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BEFORE THE
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UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
– CONTROL –
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY

COMMENTS AND REQUEST FOR CONDITIONS OF THE FREIGHT RAIL CUSTOMER ALLIANCE

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OF THE FREIGHT RAIL CUSTOMER ALLIANCE**

The Freight Rail Customer Alliance ("FRCA")[1] respectfully submits its comments and request for conditions on the UPNS[2] application for UP to acquire control of NS.

I. Summary

The Board should deny the UPNS application outright because the merger will increase industry concentration, which will not "enhance competition" as required under the new merger rules. *Major Rail Consolidation Procedures*, 5 S.T.B. 539 (2001); 49 C.F.R. Part 1180. The merger will instead exacerbate the long-established problems in the railroad industry, particularly high and increasing rates, reduced volumes and market share, and poor service. The industry's current problems flow in large part from the high

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[1] FRCA, www.railvoices.org, is an umbrella membership organization that includes large trade associations representing more than 3,500 electric utility, agriculture, chemical, and alternative fuel companies, and their consumers. The mission of FRCA's growing coalition of industries and associations is to obtain changes in Federal law and policy that will provide all freight shippers with reliable rail service at competitive prices.

[2] UPNS is used in both the singular and plural, particularly depending on whether the time period is pre-merger or post-merger.

concentration and resulting lack of competition that followed the previous round of major Class I consolidation in the 1990s. There is no good basis to think that the Applicants' proposed merger will reverse these trends and strong reason to conclude it will make them worse.

Beyond being anti-competitive, the proposed merger does not meet the requirements under other elements of the Board's new merger rules. The merger is not necessary to achieve the claimed service benefits. BNSF has shown that it is possible to conduct fast interchanges in Chicago between independent carriers. Likewise, the success of the short line industry demonstrates that integration is not required to make relatively short origination and termination movements, as in the so-called "watershed" area, profitable for the carriers involved. Railroads are otherwise certainly capable of exploiting bottlenecks at origins and destinations.

To the extent integration will bring benefits and efficiencies, the merger is also not necessary because the modest capital investment associated with the merger, roughly $2 billion, is dwarfed by the enormous premium that UP is paying to acquire NS. Insofar as the Applicants may wish to grow their volumes, they can do so simply by lowering their rates to more competitive levels and by investing in improved service. Their gains in margins and sustained revenue adequacy give them ample means to do so. Lowering their rates may reduce their unit margins and increase their operating ratio, but should increase their total volumes and aggregate profits. Their apparent unwillingness to reduce their exploitation of their market power is no reason to approve a merger that will increase that market power.

If the Board somehow concludes otherwise and finds, *e.g.,* that the merger will make the industry more competitive, or that merger efficiencies are needed to enable the industry to compete with trucking, then robust conditions are required to limit competitive harm and provide some potential for enhanced competition and improved consumer welfare. Conditions are especially needed to protect captive and other carload shippers that are least likely to benefit from the merger and most likely to be further exploited, to preserve open gateways, and to protect and promote competition generally. The conditions should require UPNS to act to achieve the competitive outcomes that the Applicants claim they seek, rather than engage in the monopolistic and oligopolistic conduct that has characterized the industry behavior in the aggregate especially for the past two decades. The requested conditions do not impose a significant burden on the carriers insofar as they act competitively, which is their stated objective and intent.

The minimum conditions for the carriers to act in a competitive, and not monopolistic or oligopolist, manner should include the following:

1. No asset write-up or acquisition premium should be allowed for URCS variable costs or other regulatory purposes that can result in higher rates for shippers, especially captive ones.
2. Shippers and others should receive full protection from retaliation, including if the proposed merger is not approved.
3. Shippers and others should receive full protection from service disruptions attributable in significant part to the merger.
4. Shippers should receive full antitrust protections to the maximum extent possible.

5. UPNS should be required to set competitive rates for all of its traffic consistent with the revenue adequacy constraint.
6. UPNS's fuel surcharges should not operate as a profit center, and the safe harbor protection should not apply.
7. The cost of equity and overall cost of capital for UPNS should be no greater than that used for valuing the companies for their stockholders.
8. UPNS should be required to provide open gateways and other conditions, including mileage-based proportional rates, to preserve competition and reduce foreclosure.

A substantial possibility exists that the conditions will be inadequate or not effectively implemented, and the better course remains to deny the application.

II. The Board should not approve the UPNS merger application because it will not enhance competition and will instead exacerbate existing rail industry problems

A. Mergers may improve efficiencies but create competition problems

The core theory for potentially allowing a merger of Class I railroads, especially under the Board's "new" (2001) merger rules, is that, first, the merged entity will be a more efficient, productive, and otherwise better competitor than its independent predecessors, and, second, competition will cause or force the benefits of the increased efficiency and productivity to be passed through to shippers, receivers, customers, and the public generally, rather than retained and/or exploited by the carriers for their benefit and not that of the public that the carriers purport to serve. The first condition (competitor enhancement) provides no assurance of the second (enhanced competition and pass

through of competitive benefits to customers and the public), especially in a market that is already highly concentrated.

The downside risks include: mergers will increase market power that will reduce rather than increase competition and innovation; service will deteriorate; mergers will not go as smoothly as the proponents claim (*e.g.*, BN-ATSF, UP-SP, Conrail-CSX-NS, and most recently, CP-KCS); and customers will not benefit and will instead be burdened and exploited. Absent effective competition, an enhanced competitor will be able to extract more value from its customers and others in the supply chain, without providing offsetting benefits to the public.

Mergers can reduce competition in multiple ways. First, they eliminate the direct competition that previously existed between the merging entities at so-called 2:1, 3:2, and even 4:3 locations.

