answer any questions the Board may have

Respectfully submitted,

/s/

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