BEFORE THE
SURFACE TRANSPORTATION BOARD

PETITION FOR RULEMAKING TO ADOPT RULES GOVERNING PRIVATE RAILCAR USE BY RAILROADS	)))))	Ex Parte No. 768

REPLY COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE, FREIGHT RAIL CUSTOMER ALLIANCE, AND NATIONAL COAL TRANSPORTATION ASSOCIATION

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Dated: September 8, 2022

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In response to the Surface Transportation Board's ("Board" or "STB") decision in the above-captioned proceeding on April 1, 2022, the Western Coal Traffic League ("WCTL"), Freight Rail Customer Alliance ("FRCA"), and National Coal Transportation Association ("NCTA") (collectively, "Shipper Groups") hereby submit these reply comments in support of the proposal to adopt rules to incent the rail carriers to use private railcars more efficiently by accessing charges when the cars are unduly delayed.

I.
INTRODUCTION AND SUMMARY

The Shipper Groups and other shippers explained in their opening comments how their investment in private railcars is not valued by the railroads, and that the resulting delays and the inefficient handling of the private railcars have only increased as railroads implement operational changes, adopt precision scheduled railroading ("PSR"), and pursue ever lower operating ratios. The Shipper Groups therefore urged the Board to adopt a rule to incent the efficient use of private railcars to prevent unnecessary delays and inefficient use of shipper resources and improve rail

operations generally by requiring railroads to compensate shippers when private railcars experience undue delays in transit that are not reasonably excused.

In general, the railroads argued in their opening comments against any compensation, insisting that the STB lacks jurisdiction, that such compensation will create inefficiencies and bias operations in favor of moving private railcars, and that shippers with private railcars already derive sufficient benefits because they have greater control over operations. However, the railroads' arguments against any compensation for holding railcars, and insistence that a railroad should be allowed to delay a private railcar indefinitely without consequence, are an overreach and fundamentally unreasonable. Shipper Groups addressed the railroads' jurisdictional argument in their Opening Comments and demonstrated that the Board clearly has the necessary authority pursuant to 49 U.S.C. § 11122(a)(2) to require that railroads compensate shippers when they delay private railcars unreasonably. The Shipper Groups thus limit their Reply Comments below to the railroads' remaining arguments and examples. In particular, Shipper Groups explain that the railroads seek to overcomplicate and fabricate the potential harm of railroads having to provide compensation for unduly delaying private railcars. Shipper Groups address the railroads' argument that no limit should exist on how long private railcars can be delayed and again demonstrate that there is sufficient evidence in the record to support a finding that private railcars are moving inefficiently. In addition, Shipper Groups explain why having the railroads track and invoice all incentive-based compensation, similar to what exists today for demurrage, will be efficient for all concerned, and not unduly burdensome.

II.
DISCUSSION

A. Requiring Compensation for Excessive Delays of Private Cars Will Incent Railroads to Operate Their Networks More Efficiently and Benefit All Users

1. Unreasonable Delays and "Pauses" of Private Railcars Undermine Efficient Railroad Operations

The railroads argue against any ceiling as to when the detention of private railcars becomes unreasonable,[1] even as the railroads require shippers to purchase or lease private railcars to receive rail service and assess demurrage and detention when shippers delay their receipt or return of railcars, often due to causes beyond the shippers' control. The Association of American Railroads ("AAR") goes so far as to claim that "even if there is a real 'pause' of some duration in a car's onward movement, that does not mean that forward progress has stopped, or that anything inefficient has taken place" and that "such pauses – of brief or longer duration – are a natural part of railroad network operations." AAR Opening Comments at 12.

The railroads' detentions of shipper provided railcars are far from "pauses" and, if anything, such carrier-caused detentions are growing more frequent and severe[2]

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[1] *See* Association of American Railroads Opening Comments at 12-13.

[2] For example, in comparing the rail service data that UP and BNSF reported to the Board in EP 724 for the first week of August from 2019 to 2022, there has been a steady year-over-year increase for the "weekly average number of loaded and empty cars in revenue service that have not moved in 48 hours or greater." For the first week of August, UP reported 2,828 cars (loaded and empty) for 2019; 3,571 in 2020; 5,647 in 2021; and 6,098 in 2022 – an increase of 116% in detained cars not moving from 2019. Similarly, for the first week of August, BNSF reported 10,044 cars (loaded and empty) for 2019; 8,661 in 2020; 9,890 in 2021; and 14,006 in 2022 – an increase of 39% in delayed cars not moving from

and flow directly from the railroads' preference to keep operating ratios low and profits high, while eliminating capacity to accommodate fluctuations in traffic.

The railroads have even acknowledged using price as a mechanism to discourage volumes. For example, Mr. Fritz boasted to UP's investors earlier this year that "if we see volume overwhelming our ability to satisfy it, we've always got price as a lever that we can use that discourages some amount of that volume and helps it find a different home." UP 4Q2021 earnings call (Jan. 20, 2022). The railroads have also imposed legally questionable embargoes, and as BNSF candidly acknowledges in its comments, "[i]f embargoes become a more frequently utilized tool, railcar providers could find themselves with more stranded assets."[3]

BNSF also asserts that "the excess car inventory currently on the national rail network already demonstrates that the existing market forces may not be not [sic] strong enough to discourage shippers from placing too many cars online,"[4] suggesting that shippers are somehow responsible for the current rail service crisis. However, such finger pointing is off-base and misplaced. As the Shipper Groups stated in their Opening Comments, "[e]fficiency should be measured not on avoiding cost, but on serving

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2019. Notably, in its bi-weekly status report for August 12, 2022, BNSF reported that "Average Trains Holding" increased by 19.6% from the March 4, 2022 baseline. BNSF Supplemental Bi-Weekly Status Report, *Urgent Issues in Freight Rail Service*, EP 770 (Sub No.1) (filed Aug. 19, 2022), https://dcms-external.s3.amazonaws.com/DCMS_External_PROD/1660938431268/305166.pdf.

[3] BNSF Opening Comments at 6.

[4] *Id.* at 6.

customers efficiently and appropriately."[5] Actions to limit volumes should be limited to true service emergencies, and the focus should instead be on timely service and increasing efficiencies of resources, including private railcars.

2. There is Clear Evidence in the Record that the Railroads are Handling Private Railcars Inefficiently

UP asserts in its Opening Comments that "Petitioners have not shown railroads use private freight cars inefficiently," and that "[Petitioners] offer just a handful of vague stories about sporadic service issues involving unnamed railroads *during the pandemic*."[6] Such claims are makeweight at best. The evidence is overwhelming that service is poor, railcars are not being handled efficiently,[7] and the service problems predate the pandemic.[8] The results for NCTA's Utility On Time Performance (OTP) Metric Survey for the second half of 2021 were included with the Shipper Groups Opening Comments. NCTA's updated results for the first half of 2022 are attached hereto as **Attachment A**. The survey results for 2022 indicate that rail service has grown worse since 2021, with 100 percent of survey responses received answering in the

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[5] Shipper Groups Opening Comments at 22.

[6] *See* UP Comments at 7-8 (emphasis in original).

[7] Petitioners Opening Comments at 7 (filed June 30, 2022) and Petitioners Letter (filed Aug. 18, 2022) (provided updated totals).

