Freight Rail
Customer Alliance

NATIONAL COAL TRANSPORTATION ASSOCIATION
NCTA

November 17, 2022

Chairman Martin J. Oberman
Vice Chairman Michelle A. Schultz
Member Patrick J. Fuchs
Member Robert E. Primus
Member Karen J. Hedlund

Re: EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service—Railroad Reporting*

Dear Chairman Oberman, Vice Chairman Schultz, and Members Fuchs, Primus, and Hedlund:

The Freight Rail Customer Alliance ("FRCA") and National Coal Transportation Association ("NCTA") write jointly in response to the decision that the Surface Transportation Board ("Board" or "STB") served in the above-captioned proceeding on October 28, 2022.

First, FRCA and NCTA commend the Board for extending the reporting period for another six months. To put it mildly, the problems that prompted the original reporting requirements have not gone away, as virtually all FRCA and NCTA members can attest from their direct experience with the dismal service provided by the "Four Carriers," *i.e.,* BNSF, CSX, NS, and UP.

However, even if those service problems had dissipated, there would be substantial value in continuing the reporting, so that the next time service problems arise, the Board, shippers, and the public would have baseline values to facilitate identifying problems at their start, before they grow more severe. For this reason, FRCA and NCTA urge the Board to make the reporting requirements permanent. FRCA and NCTA also agree with Member Fuchs that requiring consistency in the data reporting across carriers, where it is not unduly burdensome, would be useful in enabling cross-carrier comparisons. In addition, FRCA and NCTA suggest that the Board restore the reporting of demurrage fees by all carriers, especially as service continues to suffer and shippers remain concerned that they are being charged for problems caused by the railroads.

Second, FRCA and NCTA strongly urge the Board to expand the key performance indicator and other data reporting to include a focus on volumes, not only volumes actually delivered, but also available volumes that the railroads are unable to serve. The Board gave the carriers considerable discretion to develop their own key performance indicators. Those indicators, as well as the metrics specified by the Board, focus on the overall health and fluidity of the carriers' operations, and they are certainly appropriate for that purpose. However, shippers are also deeply concerned about the volume of deliveries. A carrier may show improving fluidity in terms of velocity, dwell, recrews, held trains, and the like, but such progress is of no value if it is accompanied by or causes a reduction in overall volumes.

The concern is not speculative. One action that the carriers took to "restore" service was to restrict cars in service in order to reduce their car inventory. The stated purpose was to unclog the networks, increase velocity, and reduce dwell time, recrew rates, and the like. Relieving the "tragedy of the commons" might have also led to increased deliveries of coal and other freight, but it has not done so to date to any appreciable extent. For example, the total traffic delivered by all Class I railroads in the third quarter of 2022 declined by 1.3% compared to the third quarter of 2021. The railroads represented that the railcar restrictions were only temporary and would be removed once fluidity was achieved, but the restrictions remain largely in place and may have recently been expanded.

The impact has been particularly severe for unit train coal shippers, many of which are FRCA and/or NCTA members. Coal shippers have invested heavily in their own railcars, often at the rail carriers' direction, precisely in order to be able to continue to receive adequate coal deliveries despite service fluctuations. The value of that substantial investment is negated when railroads prevent shippers from using their trainsets. The adverse consequences include not only curtailed delivery volumes, but also stranded investment in the railcars and additional shipper-incurred costs for storing the railcars that the rail carriers will not allow to be returned to service.

To give some indication of the problems and harms that coal shippers have experienced, FRCA and NCTA are submitting for inclusion in the Board's EP 770 docket the report that they prepared, with assistance from the National Rural Electric

Cooperative Association ("NRECA"), and presented at the recent meeting of the Board's Rail Energy Transportation Advisory Committee ("RETAC"), https://www.stb.gov/wp-content/uploads/STB-RETAC-utility-2022-1022.pptx. This report presents the data from the most recent NCTA/FRCA/NRECA joint On Time Performance Survey covering the period January-June 2022.

This report, covering 45 utility respondents, shows that all have had to modify their operations due to the poor and deteriorating railroad service. Approximately 90% of the respondents report coal stockpiles below target levels and being restricted by carriers from adding more of their own car sets into service. Over 87% report that service issues have caused an increase in their costs. Sixteen respondents (38.42% of 42) report having individually experienced over $20 million in increased costs. That result translates into a minimum of $320 million in increased costs (16 times $20 million), for just sixteen respondent utilities over a six-month period.