Second, even true end-to-end mergers can reduce so-called vertical (upstream and downstream) competition by closing previously open gateways and foreclosing or reducing the competition that allows shippers to use other carriers in conjunction with the pre-merger independent applicants and also allows other carriers the opportunity to compete to serve those shippers. The merger increases the market power of the merged entity by expanding its geographic reach. The expanded footprint creates the power to foreclose competition on what were, or could be, interline movements that might involve other carriers at gateway connections.

Single-line service may, in theory, be more efficient in some circumstances by eliminating interchanges, switching, and other touches as well as reducing overhead and

contributing to efficiencies of scale and density, but those potential benefits will not be passed through to customers without competition. Customers that might have previously had choices and associated competition lose those options, *e.g.*, a customer that previously might have combined CSX with UP or NS with BNSF (or CN or CPKC) may be forced to deal only with NS and UP.[3] Shippers with operations at multiple locations served by different carriers providing single line service may find that a single carrier serves more of those locations, causing the shippers to lose the benefits of diversification and associated competition. New customers and customers adding new facilities will find that their competitive options and associated leverage are reduced.

Those lost benefits extend beyond rates to include quality of service. If the merged incumbent experiences service failures, as has occurred repeatedly following past mergers, then it is vital that shippers have access to alternatives, even if they are less efficient because they entail interchanges. Interline service is better than no service at all, and single-line service is not necessarily superior. Short line carriers at origin or destination typically provide better first-mile/last-mile service than a Class I carrier providing single-line service because the short line carriers focus on providing the local service, not operating complicated, large-scale networks.

[3] Pre-merger, shippers going west-east may have had four equally viable options: BNSF-CSX, BNSF-NS, UP-CSX, and UPNS. Post-merger, UPNS will have motive and ability to discourage UP-CSX and BNSF-NS, and BNSF-CSX will be at an operational disadvantage. UPNS recognizes that their merger presents gateways problems, but gateway conditions are inadequate, particularly as measured by UP's own proposed gateway condition in CPKC, as developed further *infra*.

Reducing the number of carriers reduces the ability of individual shippers and the economy as a whole to diversify in order to overcome service problems and avoid contagion. If the merged UPNS has a service problem on one coast or half of its system, it is more likely to have the same problem on the other coast or other half, particularly compared to the situation where UP and NS remain independent. Similarly, a shipper seeking to locate or expand in the East or West has less of a choice than if UP and NS remain independent.

Third, mergers can also reduce competition within and throughout the industry generally through increased coordination. The industry as a whole becomes less competitive as the remaining firms are better able to coordinate their actions because they are fewer in number, thereby reducing competition. For example, widespread use of percentage-based fuel surcharges, along with "public pricing" for western coal movements, took root in the early 2000s, only after the preceding wave of mergers in the 1990s.

Coordinated activity may fall outside of the reach of the antitrust laws for multiple reasons. Coordination can occur without formal agreement, *e.g.*, under follow-the-leader. Follow-the-leader becomes particularly effective, which is to say problematic, when: the leader has 40%-45%, or by some measures as much as 55%, of national rail traffic; there are only two major followers, both substantially smaller; actual agreement may be difficult to prove, especially if coordination activity may be deemed to fall under the protection of 49 U.S.C. § 10706; the *Keogh* doctrine may bar applicable damages, *etc.*, even if the affected movements fall outside the limits of the Board's jurisdiction (such as

the jurisdictional threshold) or what jurisdiction the Board is willing or able to exercise. The risk of coordinated effects is particularly high in an industry as concentrated, standardized, and interconnected as the railroads.

B. Single-line service does not solve the competition problems of consolidation

The Applicants present single-line service as a panacea to the competition problems caused by their proposed merger. The core of their response is that because single-line rates are, in the aggregate, lower than interline rates, their proposed merger will result in lower rates. This response fails on several key levels.

First, their analysis relies on rates in the aggregate. Applicants make no effort to account for potential differences between the groups of observed single-line and interline rates, such as whether the groups are identical in terms of being captive, competitive, carload, intermodal, manifest, unit train, *etc*., and being influenced by intramodal, intermodal, geographic, and product competition. All of these factors bear on whether average rates are higher or lower, and they are ignored.

Second, since the Applicants' analysis does not consider any sub-categories or underlying factors, it does not consider the extent to which those factors will or will not continue to apply post-merger. The analysis also does not demonstrate why that pattern will apply to single-line UPNS rates as opposed to rates of other carriers. The single-line rates observed are, by definition, not single-line east-west transcontinental rates because there has not been an east-west transcontinental carrier. The reason that the Board adopted the new merger rules is that the agency recognized that a transcontinental merger would be different and pose risks and concerns that had not been previously considered.

Applicants are caught in a contradiction as they seek to rely on historical precedent for a merger that is unprecedented.

Third, the alleged "fact" (which, as discussed next, is not a fact at all) that single-line rates existing in the current environment may be lower, on average, than interline rates, on average, does not begin to establish that the UPNS rates, or rates overall, are likely to decline as a result of the merger. The merger constitutes a substantially changed circumstance. Single-line rates might be lower than interline rates following the merger, but still higher than pre-merger rates. In particular, the merger gives UPNS an incentive and ability to increase their remaining interline rates, so as to steer business to their single-line rates. All rates may raise due to the fact that one carrier is now handling 40% to 55% of the nation's rail volumes.

As explained *infra*, rail rates have been increasing since 2002-2004, following the last major round of Class I mergers, on a real basis (adjusted for inflation as measured by the GDP-IPD), even for categories of movements, particularly intermodal, that are typically deemed to be competitive. Moreover, the universe of rising rates logically includes more single-line rates, especially for longer distances, which have become possible only because of the past mergers. Applicants have not explained why their merger should reverse the established trend of increasing rates, and the increased concentration should make things worse.

