

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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OVERSIGHT HEARING PERTAINING TO UNION PACIFIC RAILROAD COMPANY'S EMBARGOES	) ) ) ) )	Ex Parte No. 772
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**COMMENTS OF FREIGHT RAIL CUSTOMER ALLIANCE  
AND NATIONAL COAL TRANSPORTATION ASSOCIATION**

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Dated: December 12, 2022

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**COMMENTS OF FREIGHT RAIL CUSTOMER ALLIANCE  
AND NATIONAL COAL TRANSPORTATION ASSOCIATION**

The Freight Rail Customer Alliance (“FRCA”) and National Coal Transportation Association (“NCTA”) submit these comments in response to the Notice that the Surface Transportation Board (“Board” or “STB”) served in the above-captioned proceeding on November 22, 2022.

The members of FRCA and NCTA have generally not been subject to formal embargoes by Union Pacific Railroad Company (“UP”). Nonetheless, virtually all FRCA and NCTA members have experienced what amount to *de facto* embargoes in the form of impaired service on not just UP, but also the other Class I carriers, particularly BNSF, CSX, and NS.

The *de facto* embargoes take various forms, but the most prominent for the FRCA and NCTA members is the forced parking of trainsets that has and continues to adversely affect coal shipments. Coal and other shippers invested heavily in railcars precisely in order to be able to continue receiving adequate shipments when rail service deteriorates due to, *e.g.*, poor cycle times, sustained unwillingness to invest in adequate labor and infrastructure, pursuit of lower operating ratios, failure to fulfill the common

carrier obligation and contractual commitments in derogation of 49 U.S.C. § 11101(a), reliance on doubled or “super” trains to make up for labor and other resources, and so-called Precision Schedule Railroading (“PSR”). The substantial investment that shippers made in railcars, and the protection from poor service that the investment in railcars was intended to provide, are effectively negated when the railcars cannot even be utilized due to discretionary decisions made by the rail carriers.

FRCA and NCTA recently addressed in detail the harms that their members experienced due to poor service from UP and the other members of the “Big Four” in the joint filing they made on November 17, 2022 filing in EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service—Railroad Reporting*. That filing also address the underlying causes for the poor service and the needed remedial measures. FRCA and NCTA are including a copy of that filing for inclusion in the record in EP 772.

The additional point to be noted is that *de facto* embargoes can be, and often are, worse than formal embargoes in practice in important respects. Formal embargoes entail a measure of transparency in that they are posted on the AAR’s website and, to a lesser extent, on UP’s own website. *See* <https://embargo.railinc.com/#/embargo/searchEmbargo> and <https://www.up.com/customers/embargo/list/index.htm>. Furthermore, shippers, receivers, and the public have, at least in theory, the ability to challenge embargoes at the Board to determine if they have been properly invoked and implemented and are not being used to evade the common carrier obligation, for “[l]imiting the amount of Traffic

to be accepted daily or periodically,” or to “[r]estrict business growth.” Revised Circular TD-1, <https://public.railinc.com/sites/default/files/documents/TD-1.pdf>.

In contrast, the *de facto* embargoes imposed by UP on FRCA and NCTA members come with no or very little transparency and often with no or little advance notice. Apart from very general statements that UP may make from time to time about the need to reduce or control “car inventory,” UP appears to approach shippers on a one-by-one basis and inform them that one or more of their trainsets will no longer be utilized. While UP may assert that a particular shipper is not being singled out for adverse treatment, or is actually being treated more favorably than others, there is no documentation from UP to that effect and no ability to obtain any verification. Moreover, there is always the risk of retaliation if the shipper seeks information from other shippers or receivers as to the parity of its treatment. There is no vehicle for obtaining formal relief from the Board, as nearly all coal is shipped under confidential coal transportation agreements, and in many instances, railroads have used their leverage to deny shippers meaningful service protection in those contracts.