[8] For example, the rail service data that UP and BNSF reported to the Board pursuant to EP 724 for the first week of March 2018 listed a significant number of cars being delayed, with UP reporting 13,361 and BNSF reporting 15,370 as the total weekly average number of cars (loaded and empty) that were not moved in 48 or more hours.

affirmative that their company had to modify operations in response to rail service disruptions and delays.[9]

The railroads also try to make the point that railroads treat private railcars no differently than railroad-owned freight cars.[10] Even if such claims were true, the claim is irrelevant for unit train coal shippers, tank car shippers, and other shipper segments that rely overwhelmingly or entirely on privately owned or leased railcars. Further, when given the opportunity, railroads do treat railroad owned railcars differently, as evidenced by UP's recent decision to allow its own cars back onto the system and its failure to extend that treatment to shipper owned or leased railcars.[11]

3. Railroads Can Choose What Operational Changes to Make to Avoid Unreasonably Delaying Private Railcars

The railroads argue in part that they should be allowed to continue the practice of unduly detaining private railcars because adherence to any reasonable standard would somehow result in gross inefficiencies. However, the argument that trains will start moving more inefficiently if railroads are restricted from unreasonably detaining private railcars is tantamount to threats that the railroads will resort to gamesmanship and retaliation, and the examples provided are unrealistic and contrived.

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[9] Attachment A at 4-5.

[10] UP Comments at 8.

[11] UP in a letter to customers on August 18, 2022 stated that it had "pulled almost 3,000 UP-owned cars out of storage and started to add more unit train sets to support customer demand." Kenny Rocker, *Status of the R.R. – A Message from Kenny Rocker, EVP, Marketing & Sales*, Aug. 18, 2022, https://www.up.com/customers/announcements/customernews/allcustomernews/CN2022-43.html (accessed Sept. 8, 2022).

For example, BNSF suggests that, if required to pay compensation, railroads will not respond as rational actors that want to more efficiently move trains, but instead will seek to circumvent the standard, even to the point of sending a train backwards and extending the trip by more than 370 miles. BSNF Comments at 4 (example whereby a railroad opts to send a train to Amarillo from Fort Worth that is bound for Chicago).[12] BNSF's stated reason for such a circuitous routing is to avoid paying compensation for holding the cars for over three days while waiting for a train to Chicago, which inexplicably appears to be scheduled to arrive only every four plus days.[13] BNSF's glaring example illustrates how unusual and what a stretch it would be for a railroad to reroute trains to avoid paying a penalty.

Shippers are also already forced to contend with delays due to the rerouting of trains. In fact, operational changes and longer trains already result in cars going past smaller yards and "on to the next destination" only to return hours and "even days" later.[14] The railroads are now seeking to use these proposed standards to justify even additional delays and the rerouting of trains, when the root cause is PSR and the

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[12] PC Miler most "practical" route from Saginaw (BNSF station in Fort Worth, TX) to Amarillo, TX to Chicago IL is a distance of 1,297.5 miles, whereas the PC Miler most "practical" route from Saginaw, TX to Chicago, IL is only 984.0 miles.

[13] Even Amtrak has three daily trains in the summer from Fort Worth to Chicago. *See* Fort Worth – Chicago Train Schedule, https://www.wanderu.com/en-us/train/us-tx/fort-worth/usil/chicago/#:~:text= Trip%20Summary,23%20hours%20and%2024%20minutes (accessed July 15, 2022).

[14] Brotherhood of Locomotive Engineers and Trainmen, Division of the Teamsters Rail Conference Comments, *Urgent Issues in Freight Rail Service*, EP 770 (filed Apr. 22, 2022) at 8.

"eliminat[ion of] hump yards, yard crews, and local road switchers." *Id.* However, since the railroads raised the prospect of circumventing the standard, Shipper Groups encourage the Board to include provisions that address excessive mileage and circuitous routings undertaken to avoid compensation for undue delays.

B. The Board Must Act to Provide Adequate Incentives for Railroads to Efficiently Move Private Railcars

1. Current Railroad Operations Have Significantly Reduced the Benefit Shippers Supposedly Receive from Owning Private Railcars

The Railroads assertion that "[s]hippers receive many benefits from their choices to provide private railcars for use by railroads in handling their shipments"[15] is misleading, as members of the Shipper Groups have been forced to provide these railcars, and the benefits have been drastically reduced because of the inefficient handling and mishandling of the private railcars. Likewise, UP's and AAR's quoting of a 1989 ICC decision stating that a purported benefit is that "private car owners have control over their equipment and can demand that it be returned immediately after it is unloaded,"[16] must be qualified, because shippers are not actually receiving promised service and trainsets are being parked.[17] It is therefore simply untrue that the "economic benefits"[18] enjoyed

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[15] AAR Comments at 21.

[16] AAR Comments at 22; UP Comments at 10-11 (quoting *Shippers Comm. v. Ann Arbor R.R.*, 5 I.C.C.2d 856, 858-59 (1989)).

[17] For example, coal shipping members of the Shipper Groups report trains are not always directed to the requested mine, potentially impacting operations and coal supply contracts, and that trainsets are kept off the system entirely. Shipper Group Opening Comments at 4-5.

[18] *See* AAR Comments at 22.

by shippers that own or lease railcars somehow negates the need for a standard requiring private railcars to be handled efficiently.

2. Railroads, like Shippers, Must be Incentivized to Efficiently Manage Transportation Resources

The railroads try to distinguish between demurrage and charges to incent the efficient movement of private railcars, arguing that "the demurrage regime has the crucial advantage, and key difference, of being a market-based regime."[19] The railroads also state that "Congress intended for the level of service shippers receive to be disciplined by the market, not regulatory fiat."[20] However, such assertions are self-serving and an overreach. Reasonable detention standards and incentives are needed to address private car delays caused by railroads that are not adequately constrained by market forces.

Congress intended under the Staggers Act for there to be a "greater reliance on the marketplace," not an absolute reliance with no regulatory check.[21] As Professor John W. Mayo explained at a Congressional Hearing in 2015 on the Staggers Act, a "light-touch regulatory approach has been very, very successful [in regulating the rail industry]. . .[i]t doesn't mean that we ought not have regulatory oversight when market failures do occur. Regulators should be vigilant and move decisively."[22] Here, because

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[19] AAR Comments at 20.

[20] AAR Comments at 5.

[21] H.R. Conf. Rep No. 96-1430, at 79 (1980).

[22] The 35th Anniversary of the Staggers Rail Act: R.R. Deregulation Past, Present, & Future, Hearing Before the Subcomm. on R.R.s, Pipelines, & Hazardous Materials, 114 Cong. 16 (2015) (statement of John W. Mayo),

there is clear evidence of the railroads failing to efficiently manage private railcars, and because shippers cannot impose late fees on their own, the Board needs to step in to correct a problem that cannot be fixed by the market.

As it stands, "[t]he majority of North American freight railcars are not owned by the railroad . . . [but] [u]nless a shipper charges a late fee, there is not an explicit railroad cost to delayed lading."[23] Contrary to the railroads' contentions, there exists no effective market check on how long a railroad can hold a shipper owned or leased car for shippers that rely exclusively on rail. Conversely, there is a check on delays caused by shippers with demurrage, and as acknowledged by the railroads, it "provide incentives . . . [that] would *not otherwise exist at all* when cars are in the hands of shippers." AAR Comments at 24 (emphasis in original). The proposed penalties would serve a similar purpose and similarly incent railroads to account for the use of shipper resources.