One recently published article did undertake a like-to-like comparison of single and interline rates and found that single-line rates were not lower than interline rates for the studied coal movements. Alexei Alexandrov, Russell Pittman, and Olga Ukhaneva,

Double Marginalization in the Pricing of Complements: The Case of US Freight Railroads, Journal of Economics & Management Strategy, Vol. 34 (2025), pp. 403–427, DOI: 10.1111/jems.12604. Coal remains significant as it, according to the AAR, accounts for a quarter of non-intermodal rail volumes. *See* https://www.aar.org/rail-industry-overview/.

The published article effectively refutes a key premise of the UPNS application, that the resulting single line rates are lower than interline rates. Similarly, the real world experience of BNSF shows that a merger is not necessary to achieve relatively quick interchanges through Chicago, disproving Applicants' claim that quality service cannot be provided absent a merger.

Fourth, the merger will reduce the number of carriers seeking to innovate. Consolidation leaves fewer independent railroad "laboratories" to experiment and develop new strategies, methods, and approaches. The carriers will become even more like each other, with less need and willingness to take risks and attempt different approaches, and more prone to coordinated action such as follow the leader, leading to more stagnation and a focus on growing margins by reducing costs and the quality of service. Reducing the number of carriers also reduces the prospects that a disruptive "maverick" will emerge to bring real innovation and competition. *E.g.*, Yajing Jiang, *Never Underestimate the Role of a Maverick to Competition: USA et al v American Airlines Group Inc. et al*, 32 AJCCL 168 (2024), available at https://media.crai.com/wp-content/uploads/2024/07/02102013/Never-underestimate-the-role-of-a-maverick-to-competition-USA-et-al-v.-American-Airlines-Group-Inc.-et-al.pdf.

C. The railroad industry already reflects inflated rates and other indicia of reduced competition following the previous consolidation in the 1990s

The railroad industry is already highly concentrated due to the past mergers and consolidation that occurred in the 1990s. The result is a lack of competition that manifests itself in high rates, reduced volumes and market share, and frequent rounds of poor service. FRCA, together with the National Coal Transportation Association, addressed these problems at length in their joint written submission filed in EP 775, *Growth in the Freight Rail Industry*. A copy of that submission is attached as Exhibit A.

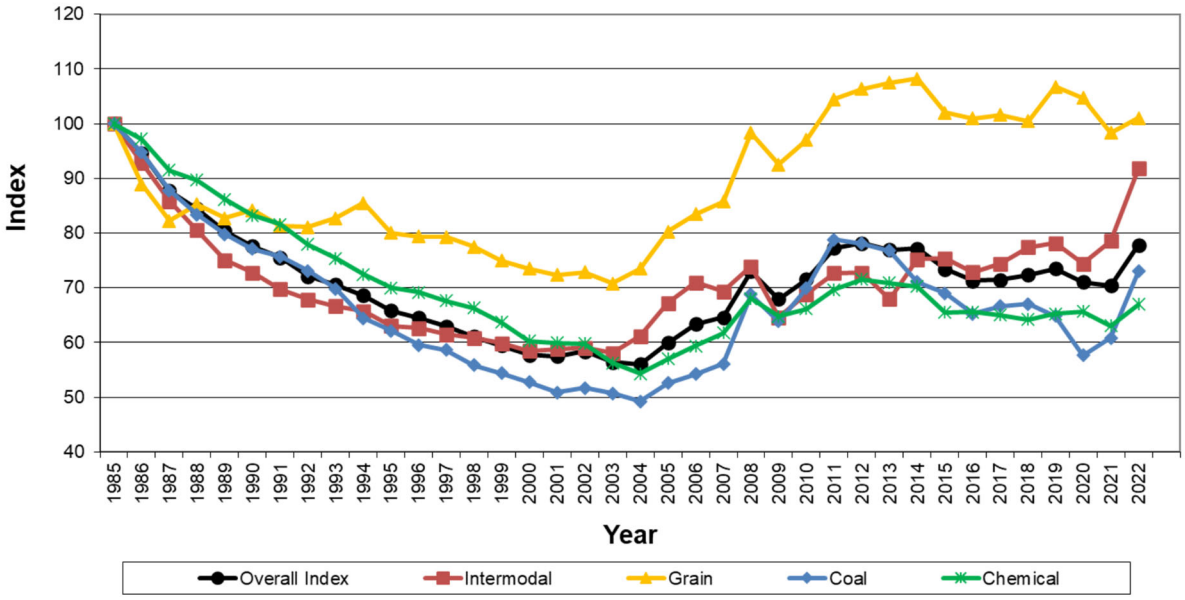
The first problem is excessive rates, generating revenues beyond the level required for the railroads to achieve revenue adequacy,[4] that continue to increase relative to underlying costs and expenses. The Tornqvist rate analyses that the Board's Office of Economics regularly releases demonstrates this established trend in railroad rates. The most recent iterations is available at *E.g.*, https://www.stb.gov/wp-content/uploads/Annual_Rail_Rate_Index_Study_2022.pdf.[5]

[4] The investment community views the railroad industry as having achieved revenue adequacy in terms of recouping its cost of capital as of the mid-2000s. *E.g., When Pigs Fly III: Silk Purses from Sow's Ears*, UBS Research (Rick Paterson, analyst), dated April 18, 2006. The Board's Tornqvist index analyses show that rates were actually at their lowest relative in real terms (as measured by the GPD-IPD at that time and have increased since.

[5] Determining whether and the extent to which the rail transportation market is competitive is an inherently empirical exercise that requires the analysis of data. UPNS contend that the market is competitive and that the rail industry has stagnated after 2000 despite rates that have remained stable and not increased in real terms. George VS at 14 (Amended Application, Vol. 1 at 256) & Fig. 1. UPNS reaches this conclusion, relying on a variant of the "Gallamore Chart," by looking at average rates for all rail traffic and ignoring changes in that traffic mix over time. As explained *infra*, the Board's analysis

Unlike depictions by UPNS and other Class I railroads, the Board's Tornqvist analysis adjusts for changes in the traffic mix.[6] The analysis depicts rate trends in both nominal dollars and real dollars using the GPD-IPD as the deflator. The Board's analysis shows that real rates for all major commodity groups fell from 1985 (the starting point of the analyses) to 2002 but have increased substantially since 2004, continuing to the present:

Figure 4.1 Rail Rate Indices for Commodity Groups, 1985=100



STB Annual Rail Rate Study 1985-2022, at 3.

relies on a like-to-like comparison that shows rates have been increasing across all major categories.