FRCA and NCTA members are particularly concerned how the financial motivations that are the root cause of the existing service problems may also manifest themselves in how UP allocates service. If there are two otherwise identical shippers, except one pays a higher rate than the other, UP will have a financial incentive to allocate service to favor the shipper with the higher rates, even though the shipper with the lower rates may be more deserving or denial of service may carry greater adverse

consequences. Again, the lack of transparency prevents a shipper from knowing the reasonableness of its treatment relative to that of others.

The bottom line is that *de facto* embargoes enable UP to avoid both transparency and accountability to shippers, the Board, or any entity other than itself. The debacle that is PSR and the current state of performance by the Big 4, and especially their sustained inability to meet shipper needs, demonstrates all too painfully how the railroads have sacrificed adequate service for financial considerations, and how most shippers, even seemingly competitive ones, lack meaningful leverage when it comes to railroad service.

Accordingly, the Board should recognize and address the reality that formal embargoes are only the tip of the iceberg in terms of poor service and how service reductions are allocated among users of the freight rail network. FRCA and NCTA urge the Board to ensure that there is transparency and accountability for *de facto* embargoes as well as formal ones.

Respectfully submitted,



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Dated: December 12, 2022



Freight Rail  
Customer Alliance



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, renews, 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, renews 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.

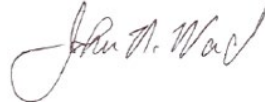
The Board also decided in its recent EP 770 decision to discontinue the biweekly meetings between the carriers and the Board's Office of Public Assistance, Governmental Assistance, and Compliance ("OPAGAC"). Shippers were not party to those discussions and lack direct insight into their continued utility. 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

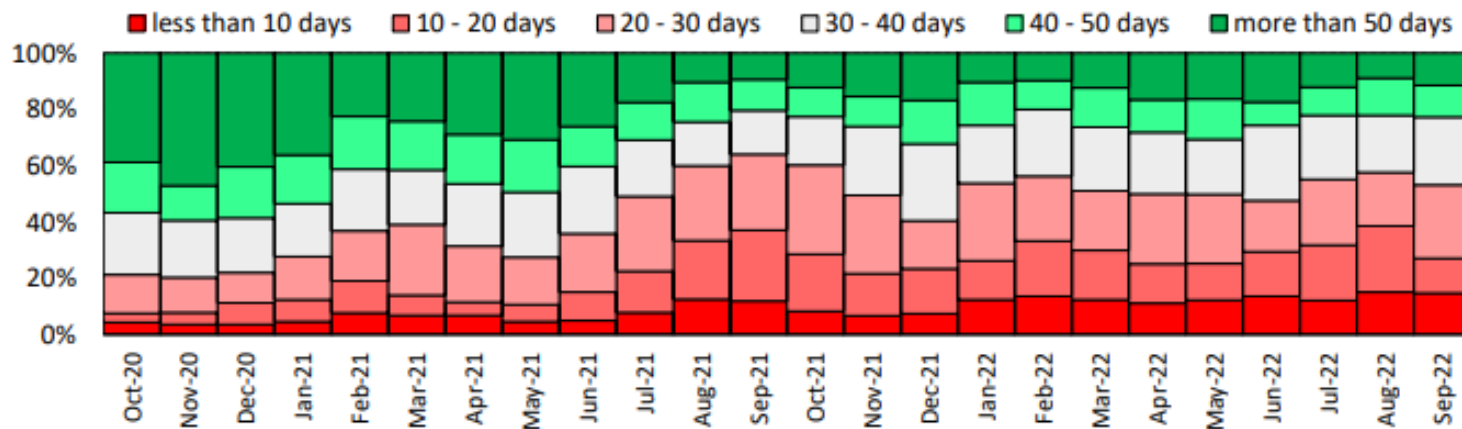
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- ▶ Inventory Updates / Challenges
- ▶ On Time Performance Survey / Concerns
- ▶ Key Takeaways / Asks