The railroads' failure to meet customer demand is especially distressing because the carriers have not suggested that unserved traffic is unprofitable in any way. The failure to serve instead stems from the carriers' decisions to prioritize reducing operating ratios over increasing volumes, revenues, and traffic. Investors may have rewarded the carriers and their management for this choice, but it inflicts harm on shippers, the economy, and the public as a whole. Such outcomes are not consistent with and do not further the public interest or the national transportation policy at 49 U.S.C. § 10101.

The excessive devotion to the operating ratio inflicts further harm by reducing railroad freight transportation to a zero-sum game. The railroads continue to focus on lowering costs, increasing rates, and not passing through efficiencies to shippers, rather than working with shippers to grow volumes and revenues. In addition, the carriers have made explicit their intent and ability to continue imposing rate increases that exceed the rate of inflation. Such outcomes represent unwarranted departures from the competitive business model and fly in the face of the railroads' claims that they face effective competition and deserve to be treated like other unregulated firms.

FRCA and NCTA respectfully submit that the Board should pursue two regulatory responses to such railroad conduct. The first is that the Board should exercise its authority to impose penalties under 49 U.S.C. § 11901(a) linked to the railroads' failure to meet demand. The railroads have a common carrier obligation to serve on reasonable request under 49 U.S.C. § 11101(a). That obligation to serve forms the public interest predicate for all of their powers and privileges. While the pandemic has contributed to the railroads' service problems, the fact is that their service suffered even before the onset of Covid due to the railroads' adoption of Precision Scheduled Railroading and pursuit of lower operating ratios.

The discussion of the common carrier obligation has been framed to date primarily in terms of the service to the individual shipper. The problems are no longer individual or isolated. Instead, they manifest a systemic and sustained failure to provide adequate service that continues to inflict substantial injury on numerous industries and broad swaths of the country and the economy. Under the circumstances, fulfillment of the common carrier obligation must be measured on system performance, not just service to the individual shipper.

The metric of unmet demand may be the most important indicator of whether railroads are fulfilling the common carrier obligation and the most telling indicator of the consequences of failure to do so. As noted, service inadequacy cost just sixteen FRCA and/or NCTA members at least $320 million in the first six months of 2022. Other data confirms the existence of a substantial gap. For example, the EP 724 (Sub-No. 5) data filed by BNSF for the week ending November 4, 2022, https://www.stb.gov/wp-content/uploads//files/rsir/BNSF/BNSF%20Data%202022-11-09.xlsx, shows a loading plan of 41.0 unit trains of Powder River coal for the week, but actual loadings averaged only 31.4 unit trains. The unmet demand amounts 9.6 trains, or 31% of actual loadings. That figure is actually conservative as utilities would like to be able to schedule additional tonnage, particularly to make up accumulated deficits. BNSF's filing also shows 2,460 grain orders that were unfilled for one to ten days, and 3,144 grain orders that were unfilled for eleven or more days.

Measuring unserved and underserved demand for other freight segments may require some effort, but the railroads are in the business of ascertaining demand for their services. If they can set rates to maximize their profits (or lower their operating ratios), they must also be able to quantify the demand for those services. During this time of poor service, they should be required to report how much additional traffic shippers desire to ship at existing rates, and shippers should have an opportunity to comment on those reports and submit their own data on additional volumes that are available. The Board should then impose penalties under 49 U.S.C. § 11901(a) or take other appropriate measures tied to the failure to serve. FRCA and NCTA add that they have no interest in carrier punishment *per se*, but market forces are plainly insufficient to incent the railroads to operate soundly.

Second, and also flowing from the inadequacy of market forces, the railroads should not be allowed to profit further from the service inadequacies that they have created. The railroads have made clear their intent and ability to increase rates in excess of inflation, an outcome that should not occur in a competitive market. The railroads have even spoken explicitly of using rate increases to constrain demand and relieve congestion.

Allowing railroads to profit from their service inadequacies constitutes bad public policy and a perversion of the competitive market principles that the railroads purport to espouse. Shippers should have an expedited mechanism for challenging such increases, one that does not entail the burden of a stand-alone cost presentation or a derivative thereof. Such a mechanism flows directly from the revenue adequacy mechanism prescribed in *Coal Rate Guidelines*, 1 I.C.C.2d 520, 535 (1985), *aff'd sub nom. Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987). While other means for implementing the revenue adequacy constraint have been proposed, a mechanism directed at rate increase in excess of inflation has been supported by all shippers and is especially needed in the current environment. The revenue adequacy constraint should not be allowed to lie fallow under these circumstances.