[6] The need to adjust for changes in the traffic mix is long established. *E.g.*, Frederick C. Dunbar and Joyce C. Mehring, *Coal Deregulation: A Hedonic Price Analysis*, Logistics and Transportation Review, Vol. 26, No. 1 (March 1990).

Use of the GPD-IPD as the deflator substantially understates and masks the extent to which rates have increased relative to inflation in actual costs and expenses as measured by even the RCAF-U, much less the productivity-adjusted RCAF-A and RCAF-5:

Table 1
Comparison of Price/Cost Indices

Period	RCAF-U	AII-LF	RCAF-A	RCAF-5	GDP-IPD
1Q15	0.830	83.200	0.352	0.333	96.769
1Q25	0.957	106.900	0.367	0.347	127.577
Percentage Increase	15.30%	28.49%	4.26%	4.20%	31.84%
CAGR	1.43%	2.54%	0.42%	0.41%	2.80%

The post-2004 rate increases in real terms would be far greater if the deflator were based on a measure of railroad costs rather than the GDP-IPD.

Real rate increases since 2004 are manifest broadly across commodity and shipment types, including intermodal, which is typically viewed as being competitive due to the trucking alternative. The post-2002 and post-2004 increases in intermodal rates actually exceed those for coal, chemical, and the overall index.

Notably, the Board's analyses depict rate trends for a given traffic category. A given category may include movements where rates have not increased as much, or have actually decreased, at least in real terms, as well as other rates that have increased more rapidly. The Board's concern should be not only with competitive rates, but also with rates that have increased due to diminished competition, especially as the national transportation policy is "to maintain reasonable rates where there is an absence of

effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital." 49 U.S.C. § 10101(6).

The Board's own analyses demonstrate a lack of competition in the rail industry following the wave of consolidation that occurred in the 1990s. In a competitive market, firms are able to recoup cost increases, but are not able to increase their rates by more than their costs because they would lose desirable business to competitors that would seize the profitable or contributory opportunities presented by the excessive and unneeded rate increases. Under Precision Scheduled Railroading (PSR), the railroads have focused on lowering their operating ratios and increasing their rates.

The second problem is the carriers' failure to grow their volumes, particularly carload, across a range of commodities, and a resulting loss of market share. The volume trends coincide strongly with and are a function of the first problem, that is, the excessive rates. Rail volumes grew sharply from 1985 to 2001, when rates declined in real terms (relative to the GDP-IPD), but have declined or been stagnant since, as real rates have increased. *E.g.*, https://www.bts.gov/archive/publications/national_transportation_statistics/2004/table_01_46, https://fred.stlouisfed.org/series/RAILFRTCARLOADSD11, and https://www.bts.gov/content/us-ton-miles-freight. The railroads' failure to grow market share extends to intermodal where the railroads enjoy inherent cost and operational advantages.

The volume problem flows directly from the rate problem. Railroads have more interest and incentive in increasing rates and profit margins, and reducing their operating ratios, than in growing volumes. Since railroads face demand curves, certainly where

there may be competition and even where they enjoy market power, the unavoidable tradeoff for the excessive rates and rate increases is a loss of, or failure to increase, volume and market share.

The tradeoff is especially apparent in intermodal, where the discount needed for intermodal to compete with trucks is closely tracked. *E.g.*, https://www.freightwaves.com/news/sonar-adds-intermodal-savings-rates; https://www.joc.com/resources/special-reports/intermodal-savings-index. It follows that if the railroads wanted to increase their intermodal volumes and share, they need only offer lower rates.[7] Given the railroads' sustained increase in real rates for intermodal since 2004, along with their increased profitability and lower operating ratios over that period, the railroads certainly have the cushion to do so while still maintaining positive contributions.

The third problem is poor service. Shippers and consumers might be more willing to tolerate higher rates if they were accompanied by consistent and reliable service, but the opposite has been the case. Shippers have been exposed to recurring waves of service failures and serve meltdowns, which long preceded Covid. Shippers are willing to pay a premium for trucking because of its consistency and reliability. A related trend has been

[7] Railroads have been able to increase their intermodal volumes in 2026 due to labor shortages for trucking and high fuel prices since trucking is less fuel efficient. *E.g.*, https://www.trains.com/pro/freight/intermodal/intermodal-traffic-sees-boost-as-trucking-takes-hit/ (May 31, 2026); https://www.freightwaves.com/news/rail-traffic-surges-intermodal-hits-record-highs (Sept. 30, 2026); https://www.reuters.com/business/energy/us-railroads-pull-ahead-high-fuel-costs-hit-truckers-harder-2026-10-22/ (Oct. 22, 2026).

a reduction in railroad capital investment, especially when measured as a percentage of revenues.[8] Reduced investment in track capacity, locomotives, and personnel results in declining quality of service.[9]

UP has been especially prominent for having poor service and has created a disproportionate share of the service matters that have required the Board's attention. *E.g.*, EP 772, *Oversight Hearing Pertaining to Union Pacific Railroad Company's Embargoes*; FD 36609, *Foster Poultry Farms – Ex Parte Petition for Emergency Service Order*; NOR 42171, *Sanimax USA LLC v. Union Pacific Railroad Company*; NOR 42165, *Hasa, Inc. v. Union Pacific Railroad Company*. Of additional concern is UP's recurring lack of candor, as noted in the EP 772 embargo proceeding and UP's responses to orders to produce responsive information, and in FD 36501, *Union Pacific Railroad Company -- Construction And Operation Exemption -- In Maricopa County, Ariz.* Moreover, UP's financial success has been linked to its high rates, as opposed to efficiency or premium service. *E.g.*, Fuzile Magwa, *Beyond the Operating Ratio: What Union Pacific's Numbers Actually Say*, RailwayAge (Aug. 3, 2026),

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[8] Framing capex as a percentage of revenues takes into account rate inflation and changes in volumes.