# Inventory Challenges

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

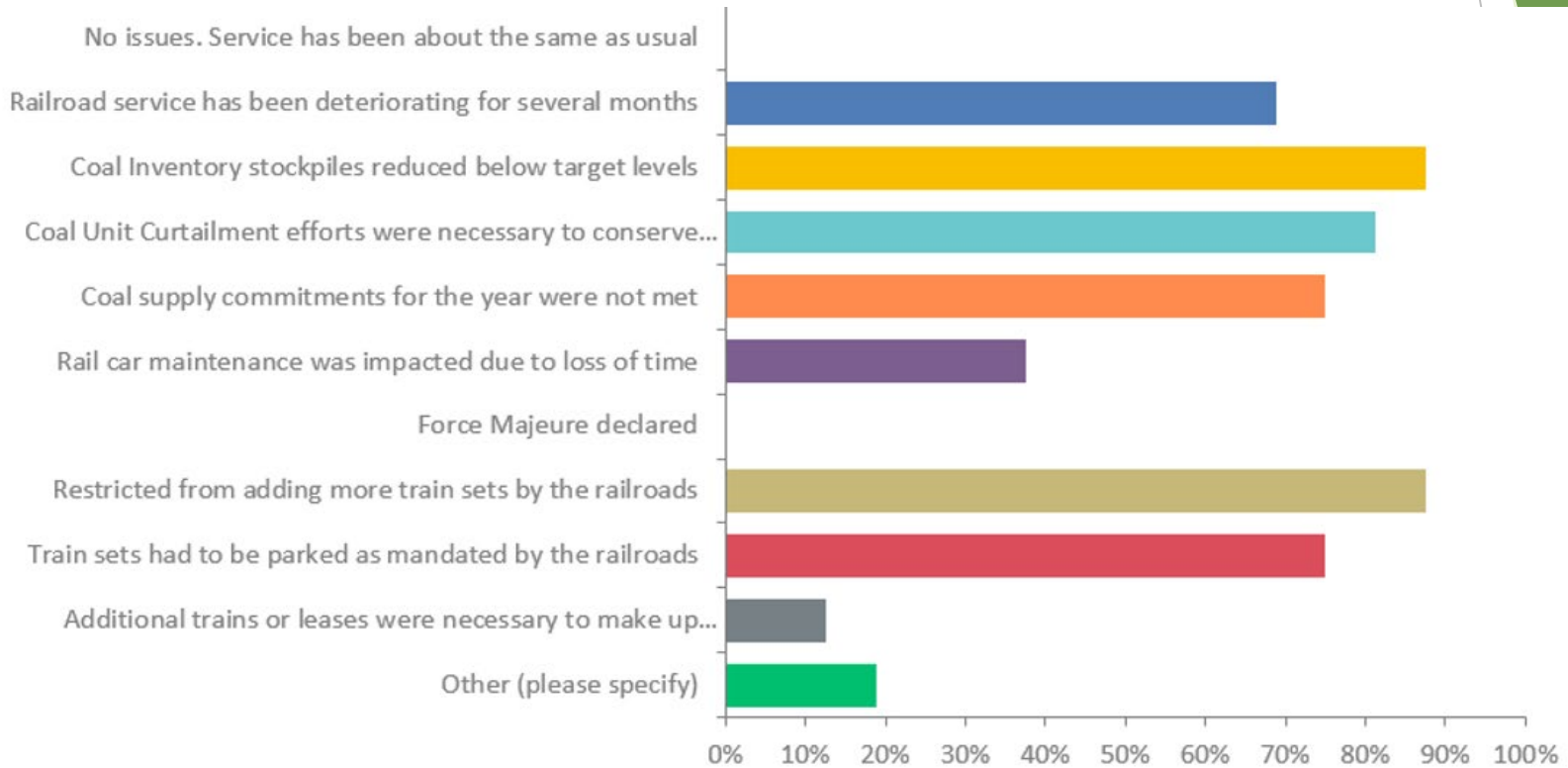
**Distribution of plants by days of full-load burn - Total utilities**