The current delays and unmet demands of shippers is also evidence of a failure by the market to incent railroads to efficiently move private railcars. For example, for coal shippers, despite stockpiles being low heading into the summer months,[24] BNSF

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https://www.govinfo.gov/content/pkg/CHRG-114hhrg94575/html/CHRG-114hhrg94575.htm.

[23] Alexander H. Lovett et al., *Determining Freight Train Delay Costs on R.R. Lines in N. America*, RailTEC (2015) at 3, https://railtec.illinois.edu/wp/wp-content/uploads/2019/01/Lovett-et-al-2015-IAROR.pdf.

[24] The Shipper Groups warned in their Opening Comments that coal stockpiles were down and not where they needed to be heading into the summer months. Shipper Groups Opening Comments at 11.

and UP have continued to underdeliver coal and to hold coal unit trains more than other unit trains.[25] Additionally, the delays to private railcars continued during this summer, and cycle times were longer than average. One Shipper Group member reported that despite Board intervention, there were substantial delays of over a week. This represents a market failure, and the Board should respond accordingly.

3. Additional Protections are Necessary to Address the Impact Cumulative Delays have on Shippers that Provide Private Railcars in Unit Train Service

AAR claims, without foundation, that parity already exists in how railroads handle their own cars and private railcars, but admits this is not the case "*when operated in unit trains at the direction of the shipper or receiver*." AAR Comments at 8 (emphasis added). The railroads thus concede the point the Shipper Groups made in their Opening Comments that shippers that supply private railcars in unit train service are at a service disadvantage.

The railroads' admission that there is no parity for unit train shippers supports the Shipper Groups' position that there should be additional protections for unit train shippers,[26] as a trainset represents a massive investment and delays are multiplied over a hundred or more cars. While there can be shipper-related delays at origin or destination (for which railroads are quick to charge demurrage), the railroads can cause

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[25] Shipper Groups Opening Comments at 7-8.

[26] Shipper Groups Opening Comments at 23-24 (proposing incentive-based compensation apply to unit trains for "a single delay event of 24 hours, or multiple individual delay events of at least 10 hours each that cumulatively amount to at least 72 hours during one cycle").

cumulative delays enroute that result in delays of days of upwards of a week.[27] Therefore, incentive-based compensation should also apply to cumulative delays enroute for private railcars in unit train service because, as explained by UP, otherwise "[t]he proposed rules would not even guarantee faster service for shippers using private cars because they would regulate only the amount of time cars may remain idle at any one location, not the total amount of time cars may be idle while enroute."

C. The Railroads Need to Track and Invoice Charges using a System Similar to What Currently Exists for Demurrage

Shipper Groups in their Opening Comments proposed that the railroads be responsible for tracking and invoicing charges for undue delay of private railcars, just as the railroads are responsible for tracking and invoicing demurrage charges.[28] The railroads already track and compile the relevant data and are best positioned to prepare invoices accurately and efficiently.

The AAR's assertion that "the burden that a pause was unjustified would necessarily fall upon the . . . private car owner"[29] rests on a faulty premise. After the railroads compiled the data and prepared the invoice, they would have the opportunity to identify mitigating factors, just as shippers currently do with demurrage. This approach would maintain fairness, an appropriate level of reciprocity, and efficiency.

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[27] *See* Shipper Groups Opening Comments at 9 (discussion of cycle times).

[28] Shipper Groups Opening Comments at 25.

[29] AAR Comments at 32 (Response to Question 5).

In summary, a reasonable tracking and invoicing system which is reciprocal and implemented similarly to demurrage to incent the efficient use of railcars will not unduly burden Board resources or result, as AAR suggests, in "micromanagement"[30] of rail network operations.

IV.
CONCLUSION

For the above stated reasons, the Shipper Groups again request the Board exercise its regulatory authority and proceed with a rulemaking to adopt regulations that will incentivize the efficient handling of private railcars.

Respectfully submitted,

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[30] AAR Comments at 32.

ATTACHMENT A

NCTA/FRCA/NRECA Utility Members On Time Performance Survey

- On Time Performance (OTP) data from the Shipper Perspective
- Valid (anonymous) data showing different shipper experiences than RR metrics stories
- OTP Transit time service metrics are a value as benchmark and logistics and planning tool for shippers
- OTP data has become useful in dialogue with STB & GAO

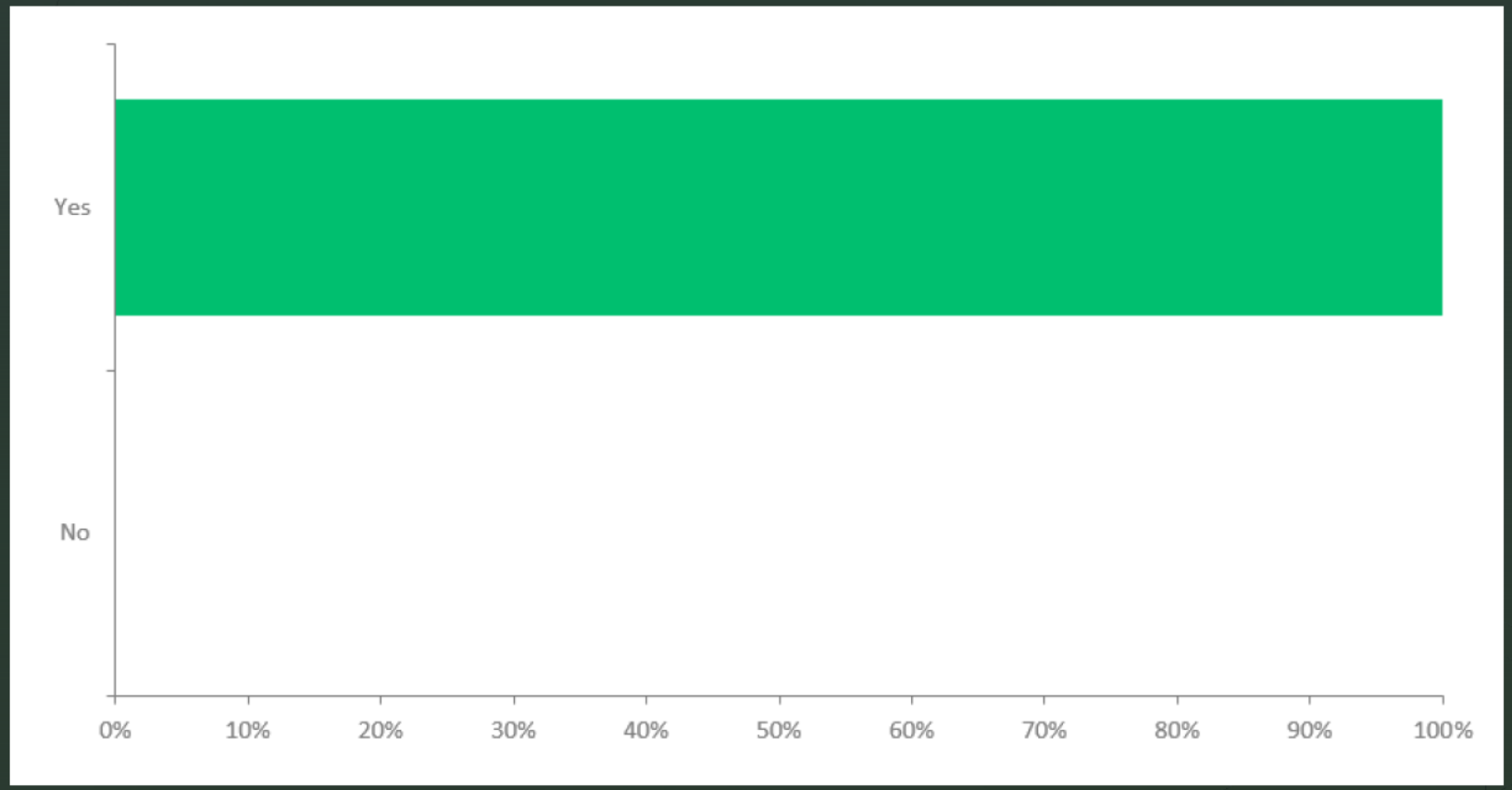
  1. FRCA written comments submitted to STB Reauthorization hearing March 2022 held by House Railroads, Pipelines & Hazardous Materials (Railroads) Subcommittee.
  2. Submitted to Government Accountability Office in response to PSR study and follow up to meetings held with FRCA and WCTL
  3. Used in discussions with STB's Rail Energy Transportation Advisory Committee (RETAC)