[9] *E.g.*, Michael Baudendistel, *What is Precision Scheduled Railroading (PSR)?*, https://www.freightwaves.com/news/what-is-precision-scheduled-railroading-psr (Jan. 9, 2020) (discussing how PSR includes a reduction in capital expenditures); Keith Barrow, *Precision Scheduled Railroading – evolution or revolution?*, International Railway Journal (Sept. 17, 2019), https://www.railjournal.com/in_depth/precision-scheduled-railroading-evolution-revolution/; Steve Blinn and Dan Bostek, *PSR: The Cushion is Gone*, https://www.railwayage.com/regulatory/psr-the-cushion-is-gone/ (Sept. 27, 2026), and https://www.linkedin.com/pulse/cushion-gone-daniel-bostek-ylzoe/ (Sept. 18, 2026).

https://www.railwayage.com/freight/class-i/beyond-the-operating-ratio-what-union-pacifics-numbers-actually-say; and *Beyond the Operating Ratio*, Railway Age (Aug. 10, 2026), https://www.railwayage.com/freight/class-i/beyond-the-operating-ratio/?RAchannel=class-i.

The thread uniting these three problems of high rates, diminished volumes and market shares, and poor service has been so-called PSR, particularly as employed in pursuit of lower operating ratios. *E.g.*, Bill Stephens, *Union Pacific has lost its way: Analysis*, Trains (Jan. 11, 2023, last updated Aug. 6, 2025), available at https://www.trains.com/pro/freight/class-i/union-pacific-has-lost-its-way-analysis/#:~:text=Starting%20with%20an%20O.R.,to%20be%20an%20empty%20slogan. As noted by Jim Blaze, PSR is neither precise nor scheduled. *E.g.*, Jim Blaze, *Commentary: Looking at PSR again*, https://www.freightwaves.com/news/commentary-looking-at-psr-again (May 14, 2020). In the words of former Board Chairman Ann Begeman, it amounts to "doing less with less," particularly combined with the railroads' ability to exercise their market power to increase rates in excess of costs on a sustained basis.

D. The UPNS merger will likely make the existing problems worse, not better

Against this historical record, there is no good reason to think that the UPNS merger will stem, much less, reverse the established trends and associated problems. The far more plausible outcome is that expanding UP's footprint, and increasing its market concentration and market power, will reduce competition and exacerbate the pricing, volume, and service problems observed to date. When the core problem is excessive

concentration, further concentration means more of the same, and not any sort of reversal of the trend that has prevailed for the last two decades.

To the extent UP does seek to grow traffic, it is likely to be in the intermodal segment, rather than carload. Such traffic arriving on or otherwise originating from the West Coast already moves very long distances by rail, and it is unlikely that eliminating an interchange at Chicago or some other location will make a substantial difference, especially when traffic is already migrating to Eastern ports, as explained by Michigan State University Professor Jason Miller in comments reported at https://www.trains.com/pro/freight/class-i/msu-professor-UPNS-merger-cant-turn-back-the-clock-on-carload-decline/ (noting that "more imported cargo bound for destinations in the Eastern U.S. is landing at East Coast ports, making the freight more likely to move in relatively short hauls via truck").

The proposed merger also increases the risk of greater contagion when there is a service meltdown, whether due to merger implementation, underinvestment, demand surge, weather, cyclicality, or any other cause. Having an east-west transcon responsible for nearly half of the nation's rail traffic means that if UPNS experiences trouble, there is less likely to be a viable alternative. Diverting from the West Coast to the East Coast on the UPNS will mean changing the problem at one location for the same problem at another location. The larger entity means larger problems will take longer to fix. The other carriers will be less able to make up for the slack if UPNS falters, just as UPNS will find it harder to boost its output if its competitors falter. At the same time, the market

power and the coordination of the rail carriers make it very difficult for shippers to obtain any, much less, adequate protection for the repeated service failures.

E. Applicants fail to show that a merger is required to achieve the posited benefits

Under the new merger rules, the proponents must show that the merger is necessary to obtain the benefits and that the posited benefits cannot be obtained through less drastic means. Applicants satisfy neither prong.

The core narrative of the UPNS merger application is that the merger is essential for achieving growth that will come primarily from two sources, conversion of truck to intermodal due to the removal of interchanges and additional rail traffic gains in the "watershed" area near where UPNS interchange. The merger is supposedly essential for achieving that growth because the railroads cannot make the necessary investments and commitments for the intermodal traffic so long as they are independent, and unification is necessary to develop the watershed traffic which otherwise is not sufficiently attractive for a carrier with only a short haul.

That narrative does not survive examination.

Additional intermodal volumes are already available to UP, NS, and the other railroads if they would discount their rates. The sustained increases in railroad intermodal rates since the early 2000s leave ample cushion for discounting. The Board's own Tornqvist analysis, discussed *supra*, shows that the railroads have chosen to increase their rates for intermodal (as well as other) traffic in real terms since the early 2000s. It follows that UP and NS could grow their intermodal traffic simply by charging less and

that the traffic would remain profitable, albeit with lower margins than they now extract with higher rates. UP and NS do not require a merger to charge lower rates in order to grow their volumes, and a merger, even if it does provide cost savings, provides no assurance that the merging carriers will charge lower rates, particularly as a merger increases their market power.