The Board also decided in its recent EP 770 decision to discontinue the biweekly meetings between the carriers and the Board's Office of Public Assistance, Governmental Assistance, and Compliance ("OPAGAC"). Shippers were not party to those discussions and lack direct insight into their continued utility. Nonetheless, the experience of FRCA and NCTA members is that the service problems have not eased, and the adverse consequences have been more severe, as reflected in the decrease in volumes from 2021 to 2022. Specific discussion of efforts to increase volumes and meet customer demand would appear to be an appropriate subject of continued discussion, especially as there was an average of more than one new informal service complaint per day during the third quarter, according to the Board's report to Congress dated October 1, 2022.

FRCA and NCTA appreciate the opportunity to weigh in on these important matters. Again, the extension of the reporting requirements is a vital and necessary measure, but further measures, such as those offered above, are needed.

Respectfully submitted,

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Utility Update

Rail Energy Transportation Advisory Committee

October 26, 2022

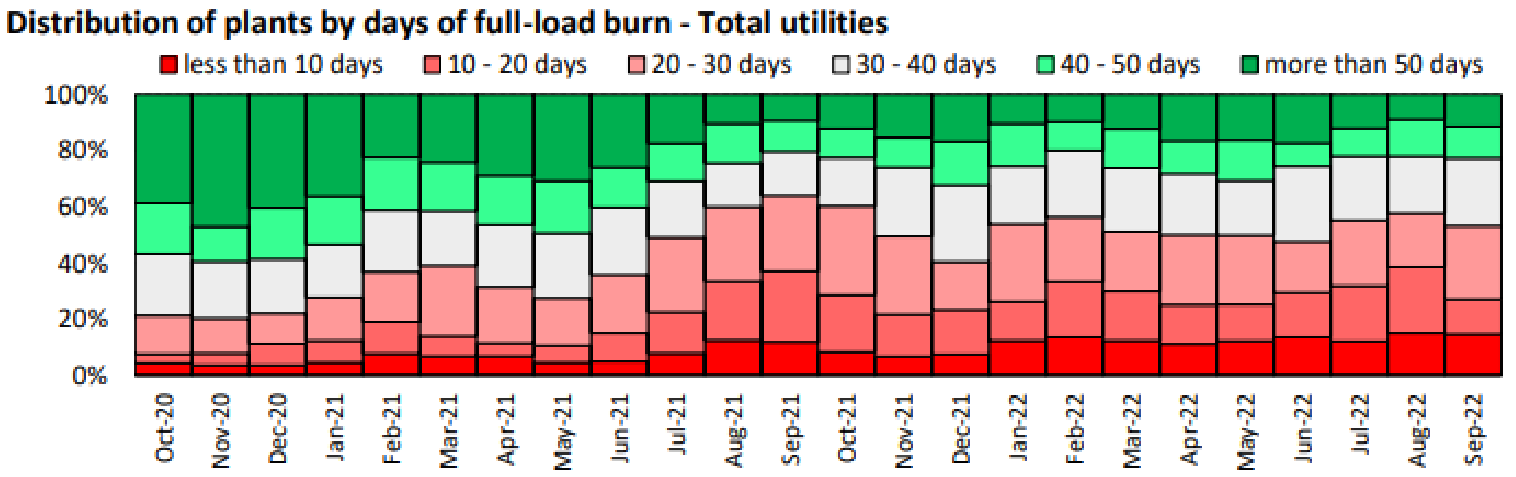
Bette Whalen – Lower Colorado River Authority

Utility Perspective

- Inventory Updates / Challenges
- On Time Performance Survey / Concerns
- Key Takeaways / Asks

Inventory Challenges

- The percentage of Utilities with days of inventory of 30 days or less has not improved YTD.

