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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36844

COMMUTER RAIL DIVISION OF THE NORTHERN ILLINOIS TRANSIT AUTHORITY D/B/A METRA —TERMINAL TRACKAGE RIGHTS— UNION PACIFIC RAILROAD COMPANY

UNION PACIFIC REPLY ADDRESSING ADEQUATE SECURITY OF COMPENSATION

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The Eighth Circuit has unequivocally held that Section 11102(a) imposes on the Board an "additional obligation" to ensure "the compensation" owed to a property owner is paid or adequately secured before use of that property may begin under a federal trackage rights order. Metra's proposal does not fulfill this obligation, as it is simply an offer to continue to pay a rate based on an expired agreement that Metra's own witness described as "outdated." Expert testimony demonstrates that the amount under the now-terminated Purchase of Service Agreement ("PSA") is below market, representing less than a { [redacted] } return on the value of the land under the UP Lines alone. Metra does not and cannot show that its proposed interim compensation based on the PSA is appropriate under condemnation principles. The only factual basis for imposing the former PSA-level compensation amount appears to be that it was the PSA amount—a circular argument that finds no support in the law. And Metra's only legal support for its

position is a non-binding concurrence. However, it is the Eighth Circuit's majority opinion that governs the agency's decision making.

Union Pacific's proposal, by contrast, is consistent with the law established by the majority opinion, is based on application of the Board's own SSW framework, and will protect Union Pacific's interests pending a final determination of compensation. The Board should adopt Union Pacific's proposal to ensure compensation is paid or adequately secured.

I. Metra's proposal is unsupported and fails to provide adequate security under the majority opinion.

Metra asks the Board to "adequately secure" compensation to Union Pacific by ordering Metra to continue to pay what it has been voluntarily choosing to pay under the *former* PSA. Metra Prop. at 1–2. Its assertion that continuing its PSA payments "fulfills" the statute is untethered from the statutory framework, treating its own payments that it unilaterally determined were appropriate as proof of their adequacy. *Id.* at 3–4.

Metra relies on a concurrence to the Eighth Circuit opinion to justify treating the expired PSA terms as adequate security, but that concurrence is not binding, conflicts with the majority opinion, and relies on agency case law that is inapplicable. Metra's attempts to justify its proposal by pointing to expired agreements is likewise unavailing. Metra's proposal should be rejected.

A. Metra's proposal is inconsistent with the binding Eighth Circuit majority opinion.

The Eighth Circuit made clear that the purpose of "adequate security" under § 11102 is to protect the *incumbent* against the risk that the grantee will be unable

or unwilling to pay once compensation is finally set. In other words, adequate security is a safeguard intended to protect the financial interests of the property owner.

Here, that means adequate security must protect *Union Pacific* against the risk that Metra will not or cannot pay the ultimate compensation. As the Eighth Circuit explained, security is not adequate if it does not assure Union Pacific that "Metra would pay, or would be able to pay, the compensation that eventually would be set at some undetermined point in the future." *See Union Pac. R.R. v. Surface Transp. Bd.*, No. 25-2919, 2026 WL 2564829, at *8 (8th Cir. Aug. 31, 2026). Ordering Metra to pay based on the expired PSA terms does not come close to achieving that goal. An order to pay an amount untethered to the ultimate compensation would "violate[] § 11102(a)'s mandate that 'compensation shall be paid or adequately secured before' a grantee rail carrier exercises its terminal trackage rights." *Id.*

The purpose of securing compensation in this proceeding is to protect Union Pacific's financial interests, and what Metra prefers to pay in the interim does not approximate what it will ultimately owe under condemnation principles. The Board is bound by the Eighth Circuit's reading that § 11102(a) "does not speak in terms of 'some compensation', it specifies 'the compensation.'" *Id.* at *8 n.3 (cleaned up). And the Board is statutorily required to set "the compensation" under condemnation principles. 49 U.S.C. § 11102(a).

B. Metra's reliance on the concurrence is unavailing.

Metra relies solely on the non-binding concurrence, and that reasoning is inconsistent with the majority opinion.

The concurrence suggests that payment under the now expired PSA would have satisfied the statute here because Metra was already using Union Pacific's rail lines. *Union Pac. R.R.*, 2026 WL 2564829, at *9 (Kelly, J., concurring). But Metra fails to explain the connection between the existence of a former agreement and § 11102(a)'s adequate security mandate.