A merger is also not required for UP and NS to pursue and compete for traffic in what they describe as the "watershed" area near UP and NS interchanges. The short line railroad industry is built upon profitable movements of relatively short distances that connect to Class I railroads, as are the favorable economics of origin and destination monopolies, otherwise known as bottlenecks.

UP and NS similarly do not need to merge in order to pursue and obtain traffic in the watershed area. If the traffic is sufficiently attractive in the aggregate, then all that is required to capture the traffic is that the railroad with the long haul needs to be willing to provide adequate compensation to the carrier with the short haul, so that both may benefit. There is nothing unusual in a carrier with a short origination or destination monopoly being able to charge a premium. Such arrangements are standard for the short line railroad industry. A merger is not required to achieve favorable economics.

It may be the case that the railroads are currently not sufficiently motivated to pursue the watershed traffic. If so, it is because they prefer to focus on other opportunities, and there is little reason to think that a merger will change those incentives. A more appropriate approach would be to limit the excessive rates and returns that the

railroads are able to extract on their existing volumes, which would leave them more motivated to pursue incremental opportunities.

A merger is also not required to achieve efficient intermodal interchanges in Chicago or elsewhere, as shown by what BNSF and CSXT have been able to achieve. It is also unclear if UP's and NS's existing interchanges are all that inefficient in general or if they can be improved without any significant additional investment. BNSF CEO Katie Farmer explained before the Midwest Association of Rail Shippers on January 14, 2026, that BNSF's "intermodal trains spend less than an hour in interchange. That's not why freight is not converting from over the road." *See* https://www.trains.com/pro/freight/class-i/farmer-reiterates-that-bnsf-has-no-interest-in-merger/ (accessed Jan. 15, 2026). If BNSF can interchange intermodal trains in under an hour within the context of existing arrangements, then UP and NS should be able to do the same, without a merger.

UPNS's claims that a merger is required to make the infrastructure investments needed to capture the intermodal and other additional traffic also lack plausibility. The application identifies $1.8 billion in increased capital expenditures in properties over the first three years to integrate their systems and handle traffic in single-line service. Amended Application, Vol. 1, pp 204-09. The $1.8 billion is less than 10%% of the premium above the preexisting stock price that UP is paying to acquire NS. UP does not need to spend $20+ billion to invest less than $2 billion.

Moreover, Applicants represent that the investment will reduce ongoing capital expenditures by $133 million annually. *Id.* at 35. The 7% return on investment by itself

provides a significant return. Furthermore, the $2 billion, which represents the cumulative capital expenditures over three years, is readily achievable given that UPNS's combined existing expenditures are around $6 billion annually.

In short, the applicants do not require a merger to achieve the claimed benefits or to make the relatively modest investment they claim are needed to achieve the projected benefits.

F. The gateway conditions that UPNS have proposed are insufficient to preserve, much less enhance, competition as required under the new merger rules, and an approach based on proportional rates is required

UPNS tout their commitment to preserving open gateways based on the CPKC merger condition and their Committed Gateway Pricing ("GCP") proposal, ostensibly based on the UP/SP I-5 proportional rate agreement. The conditions will do little in practice to preserve the existing level of competition. They are certainly insufficient to enhance competition.

The STB adopted the CPKC open gateway commitment under the old merger rules to preserve competition, but it is insufficient for that purpose. The CPKC condition allows the merged entities freedom to increase their divisions up to the level of inflation, typically as measured by the AII-LF (plus fuel surcharges), without challenge. As explained earlier, the rate of escalation in the AII-LF has substantially exceeded that in the RCAF-U over the past ten years. The overrecovery has been even greater as measured against the RCAF-A and RCAF-5, which far more accurately track the level of change in railroad costs by virtue of their recognition of productivity improvements. Use of the ALL-LF or even the RCAF-U to adjust the UPNS Rule 11 rate or the equivalent

division will enable UPNS to capture the entire movement with only a modest discount relative to the price paid by their competitors. The mechanism will not result in a pass-through of the merger efficiency gains to the shippers and receivers. The more likely outcome is that the other potential competitors will cease making any effort to compete for the business, as all come to realize it is an exercise in futility.

In a competitive market, changes in rates, including divisions, would tend to accurately track changes in costs, inasmuch as a competitor could compete for profitable business on a sustained basis by increasing its rates in line with its increasing costs, but no more. It follows that the CPKC merger condition that UPNS purport to have adopted is insufficient to approximate a competitive outcome and will allow rates, including the UPNS single-line rates, to increase by noncompetitive amounts. Application of the CPKC merger condition is incapable of preserving, much less enhancing, competition. At best, it can only contribute to the pattern of uncompetitive rate increases that has characterized the Class I rate structure since the early 2000s.

The CGP is also flawed because it excludes intermodal and TIH/PIH traffic, meaning that only a part of manifest traffic and unit train traffic may potentially benefit. Furthermore, the protection is temporary, and not permanent. In addition, the protected rate is set at the 70th percentile on a lagged basis. It follows that 70% of the equivalent UPNS rates will be lower than the rate available to BNSF, CSX, and their potential customers. Furthermore, UPNS can always undercut the 70th percentile rate in any given year to capture the business, knowing that the impact on the 70th percentile will not be felt until the following year (except for the last year of the mechanism because there will

be no following year). GCP does not establish a level playing field and allows UPNS to benefit from the resulting lack of effective competition. BNSF and CSX are likely to stop chasing traffic that they cannot win before the oversight period and CGP end.

Furthermore, while Applicants purport to base their approach on the success achieved in UP/SP, the general view is that such arrangements have been a "flop." *See* https://www.trains.com/pro/freight/class-i/when-railroad-merger-plans-collide-with-reality-analysis/. What is significant is that UPNS have not proposed anything similar to the proportional rate that UP (and others) presented in the CPKC proceeding, which was considered under the old merger rules.

For all these reasons, the Board should not approve the proposed UPNS merger.