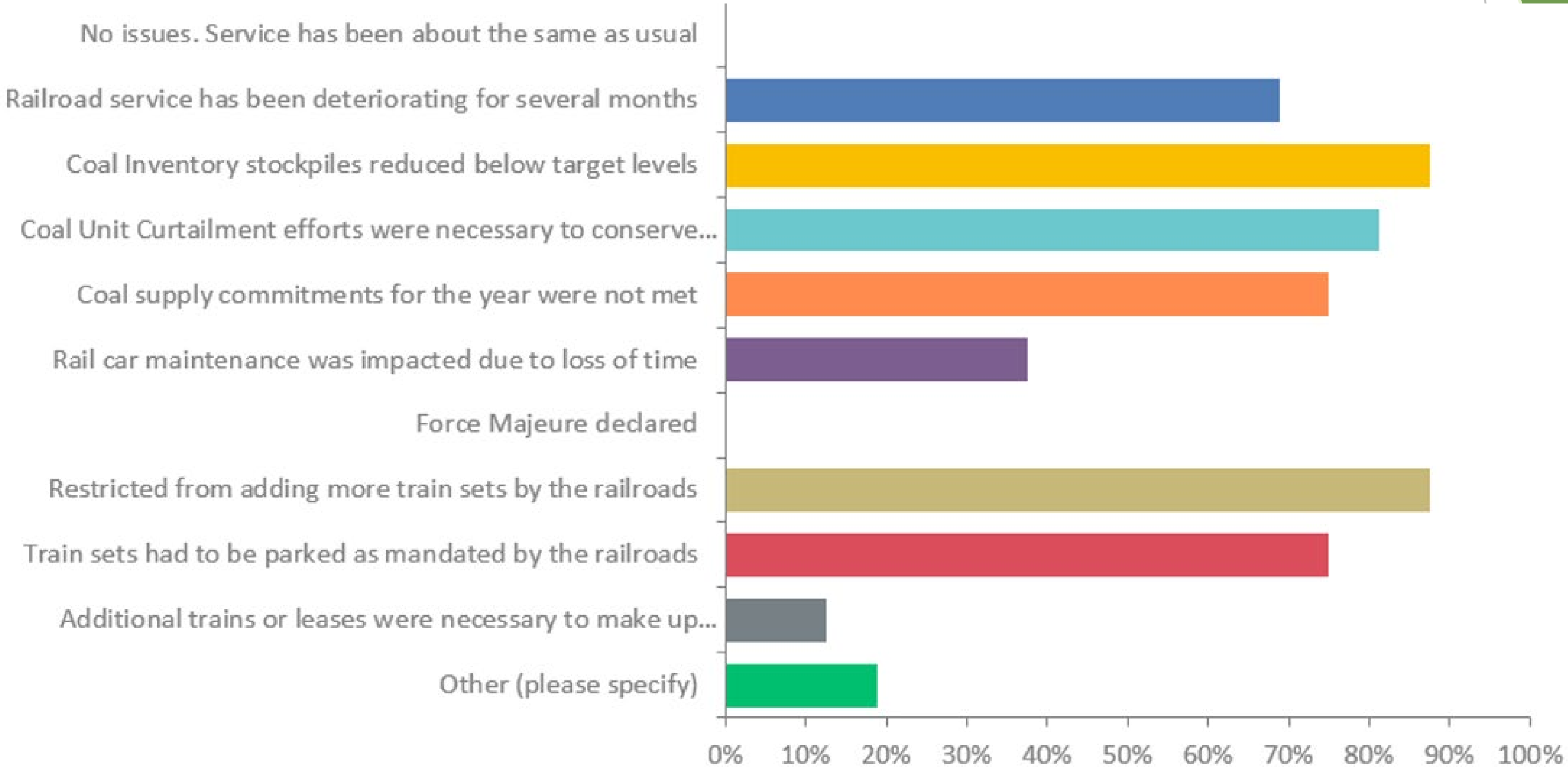


Source: 2022 Energy Venture Analysis- Coal Stockpile Report September 2022

NCTA/FRCA/NRECA On Time Performance Survey Jan – June 2022

- NCTA/FRCA/NRECA: OTP Survey Data Collected since Aug 2019 to June 2022 in 6-month periods
- 45 Plants Reported Shipper Perspective Railroad Performance Data
- 100% reported their company had to modify operations due to RR service issues (was 64% last survey)
- 87% reported Rail Service worse than it was in 2021 and/or last 3 years (was 60% last survey)
- Railroads Serving Plants Reported:
  - BNSF, UPRR, NS, Multi-RR, and Short line movements
- Six Coal Supply Regions - Mine Sources Reported:
  - SPRB, NPRB, Rockies, NAPP, ILB, NAPP, CAPP