The fact that Metra had previously been using the UP Lines does not remove the need for adequate security. And indeed, such an outcome would be squarely foreclosed by the majority's holding and the language of the statute itself. Section 11102(a) requires compensation to be secured before use of the facilities "under this section." In other words, what matters for adequate security purposes is the timing of the compensation relative to the government taking. It is irrelevant that Union Pacific was allowing Metra's trains to run on its tracks before the taking, because that use was not "under" § 11102(a).

To the extent the concurrence suggests that the expired PSA payment terms represent adequate security, that suggestion appears to rest on the assertion that such an outcome would be "consistent with ICC precedent." *Union Pac. R.R.*, 2026 WL 2564829, at *9 (Kelly, J., concurring). But the majority made its holding under the statute, which administrative precedent cannot overcome.

Metra, like the concurrence, relies primarily upon one ICC decision from 1925, arguing that, there, "the ICC allowed the petitioner to continue using the

lines but 'order[ed]' it to do so 'in accordance with [a preexisting] operating agreement." Metra Prop. at 2 & n.1 (citing *Mo.-Kan.-Tex. R.R. v. Kan. City Terminal Ry.*, 104 I.C.C. 203, 230–31 (1925)). But the order in question (which was actually issued the prior year, in 1924) was an emergency service order pursuant to a separate statutory authority,[1] which had no adequate-security requirement. *See Mo.-Kan.-Tex. R.R.*, 104 I.C.C. at 204–05, 230. In a footnote, the concurrence identifies additional citations to buttress the 1925 decision, but each traces back to the same unilluminating ICC proceeding, and none addresses adequate security.[2] *See Union Pac. R.R.*, 2026 WL 2564829, at *9 n.6 (Kelly, J., concurring).

In any event, administrative precedent cannot overcome the Eighth Circuit's holding. Metra must justify its proposal under the majority opinion, as that is the law that governs the Board's actions in this proceeding.

C. Prior expired agreements do not support Metra's adequate security proposal.

Beside the concurrence, the only apparent justification proffered by Metra is that its proposal is consistent with prior, now-expired agreements between the

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[1] The emergency service authority was then at § 1(15), now 49 U.S.C. § 11123.

[2] For example, *Fla. E. Coast Ry. v. United States*, 256 F. Supp. 986, 988–89 (M.D. Fla. 1966) cited to the *MKT* proceeding merely in support of its finding relating to the reviewability of agency action prior to establishment of terms of compensation. Similarly, the cited footnote in *Union Pac. Corp., et al.—Control—Mo. Pac. Corp., et al.*, 366 I.C.C. 462, 576 n.114 (1982), simply makes the uncontroversial statement that the agency must use condemnation principles when it sets compensation. It is also worth noting that, to the extent the latter case did opine on adequate security, the Eighth Circuit majority flatly rejected its reasoning. *See Union Pac. R.R.*, 2026 WL 2564829, at *8 (stating that this case was devoid of "any reasoning" justifying the conclusion that a pledge constituted adequate security).

parties. Metra argues that the PSA amount is appropriate because that is the amount that would have been owed under the PSA. Metra Prop. at 3 ("Metra's payments comport … with the former PSA"). Metra does not even attempt to ground this amount in condemnation principles. The PSA—which Metra itself has stated is "an outdated, overly complex legacy contract that no longer serves as an appropriate framework for the economic relationship between Metra and Union Pacific"[3]—has no bearing on what constitutes adequate security of compensation under the law. Metra's proposal fails because it does not secure "the compensation" that § 11102 requires, but rather only some historical payment amount. *Union Pac. R.R.*, 2026 WL 2564829, at *8 n.3 (cleaned up). Union Pacific initiated the process of transferring commuter passenger service to Metra and sunsetting the PSA in 2019. Following a lengthy period of negotiating that transfer, including attempting to negotiate a new agreement with updated compensation terms and short-term extensions, the PSA expired on June 30, 2025. The expired PSA does not reflect the agreement of the parties on what constitutes appropriate compensation, let alone adequate compensation under condemnation principles for access to the UP Lines.

Metra also attempts to justify its proposal by pointing to memoranda of understanding ("MOU"), but they too are irrelevant to what constitutes adequate security under the law.[4] The MOUs were entered into as a stop-gap measure while

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[3] Metra Rebuttal Statement & Evid., Ex. C, Decl. of J. Kane ¶ 21 (filed June 23, 2025).