# 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





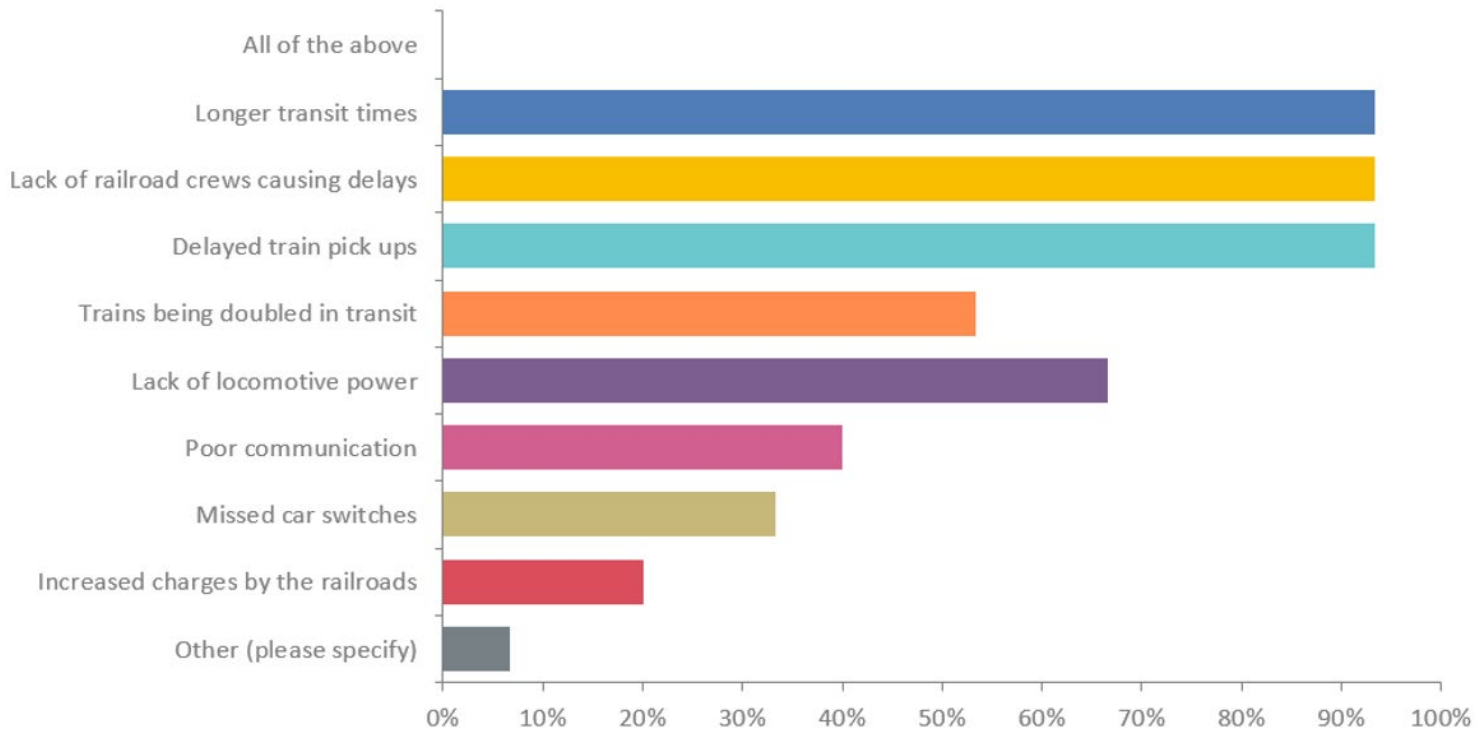
Have railroad services issues caused an increase in costs for your company?