Fifth On Time Performance Utility Shipper Survey

January 2022-June 2022

- First Survey: August 2019-July 2020, Second Survey: August 2021-December 2020 , Third Survey: January 2021- June 2021, Fourth Survey: July 2021-Dec 2021
- Fifth Survey: Jan 2022-July 2022
  - ✓ Represents 39 Plants
  - ✓ 6 Coal Supply Regions: SPRB, NPRB, Rockies, NAPP, CAPP, ILB
  - ✓ Class I Railroads, Multi Line & Short-line Movements
  - ✓ Mine to plant transit time per railroad and coal mine region per one-way mileage grouping
  - ✓ Monthly Nominations Fulfilled by the carriers: Yes/No – How many short?
  - ✓ Voluntary participation - Utility member identity confidential

Q1: In the 6 month period of Jan 2022-June 2022 Have Railroad Service Issues Impacted your Company's Coal Transportation? 39 Plants Responded "Yes".



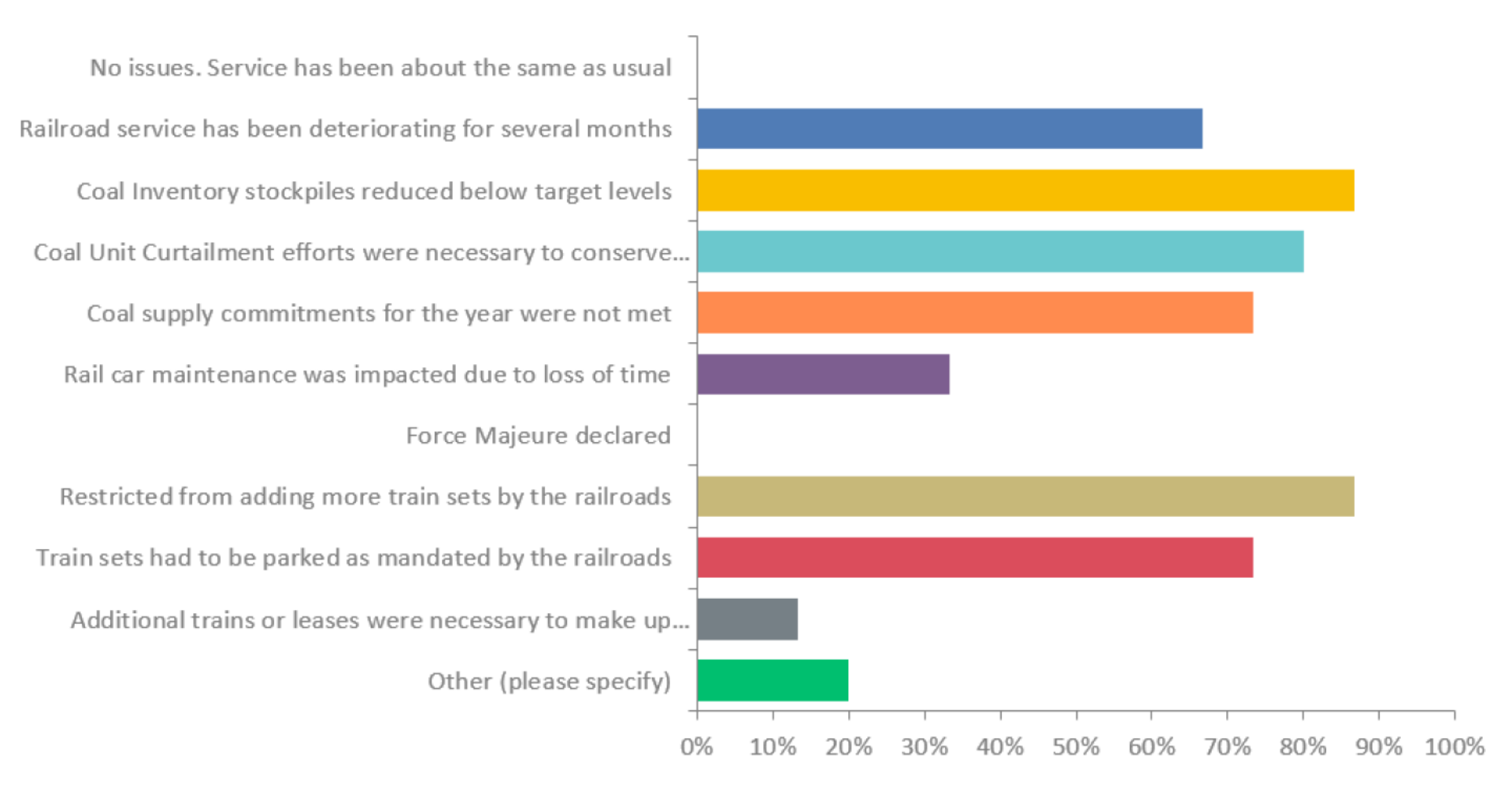
Q 2: How would you describe your railroad service in 2022? 39 Plants Responded:

ANSWER CHOICES	RESPONSES
Worse than it was in 2021 and/or past 3 years	86.67%
About the same as usual	6.67%
Better than usual	0%
Improving and expect to continue to improve	6.67%
TOTAL	100%

Q3: Has your company modified its operations in the first half of 2022 due to railroad transportation service issues, disruptions and delays?

ANSWER CHOICES	RESPONSES
Yes	100%
No	0%

Q4: In what way have your operations been impacted by railroad service issues? Check all that apply: 39 Plants responded



Q5 and Q6: Have railroad service issues caused an increase in costs for your company? Yes: 86.67% No: 13.33%