[4] *See* Metra Prop. at 3.

the PSA governed to guide the parties' active steps to transfer services from Union Pacific to Metra and negotiate a successor agreement with new financial terms during the pendency of the PSA. They presupposed party negotiations over the price of access during the PSA, but now Metra has received access pursuant to a government ordered. Indeed, by its own terms, the MOU is "binding only to the extent of the underlying agreements,"[5] so it expired with the PSA. Metra cannot use an expired, pre-condemnation placeholder agreement to artificially cap what the statute requires for compensation to be adequately secured.

Fundamentally, Metra never explains why the PSA-based figure is consistent with condemnation principles. There is no valuation of the land or track associated with the UP Lines offered in support of the PSA figure, and Metra does not claim that the PSA rate was designed to comport with condemnation principles. In fact, Metra's own witness has described the PSA amount as "byzantine," "nonviable," and "problematic."[6] The only basis for imposing the PSA amount appears to be that it is the PSA amount—a circular argument that finds no support in the majority opinion.

Union Pacific has demonstrated that the PSA amount that Metra proposes to pay—approximately $22.5 million per year—is outrageously low.[7] Measured

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[5] Metra Rebuttal Statement & Evid., Ex. D at 2.

[6] *Id.*, Ex. C, Decl. of J. Kane ¶ 22.

[7] Metra emphasizes that it has remitted "over $119 million" since July 1, 2025. Metra Prop. at 3. Yet as Metra concedes, that amount is inclusive of payments for services rendered and costs incurred in connection with Metra's commuter service, such as engineering, dispatching, rail testing, and other miscellaneous fees. *Id.* &

against a third-party appraisal of the value of the land alone, Metra's proposed payment implies a return of *less than* { [redacted] } for the use of the UP Lines.[8]

D. Metra's alternative request should be rejected.

Metra's alternative request—that the Board require Metra to post security in an amount representing only the difference between the PSA amount and the $18.50 per train mile base rate over an unspecified period of time—is unsupported and likewise unavailing. Metra Prop. at 4. Metra appears to base the reasonableness of this request on a purported "admission" by Union Pacific that the $18.50 base rate is an "upper bound" on the amount of reasonable security. *Id.* at 8. Union Pacific has made no such admission.

Union Pacific has consistently—in this proceeding, other proceedings, and in commercial discussions—stated its belief that the $18.50 per train mile base rate, while economically reasonable, was "conservative" and "substantially lower than the amount that Union Pacific would be due . . . under principles applicable in condemnation proceedings."[9] For its part, Metra has consistently conflated Union

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Ex. B (invoices itemizing services like engineering, dispatching, crew calling, and rail testing, as well as administrative costs). Reimbursement of Union Pacific's out-of-pocket expenses for services related to commuter passenger service makes Union Pacific whole and has no bearing on the interest rental Metra owes for its access to and use of the UP Lines.

[8] *See* Union Pac. Reply Statement & Evid., Verified Statement of J. Carey ("Carey V.S.") at 22–23 & Workpaper No. 13 (filed June 3, 2025); Union Pac. Prop. at 8–10.

[9] *See*, *e.g.*, Union Pac. Reply Statement & Evid. at 36–37; Union Pac. Mot. to Strike, Decl. of K. Novak at ¶ 10 (filed June 25, 2025) ("the access fee would be significantly higher [under SSW's RCNLD approach] than what Union Pacific was offering").

Pacific's arguments regarding the reasonableness of the per-train-mile rate (for purposes of determining whether Metra had reasonable access—*i.e.*, the grant inquiry) and what is required under condemnation principles.[10] Union Pacific has outlined its proposal for adequate security in light of the Eighth Circuit's opinion, justifying its proposal based on the statute, that opinion, and the Board's own SSW methodology. *See* Union Pac. Prop. at 5–11.

Because Metra fails to ground its alternative request in the law, it too should be rejected.

II. Contrary to Metra's arguments, Union Pacific's proposal is supported and grounded in condemnation principles.

Metra wrongly claims that Union Pacific has conceded that its interim approach does not conform with the SSW methodology, mischaracterizing a select portion of a declaration filed by Union Pacific in federal court. In that declaration, Union Pacific's witness explained that, in the context of Union Pacific's *contractual negotiations* with Metra, Union Pacific did not rely on SSW.[11] This should be unsurprising: SSW is a methodology *used by the Board* to establish compensation for trackage rights *ordered by the Board*. At the time of the declaration, no trackage rights order had issued. Union Pacific intends to submit evidence and argument for

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[10] *See*, *e.g.*, Metra Reply to Mot. to Strike at 1 (filed June 26, 2025) ("Metra cannot be expected to have anticipated that UP would seek to insert the putative reasonableness of its own compensation demand into the public interest analysis, when the express statutory language properly defers determination of the conditions and compensation to apply between the parties until *after* the Board's determines [sic] whether to grant trackage rights in the first place.")