Yes: 87.50% No: 12.50%

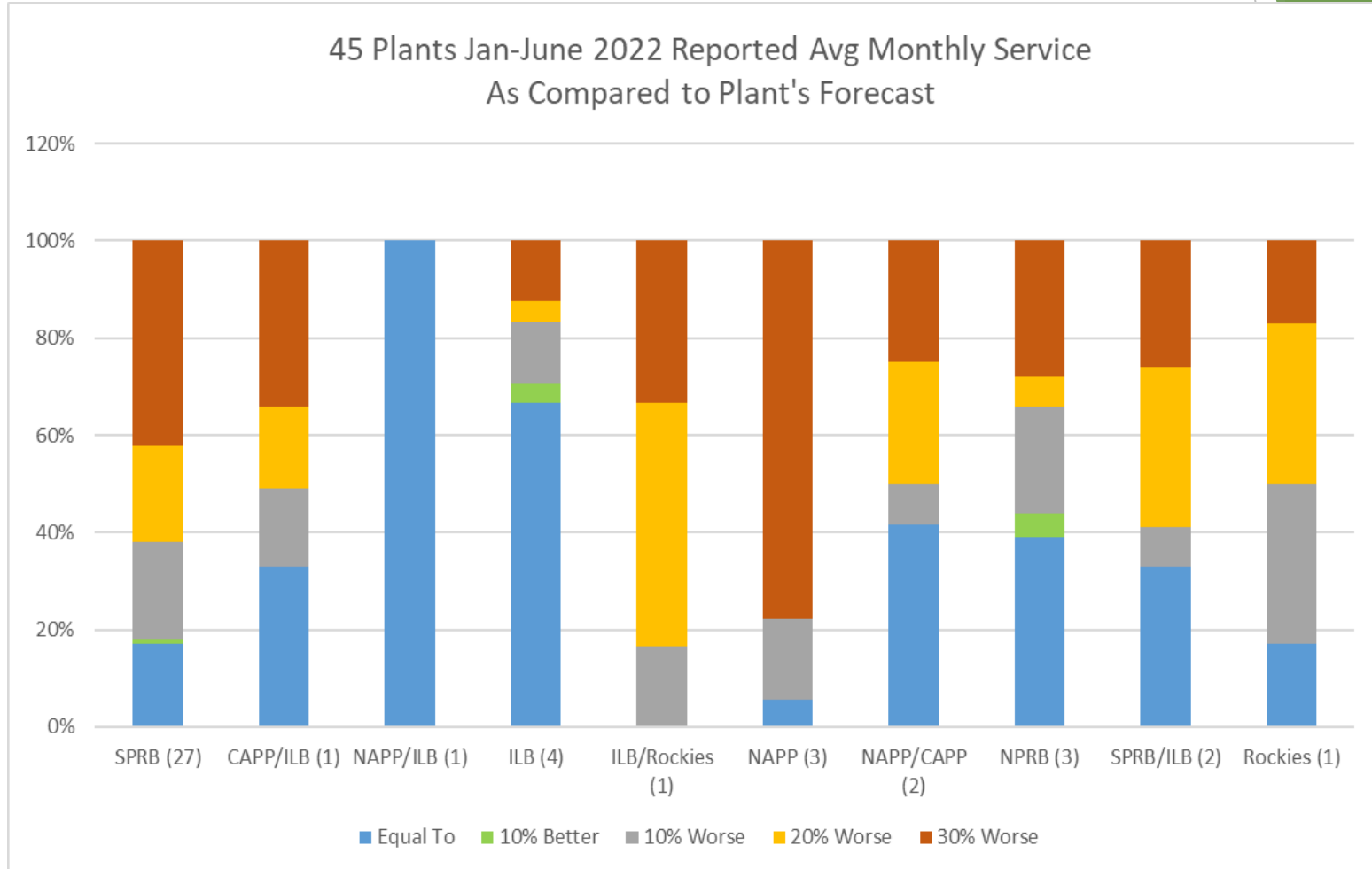
If so, how much? Ballpark Estimate? (3 declined)

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