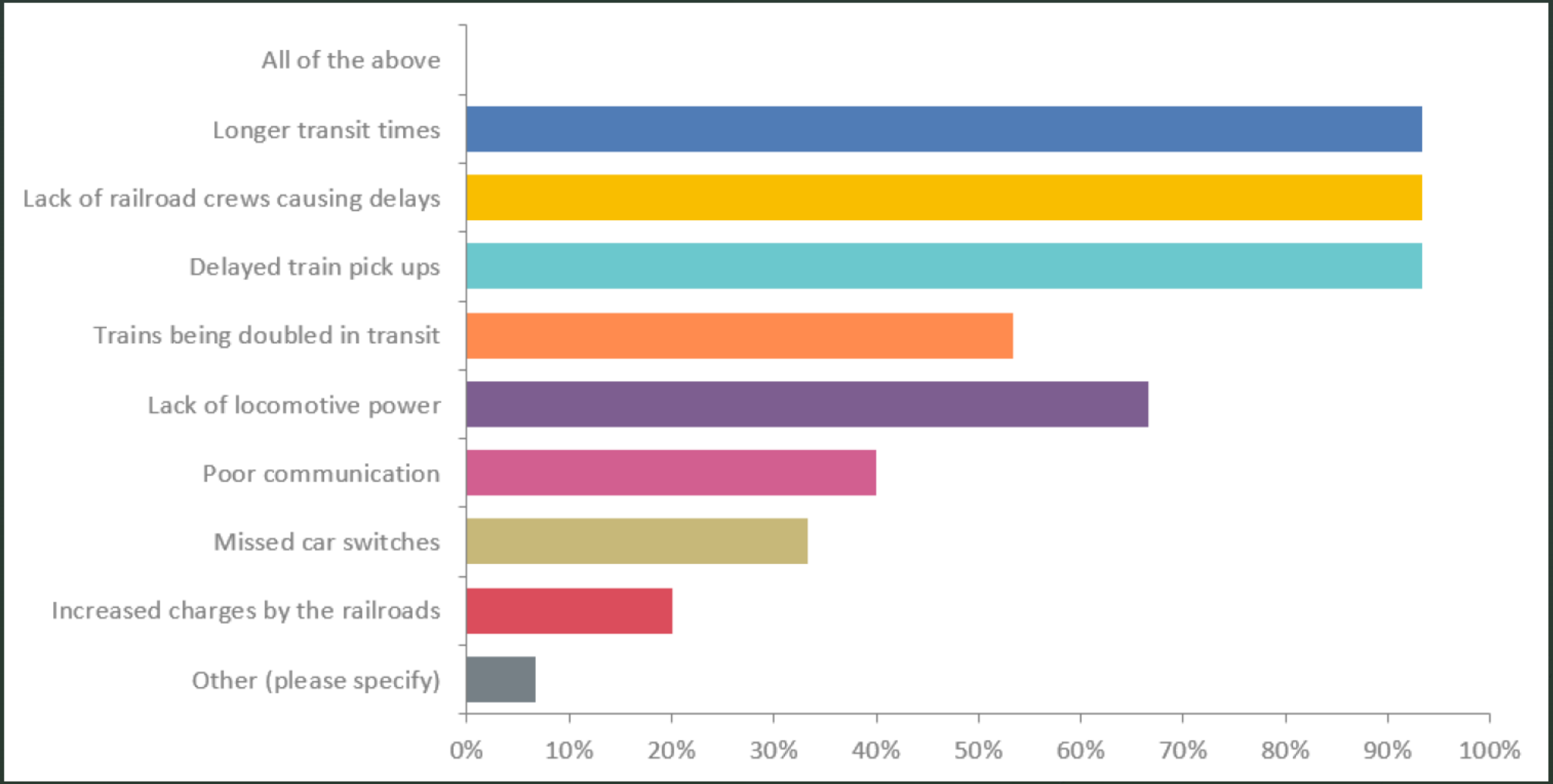
If so, how much? Ballpark Estimate? (3 declined)

ANSWER CHOICES	RESPONSES
Less than $100,000	0%
$100,000 - $ 1 M	25.00%
$ 1 M - $ 5 M	16.67%
$ 5 M - $ 10 M	8.33%
$10 M - $15 M	8.33%
$15 M - $20 M	8.33%
Over $20 M	33.33%
TOTAL	100%

Q 7: Were increased costs incurred due to any of the following? Check all that apply? (2 declined)

ANSWER CHOICES	RESPONSES
Extra costs for purchase power to replace coal generation	76.92%
Extra costs for natural gas to replace coal generation	92.31%
Additional train leases were necessary to make up deliveries	7.69%
Increased labor costs at your company to manage inventory or other production issues	38.46%
Had to make spot purchases of coal from other mines because railroads could not deliver from contracted mine sources	15.38%
Other (please specify)	30.77%
TOTAL	100%

Q 8: What kind of railroad service issues have you experienced? Check all that apply



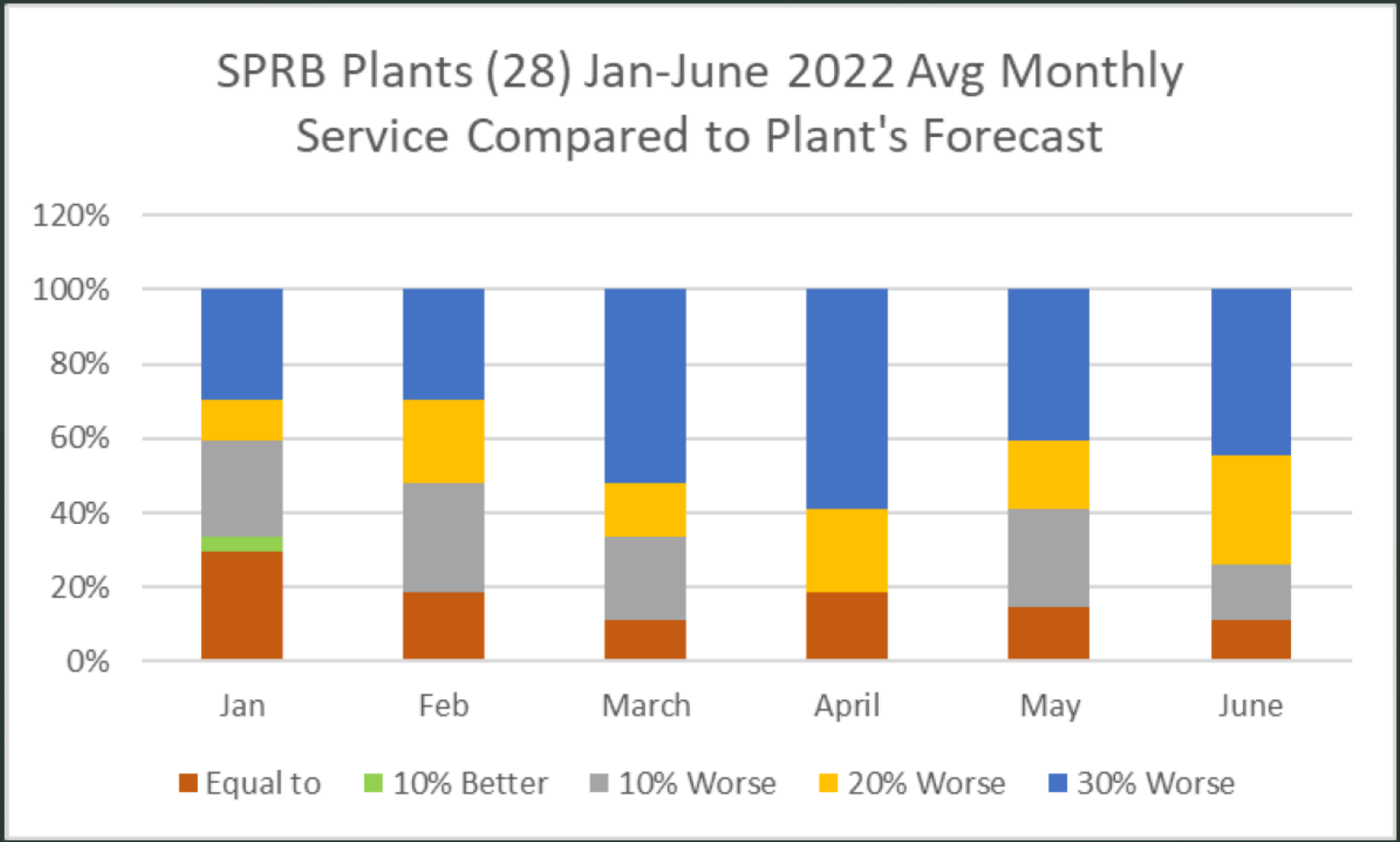
- Of the 39 Plants that reported data, what rail carriers served those plants?