[11] *See* Union Pac. Mot. to Strike, Decl. of K. Novak at ¶¶ 6–10.

compensation under the Board's SSW framework. Indeed, unlike Metra's proposal, Union Pacific's proposal for adequate security is based on the Board's SSW framework.[12]

Similarly, Metra wrongly claims that the $18.50 base rate would result in a "windfall" but once again fails to support that assertion. Metra Prop. at 5.[13] One of Metra's complaints about the $18.50 base rate is that it is higher than the PSA amount. *See* Metra Prop. at 6. But this complaint is not grounded in condemnation principles, and in any event Union Pacific has thoroughly rebutted this point. The record unequivocally establishes that the PSA is "byzantine" and "outdated,"[14] that the PSA amount is below market,[15] and that "for a long-term transportation agreement that faces termination, it is common for any such newly negotiated agreement to set a new price based on current market conditions, which can be markedly different from prior market conditions."[16] Simply pointing to the fact that

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[12] *See* Union Pac. Prop. at 8–10.

[13] *Cf.* September 3, 2025 Order at 11 (acknowledging that "as UP Points out, 'Metra argued on opening that [UP's] offer [based on an $18.50-per-train-mile rate] was economically unreasonable, but Metra provided no evidence in support, nor did it put forward its own view of economically reasonable compensation'" (some alterations in original)).

[14] Metra Rebuttal Statement & Evid., Ex. C, Decl. of J. Kane ¶¶ 21–22.

[15] Union Pac. Reply Statement & Evid., Carey V.S. at 2–3 & nn. 8–9, 26, Fig. 4.

[16] *Id.* at 18.

one rate is higher than another has no bearing on whether it is reasonable, let alone whether it is consistent with condemnation principles.[17]

Metra also tries to argue that the $18.50 base rate is too high, arguing that it is "at least triple a reasonable calculation under the capitalized earnings framework of the SSW Compensation formula." Metra Prop. at 6 (italics omitted). Because Metra's explanation of this purported SSW analysis under Capitalized Earnings was stricken from the record last year,[18] Metra points to a single page purporting to show CE results without accompanying support, explanation, or workpapers.[19] Putting aside the propriety of trying to rely on this evidence, it is apparent from the face of the single-page, unexplained exhibit that this purported CE analysis is deeply unreliable and should be rejected out of hand.

In the first place, its "representative calculations" are based not on line-specific earnings (as is required under the CE methodology)[20] but rather system-

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[17] Similarly, Metra's invocation of 2019 R-1 reported figures to support its "windfall" contention is misleading and does not provide a meaningful basis for determining the value of the UP Lines or the reasonableness of an interest rental amount for their use. *See* Metra Prop. at 5.

[18] September 3, 2025 Order at 11–12.

[19] Metra Prop. at 6 & n3 (citing Metra Reply to Union Pac. Mot. to Dismiss, Ex. B).

[20] *BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry. & Union Pac. R.R.*, Docket No. FD 32760 (Sub-No. 46), Decision No. 16 at 37 (STB served July 21, 2026) ("Under CE methodology, as established in the SSW Compensation cases, earnings are calculated for the line segment at issue."); *Atchison, Topeka & Santa Fe Ry.—Operating Agreement—S. Pac. Transp. Co.*, Docket No. FD 22218, 1993 WL 88445, at *1 (ICC served Mar. 26, 1993) ("CE values the line by multiplying the specific earnings assigned to the line by an earnings multiplier"); *St. Louis Sw. Ry.—Trackage Rts. Over Mo. Pac. R.R.—Kan. City to St. Louis*, 4 I.C.C.2d 668, 670–71

wide earnings. Its usage factor is based on car miles, rather than the parties' agreed-upon train miles.[21] And it assumes Metra has zero earnings in light of Metra's negative earnings, despite the fact that the agency has stated that because negative line earnings are "not a meaningful figure," "strict application of the CE approach might well produce a meaningless, negative valuation for the line"[22]—opting in those circumstances to use RCNLD.[23]

Finally, Metra claims that the "the land values proffered by UP included premium adjustments that the Board has rejected in stand-alone cost proceedings."[24] Metra previously pointed to *FMC Wyoming* for the proposition that a corridor factor is inappropriate.[25] But *FMC Wyoming* is inapplicable, and in any event Metra overstates its holding. The Board in that case accepted valuations with an assemblage factor (*i.e.*, a factor to reflect the additional cost of assembling a contiguous corridor) for certain lines, but rejected it for others.[26] The basis for its

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(1987) (the capitalized earnings approach focuses on "the earnings of the line segments").