In what way have your operations been impacted by railroad service issues? Check all that apply: 45 plants responded



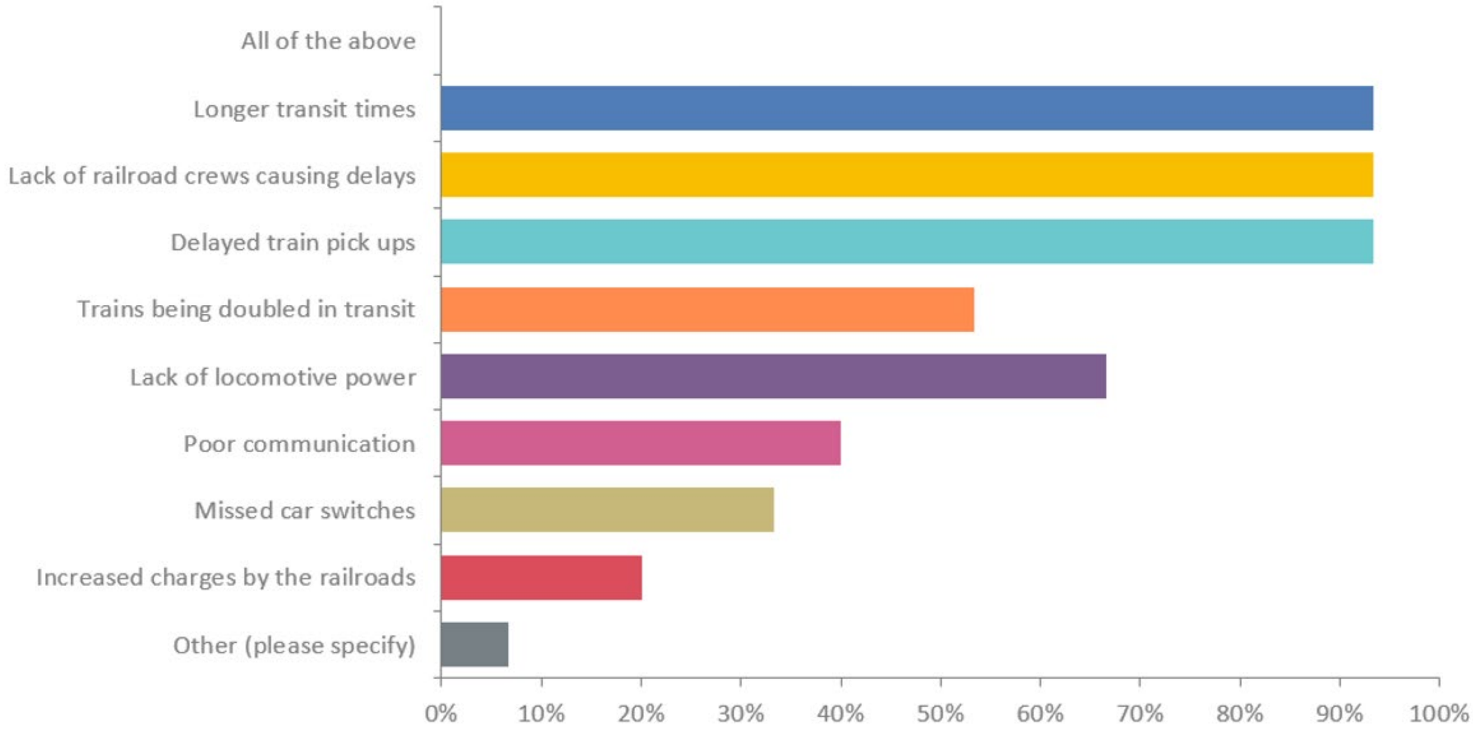
Have railroad services issues caused an increase in costs for your company?