BNSF	UPRR	NS	CN
44%	44%	10%	3%

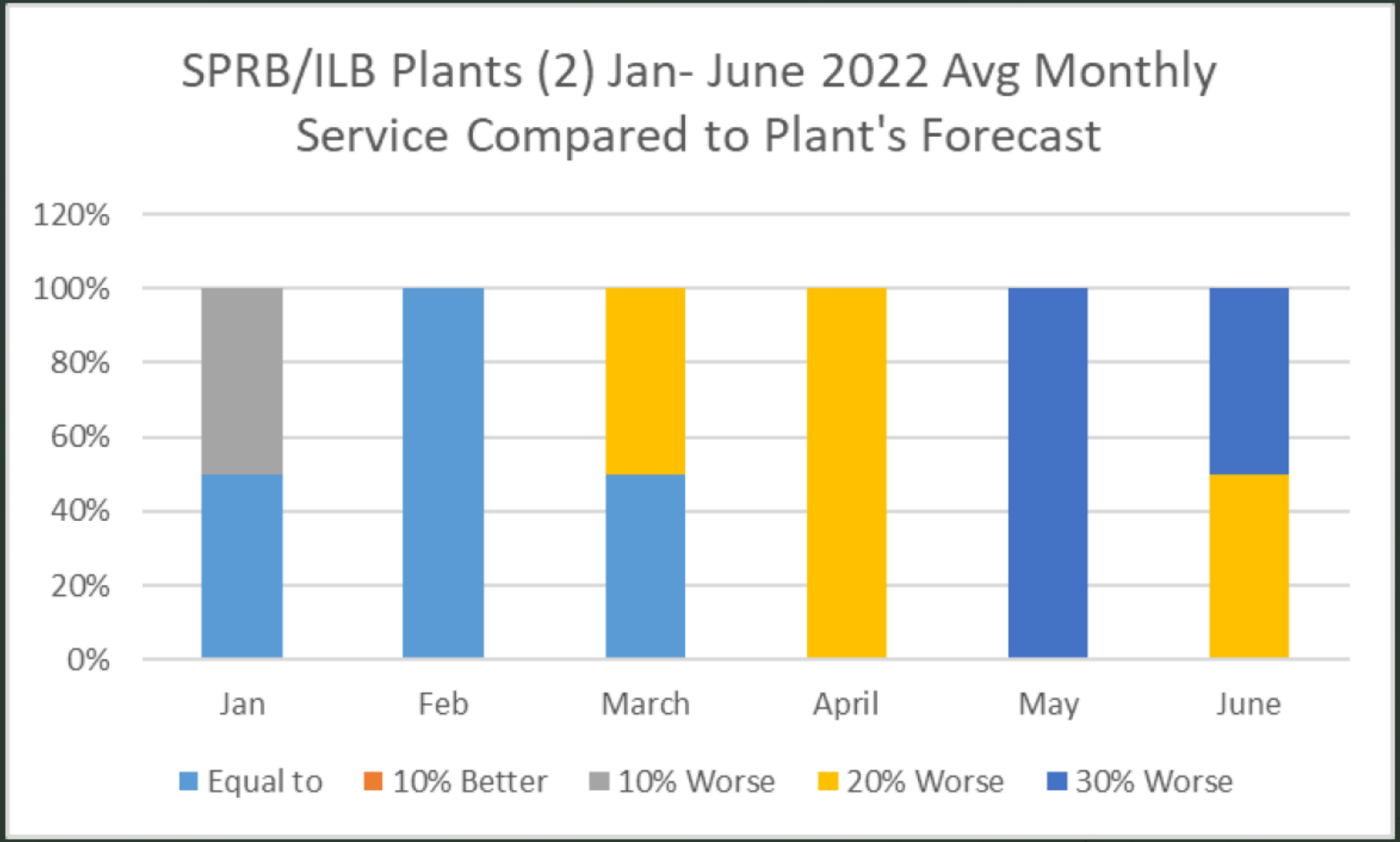
What mine source regions were used by those plants?

SPRB	NPRB	Rockies	NAPP	CAPP	ILB
74%	8%	3%	5%	3%	8%

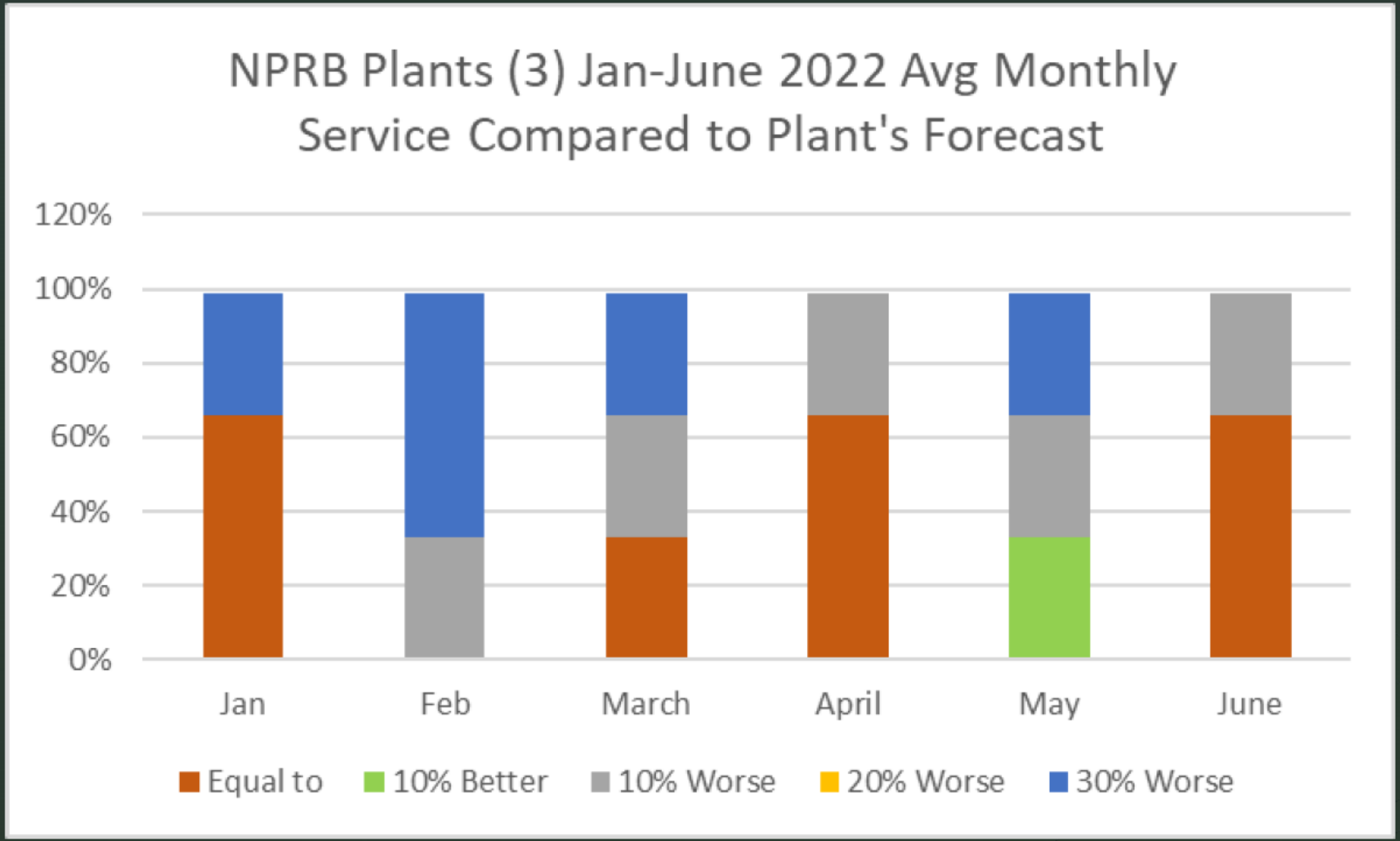
28 Plants Reported Shipping Coal From Southern PRB-WY Region