III. If the merger is to be approved, robust conditions are required.

If, for whatever reason, the Board views the evidence, arguments, and the new merger rules differently and somehow concludes that approval of the merger is appropriate, the Board should impose a robust set of conditions. The conditions are needed to avoid and mitigate reduced competition, higher rates, and poor service, to protect against retaliation and coordinated effects, to protect shippers, receivers, and the public from service failures, and to ensure that UPNS, and the rest of the railroad industry, act in a competitive manner that preserves and promotes the public interest.

The robust conditions are especially appropriate to hold UPNS to their representations that the merger is needed to meet and to contribute to robust competition and that the merger will not result in increased market power and reduced competition. UPNS should not be allowed to make competitive representations in their application and

then act in a very different manner after their application is granted. Applicants should be required to honor their commitments and representations.

The conditions requested below are not comprehensive, and FRCA expects to be able to support conditions submitted by other parties.

A. No asset write-up or acquisition premium should be allowed for any Board regulatory purpose, including the jurisdictional threshold and revenue adequacy

Railroad mergers going back to the 1990s have resulted in substantial write-ups in asset values to incorporate acquisition premiums paid to acquire control of the railroads. Premiums were paid even when the acquired carrier was recognized to be revenue inadequate (as in the 1990s and more recently with KCS). The write-up in asset values increases URCS costs and the related jurisdictional threshold, the asset investment base for determining revenue adequacy, and other aspects of regulatory costing. Absent a protective condition, the merger allows the surviving carrier to charge its captive customer higher rates.

The write-up in asset values occurs through purchase accounting under generally accepted accounting principles ("GAAP"). The Board has taken the position that it must follow GAAP in this regard under the Board's governing legislation for this purpose. The Board notably found itself not so bound in more recent decisions involving Berkshire Hathaway's acquisition of BNSF and the Tax Cut and Jobs Act of 2017.[10] Nonetheless,

[10] FD 35506, *Western Coal Traffic League—Petition for Declaratory Order*, (STB served July 13, 2013) (addressing failure of Berkshire Hathaway, Inc., to obtain approval for BNSF acquisition in 2010 by removing acquisition premium for 2010-2012 and directing a four-year phase-in starting in 2013); EP 552 (Sub-No. 22), *et al.*, *Railroad*

the Board has the authority and discretion to impose conditions on the merger, and those include the ability to prevent UPNS from benefitting from the acquisition premium. The Board should exercise that authority should it approve the UPNS merger.

The asset write-up becomes relevant only to the extent that rates and service are subject to Board regulation, especially for captive shippers that might bring rate cases. The premium is irrelevant for regulatory purposes in situations where rates are truly competitive and set entirely by market forces.[11]

UP and NS have both achieved long-term revenue adequacy on a sustained basis, even as measured using the Board's overstated cost of capital. The notion that they should become less revenue adequate, or even revenue inadequate, because they decide to

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Revenue Adequacy—2017 Determination, et al., (STB served Dec. 6, 2018) (excluding income that was realized when the corporate tax rate reduction decreased the value of deferred tax liabilities). In contrast, FERC generally requires jurisdictional entities to pass tax reduction benefits through to customers, even though it generally does not allow assets to be written up for a merger for rate-related purposes, unless there is a specific showing as to offsetting benefits for customers. *E.g.,* https://www.ferc.gov/industries-data/oil/overview/ferc-actions-regarding-tax-cuts-and-jobs-act-2017; *Policy Statement on Hold Harmless Commitments*, 150 FERC ¶ 61,031 (2015) at P 27 & n.49. The Board's Tornqvist index analysis shows that railroad rates fell in real terms during the 1990, and perhaps the pass-through of merger efficiencies contributed to the decline. The pattern has reversed for the last twenty years, following earlier mergers, and no longer justifies allowing write-up premiums, if it ever did.

Also, the merging carriers in the 1990s were generally revenue inadequate as measured by the Board. In contrast, the Applicants are more than revenue adequate on a long-term basis.

[11] Nonetheless, the premium represents a substantial investment for UP, and stockholders will expect UP to produce a return on that investment. Should UP fail to grow traffic and/or reduce its costs, even so-called competitive traffic would face pressures for a rate increase. The revenue adequacy-type condition, described further *infra*, should also apply to competitive traffic.

merge and UP is willing to pay a large premium, at least in part because NS is a successful operation as reflected in its revenue adequacy, defies economic logic and sound public policy. The same is no less true of raising variable costs and the jurisdictional threshold.

Requiring captive shippers to pay more because two revenue-adequate carriers decide to merge is the antithesis of enhancing competition. Requiring captive shippers to pay more so that competitive shippers might pay less constitutes, at best, a cross-subsidy that is to be avoided. A merger that causes captive traffic to pay more to carriers that have already achieved revenue adequacy constitutes exploitation and excessive market power.

Preventing the asset write-up from resulting in higher rates for captive shippers and other regulatory relief is a necessary first step for the merger to enhance competition and promote the public interest.

B. Full protection from retaliation is needed

Shippers and others should be protected from retaliation, especially for any failure to support the merger, but also for actions or positions adverse to UPNS taken after the merger. The protection should apply regardless of whether the merger is approved. The protection should extend to all common carrier movements, including those that fall below the jurisdictional threshold, to contract movements, and to exempt movements. The protection should extend not only to shippers, but also to receivers, competitors, and other parties that might be affected by retaliation, such as ports and governmental entities. The remedies should be sufficient to make parties whole for the harm caused by the

retaliation, including lost profits and stranded investment. The parties should have access to broad discovery to investigate potential retaliation. Relief should be available whenever there is substantial evidence that UP, NS, or UPNS engaged in retaliation, defined to include treatment that is less favorable or harsher than that afforded to others that did not oppose or that supported the Applicants.