[21] *See* Joint Report (filed May 22, 2026), Exhibit A, Section 1.73.

[22] *Atchison, Topeka & Santa Fe Ry.*, Docket No. FD 22218, 1993 WL 88445, at *3.

[23] *Ark. & Mo. R.R. v. Mo. Pac. R.R.*, 6 I.C.C.2d 619, 624–27 & n.14 (1990); *see also Mo. Pac. R.R. v. ICC*, 23 F.3d 531 (D.C. Cir. 1994) (affirming rejection of CE where, among other things, reliable line-specific earnings was not available because the carrier operated with losses).

[24] Metra Prop. at 5 (citing Metra Rebuttal Statement & Evid. at 35–40).

[25] Metra Rebuttal Statement & Evid. at 39 n.12 (citing *FMC Wyo. Corp. & FMC Corp. v. Union Pac. R.R.*, 4 S.T.B. 699, 798 (2000)).

[26] *FMC Wyo. Corp.*, 4 S.T.B. at 798 (applying an assemblage factor to the Orin Line "[w]here the parties agree that assemblage factors have actually been paid"); *see also W. Tex. Util. Co. v. Burlington N. R.R.*, 1 S.T.B. 638, 671 (1996) (applying an

rejection was that, where unsupported, the assemblage factor would create an impermissible barrier to entry for purposes of a Stand-Alone Cost ("SAC") analysis.[27] In the SAC context, the Board must assume that a new carrier could construct the transportation system without encountering barriers to entry and exit.[28] Here, the Board is not concerned with creation of a hypothetical stand-alone railroad without barriers to entry for purposes of simulating the cost structure of a contestable market. Rather, the Board must ensure that compensation for the UP Lines is paid or adequately secured under condemnation principles.

Even if a corridor factor were to ultimately be rejected—and to be clear, there is no basis for that in the record nor does Union Pacific concede that such a result is appropriate—the appraisal in evidence does provide a valuation of the UP Lines without the corridor factor.[29] And, even with the corridor factor ignored, compensation based on the ATF value of the land only under the UP Lines eclipses what Metra is proposing as adequate security. Using the ATF value alone of the UP

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assemblage factor for a line where there was evidence the railroad "did in fact pay a price that included an assemblage factor").

[27] *FMC Wyo. Corp.*, 4 S.T.B. at 798.

[28] *W. Tex. Util.*, 1 S.T.B. at 668–69 ("The ultimate objective of the SAC constraint is to simulate a competitive rate standard for non-competitive rail movements by determining the rate that would be available to a shipper in a contestable market environment. . . . [T]he railroad industry is not considered contestable because of its barriers to entry and exit. It is only by excluding from the SAC analysis the costs and other limitations associated with these entry and exit barriers that we can approximate the cost structure of a contestable market.").

[29] UP Reply Statement & Evid., Carey V.S., Workpaper No. 13, "Valuation of Union Pacific Railroad Company's Metra Lines … In Illinois and Wisconsin, RMI Valuation, September 5, 2024 (RMI Report)," at 66.

Lines without the corridor factor and the same conservative inputs from Union Pacific's adequate security proposal results in an annual interest rental payment of approximately $160.3 million dollars.[30] In other words, even assuming Metra is correct that the corridor factor should be removed (which Union Pacific does not concede), the ATF value alone confirms that Metra's proposal is grossly inadequate.

Simply put, all reliable evidence in this proceeding confirms that the PSA amount does not provide adequate security for Metra's continuing use of the UP Lines.

III. Conclusion

The Board should reject Metra's proposals for adequate security and instead adopt Union Pacific's proposal for the reasons explained herein and in Union Pacific's prior submission.

[30] *See* confidential Workpaper "Revised RCNLD Interest Rental Calculation for Bond.xlsx".

Respectfully submitted,

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Dated: October 22, 2026

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CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of October 2026, the foregoing filing was served by first-class mail or more expeditious means on all parties of record in this proceeding.

/s/ Stephen S. Laudone
Stephen S. Laudone