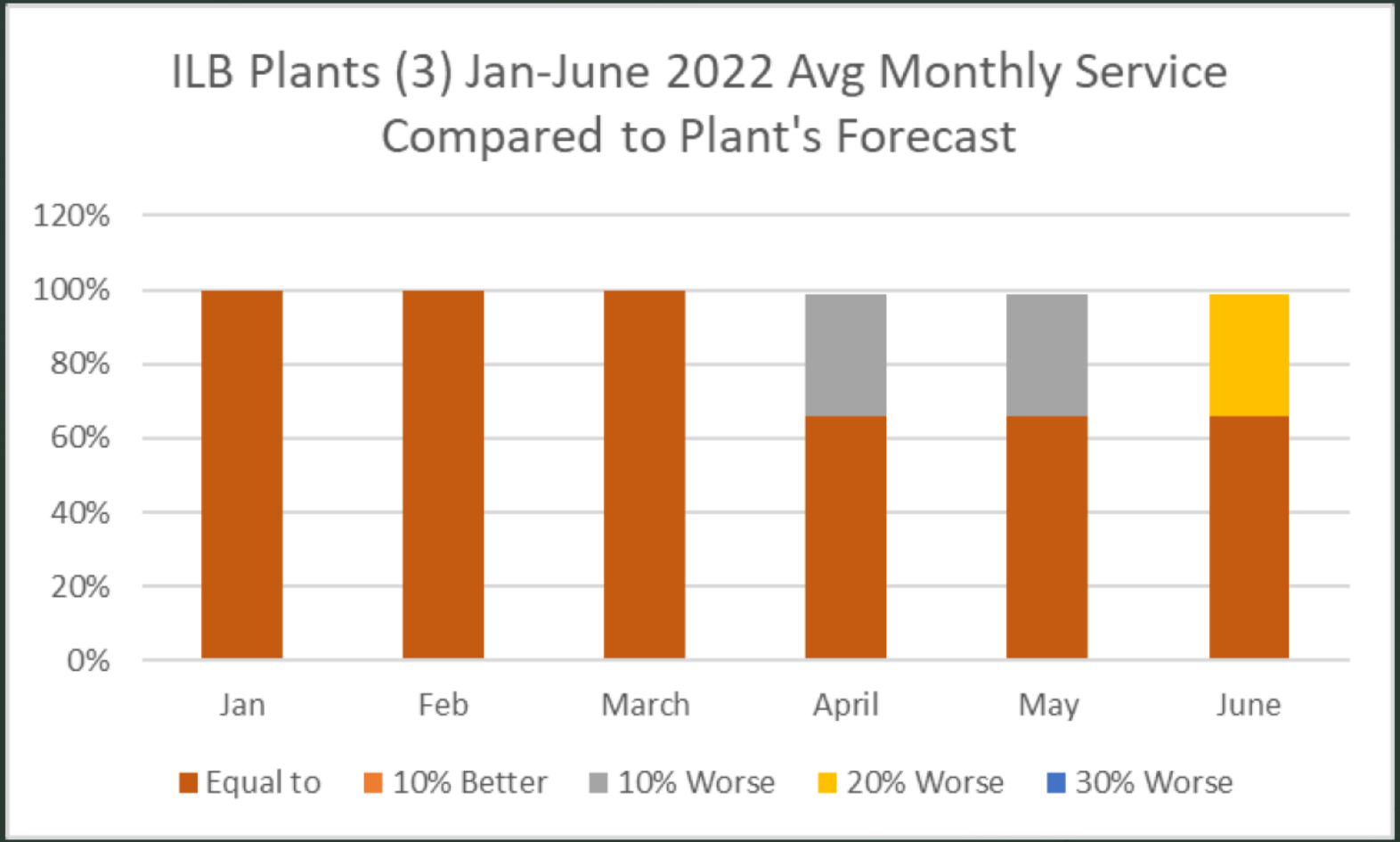
2 Plants Reported Shipping Coal From Southern PRB-WY and Illinois Basin Region



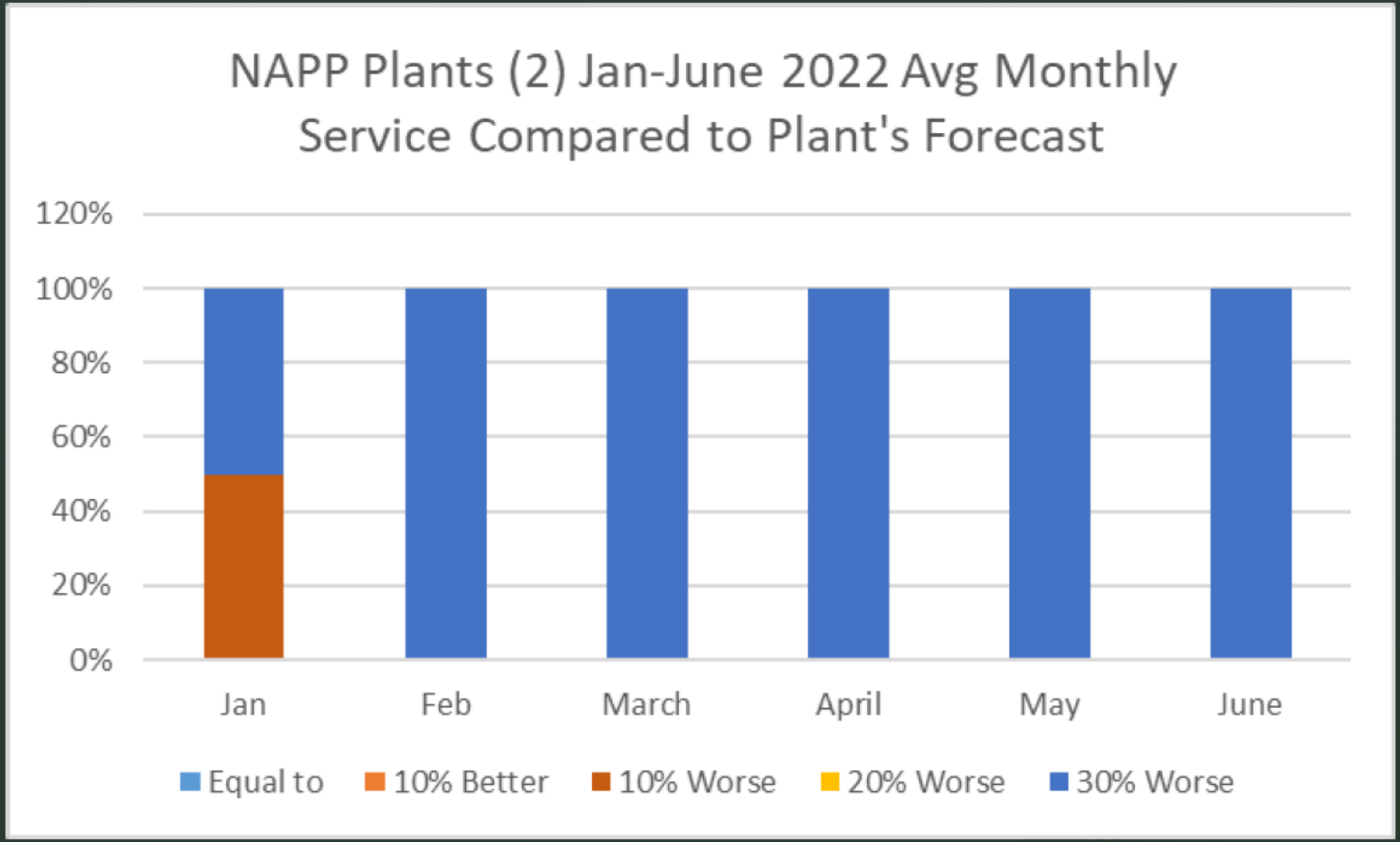
3 Plants Reported Shipping Coal From Northern PRB – WY Region