Yes: 87.50% No: 12.50%

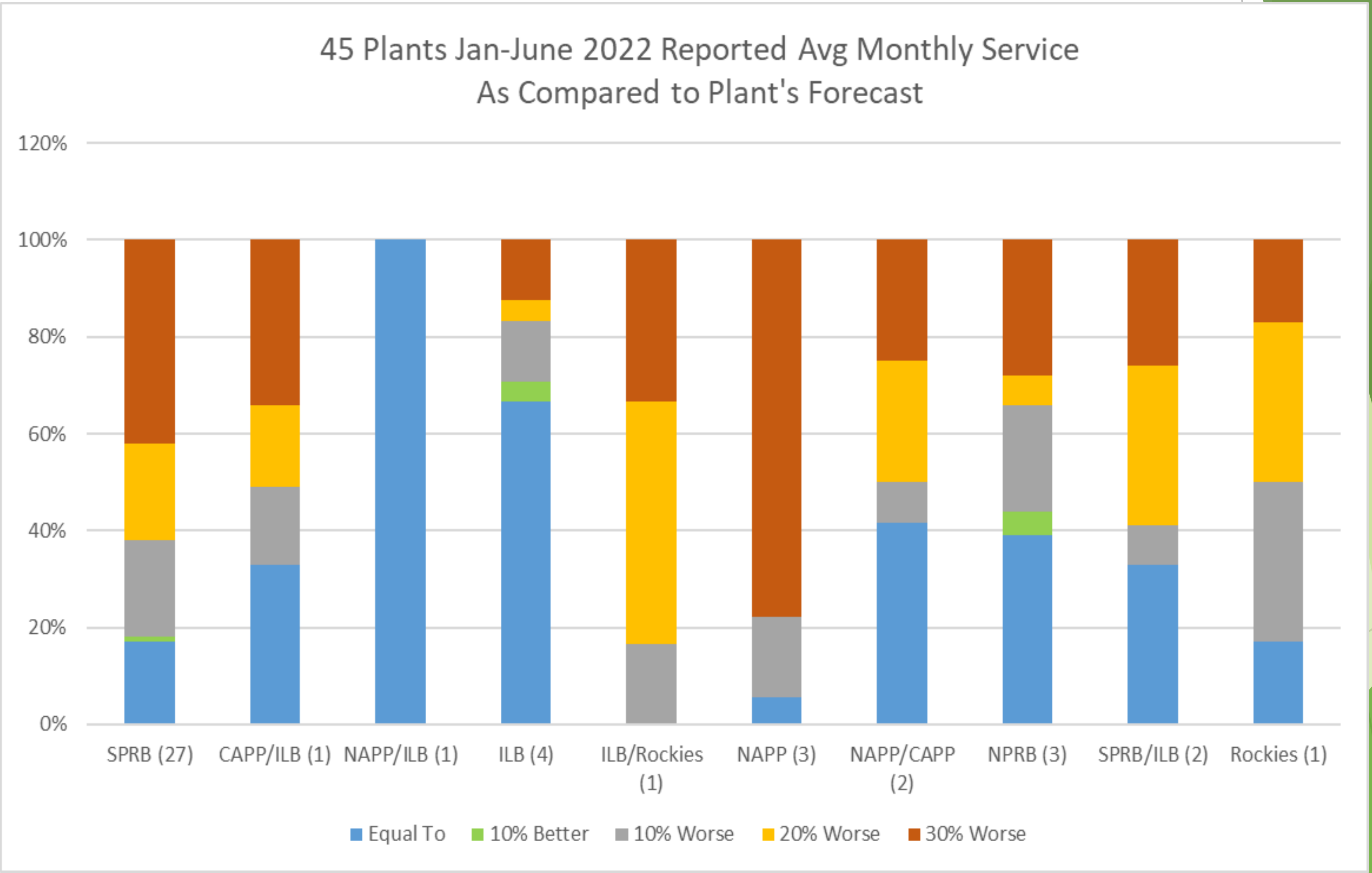
If so, how much? Ballpark Estimate? (3 declined)

ANSWER CHOICES	RESPONSES
Less than $100,000	0%
$100,000 - $ 1 M	23.08%
$ 1 M - $ 5 M	15.38%
$ 5 M - $ 10 M	7.69%
$10 M - $15 M	7.69%
$15 M - $20 M	7.69%
Over $20 M	38.46%

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



How does average monthly service compare with plant forecast? 45 plants responded



Key Takeaways and Asks

- Utility forecasting for coal deliveries involves great deal of planning
- Forecasts typically allow for some flexibility in deliveries
- Utility stockpiles afford some cushion to allow for coal deliveries and burn forecasts/actuals
- Coal deliveries trending 20-30% below monthly nominations which is concerning
  - Low stockpiles
  - Coal conservation and unit curtailment
- Asks:
  - Better communication from RRs in meeting shipper forecasts and missed permits
  - Updates on crew availability

Questions / Discussion