3 Plants Reported Shipping Coal From Illinois Basin Region



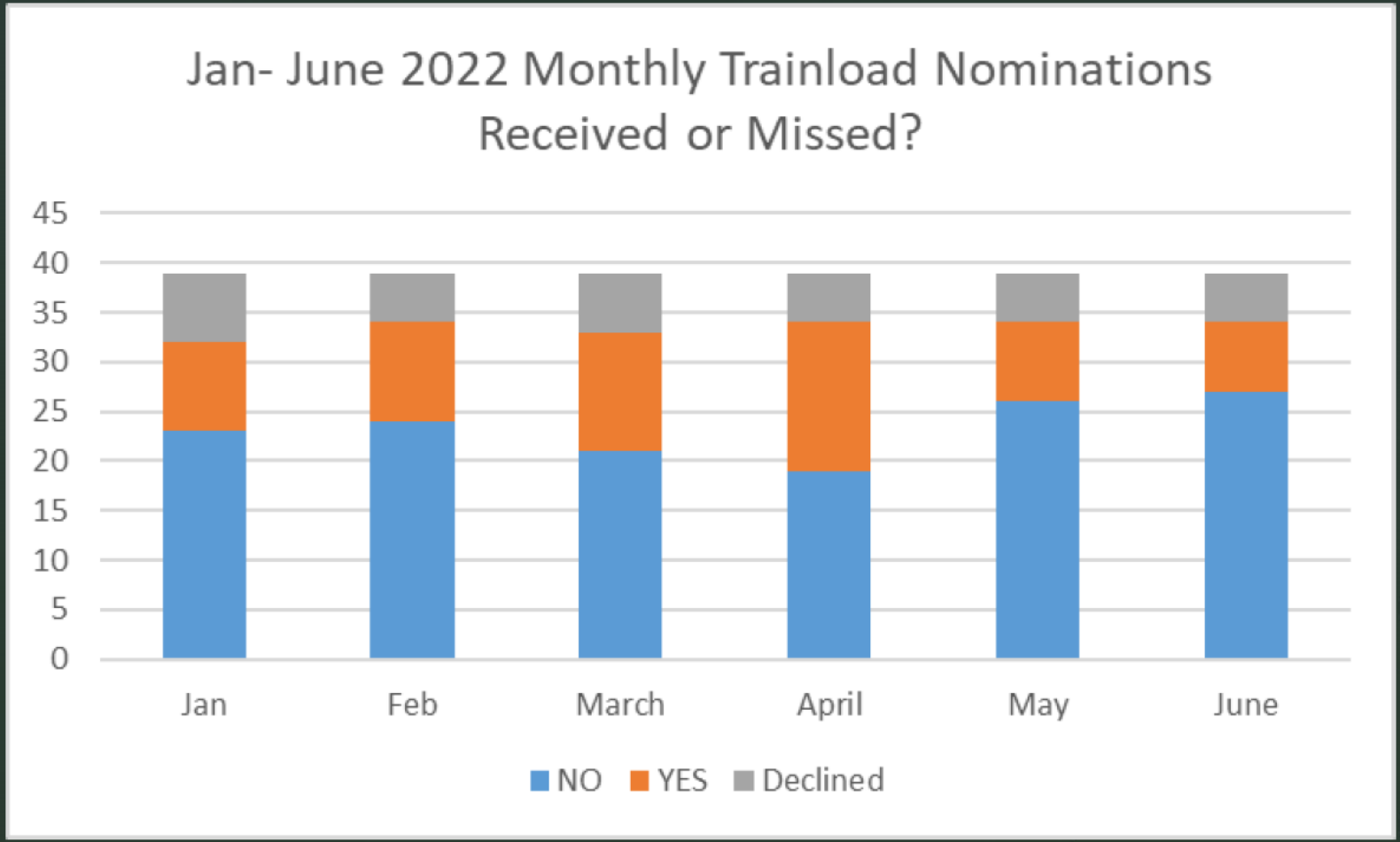
2 Plants Reported Shipping Coal From Northern Appalachia Region



1 Plant each reported shipping coal from CAPP/ILB and from Rockies

2 Plants	Jan	Feb	March	April	May	June
CAPP/ILB	30% Worse	20% Worse	Equal to	Equal to	10% Worse	30% Worse
Rockies	10% Worse	20% Worse	20% Worse	30% Worse	10% Worse	30% Worse

Monthly Trainload/Volume Nominations Received or Missed? (39 Plants)



- Nominated Volumes of Coal Tons Not Shipped per Nomination Request (33 Plants reported)

Mine Region	Jan	Feb	March	April	May	June
NAPP	60,000	165,000	180,000	135,000	180,000	135,000
NPRB	85,000	60,000	20,000	-	-	-
Rockies	-	-	-	14,000	14,000	-
SPRB	1,611,400	1,821,400	1,508,000	796,400	1,521,800	1,328,200

Shipper Quotes: Observations and Concerns

- Our railroad continues to refuse our request to return parked trains into service and has also recently mentioned that no coal trains would be added into service until Q4 of 2022.
- Our train cycle times are almost 20% longer than normal, unloaded trains sit onsite for an average of over 20 hours waiting to depart, bunching and combining of trains continues.
- July is not looking good either, I see no improvement and services seems to be getting worse
- Service improved a little first quarter 2022 – worsening thru 2nd and 3rd Q
- Unpredictable cycle times and many problems with locomotives causing delays. Also crew shortages.
- Cycle times have been improving since the beginning of the year, but we still aren't able to put enough railcar sets into service to handle our coal demand.
- Our biggest issue is the inability to add more train sets to move the coal needed.
- Cycle times have slowed by 25-35%; compared to "normal"
- Required to park one coal set. Unable to load about 200,000 tons while parked.
- Significantly long cycle times and refusal to add sets to insure a sufficient stockpile to meet generation demand