The proposed merger would leave UPNS with roughly 45% of the national rail volume. Many shippers would have no other viable rail alternative to UPNS, and many of those shippers lack viable alternatives to rail transportation. The merger will leave UPNS with vast power to determine the winners and losers within individual industries and sectors, simply by deciding who gets better rates or better service. UPNS has been very vigorous in seeking support for its merger and criticizing those that do not support it. UP has also not been shy about using its market and other powers to control and limit volume and service. *E.g.*, EP 772 and the other proceedings noted *supra*.

It follows that a condition is needed to protect from retaliation those that did not support the merger or that sought conditions in the event that the merger is approved. The protection is also needed for those that might stand up to UPNS after the merger is approved, or those that might deal with UP or NS if the merger is not approved, as railroads have long memories. UP's CEO provided a clear warning to any that would oppose him or his company's efforts.

Retaliation is a real possibility, and the Board's tools for addressing it are otherwise limited. For example, many shippers believe that the common carrier obligation is so difficult to enforce as to be essentially meaningless. The Board can grant

rate relief only in limited circumstances and has limited power to provide service relief for traffic that moves by contract, is exempt, or falls beneath the jurisdictional threshold. The ability of even captive, non-exempt carload traffic to obtain rate and service relief is very limited, notwithstanding the statutory directives that rates for captive traffic are to be reasonable as are the practices for common carrier traffic, and that railroads are to provide service on reasonable request.

Accordingly, the Board should require an enforceable commitment from UPNS that they will not retaliate or discriminate against any party, including members of an association, that did not support the merger or that sought conditions. The protection should apply to contract, competitive, and exempt shippers and their carriers, cover conduct that reflects retaliation or discrimination in significant part, and should apply even if rates are below the jurisdictional threshold or the conduct meets the low threshold for satisfying the common carrier obligation.

C. UPNS should be required to make shippers and receivers whole for damage for service disruptions attributable in significant part to the merger

An unfortunate aspect of most rail mergers has been significant service disruption as the two railroads are consolidated into one, one firm's management and operations are typically displaced, new computer and operating systems are installed, functional interchanges are eliminated, work crews are displaced, and the like. These problems were especially present in UP's last merger, when it acquired SP, but they have occurred in all mergers. These problems are likely to be exacerbated with PSR, especially as UP has been prone to its own operating problems in recent years.

The new merger rules require a service assurance plan, but such plans and efforts have proven to be inadequate over time and will likely prove inadequate here. It is then appropriate for the Board to require that UPNS make affected shippers and receivers whole for the harms caused by disruption in service that is attributable in significant part to the merger. The relief should remain available permanently, as the merger will be effectively permanent.

This protection is appropriate for several reasons. First, the threat of liability will provide an incentive for UPNS to avoid implementation problems in the first place. Second, to the extent that the problems are part of the price to be paid for achieving the efficiencies, it is appropriate that UPNS bear the cost insofar as it is choosing to merge and will receive the benefit of the efficiencies. Third, the increased scale brought about by the merger will cause miscalculations to have greater consequences. Fourth, the service problems are likely to be most severe for captive shippers. Because they are captive, they are least able to protect themselves from service problems and are likely to have the most extensive injuries. They are also the least likely to benefit from the merger. They are thus especially deserving of protection.

The protection should extend to contract and exempt traffic, as well as common carrier traffic. While competitive and exempt traffic may have some ability to mitigate their damages, mitigation should not bar recovery of the portion of damages that cannot be mitigated. Also, captive and other shippers should not be exposed to greater risk because they entered into contracts, particularly to the extent the contracts reflect the

exercise of market power and/or limited regulation. Inflicting harm on contract shippers is not consistent with enhancing competition or promoting the public interest.

The protection should apply to service harms that are caused or made worse in significant part by the merger. In particular, service problems attributable to a failure to handle increases in demand for service, or to invest in resiliency, that are made worse by the increase in scale of the merged entity should be eligible for relief. Applicants claim that the purpose of their merger is to increase their volumes, and shippers, receivers, and the public should not suffer if Applicants are unable to handle the increased volumes they claim to seek, except for factors that are truly and entirely beyond their control. Relief should certainly be available to the extent problems are made worse by the increased scale of UP or by a failure to invest in resiliency. The same principle holds true for UPNS's claims that the merged entity will provide better and more reliable service. Furthermore, shippers and others should have the ability to seek and obtain relief on a collective basis and should not be required to seek relief one-on-one or in arbitration against their will.

D. Antitrust protections for shippers should be available to the maximum extent possible.

As noted, mergers increase consolidation and thus reduce competition within the industry. An appropriate remedy for the reduction in competition is a condition that requires the merging carriers to waive various protections that the Applicants otherwise enjoy under the antitrust laws.

First, the *Keogh* doctrine established *in Keogh v. C. N.W. Ry. Co.*, 260 U.S. 156 (1922), should not apply except where the Board actually sets the rate. Strong arguments exist that *Keogh* should not apply at all to railroad rates following the Staggers Rail Act of 1980 and more so following the ICC Termination Act of 1995. Fritz R. Kahn*, Keogh's Kaput*, 49 ICC Practitioners J. 478 (1982); Fritz R. Kahn, *Keogh's Demise*, 37 Transp. J. 37 (1997). The courts have ruled otherwise and *Keogh* continues to apply. *E.g.*, *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). Nonetheless, awards of antitrust damages and injunctive relief no longer pose any potential conflict with the Board's limited rate regulation, except perhaps where the STB actually determines rates.[12] The Board does so virtually never, especially as so few rates are actually filed with and set by the Board. If the objective is to preserve and enhance competition, an appropriate measure is to allow antitrust damages to be available as a condition of the merger, except where the Board actually sets a reasonable rate.

An additional condition is needed to address the prominent role that 49 U.S.C. § 10706(a)(3)(B) played in the recent summary judgment decision in *In Re Rail Freight Fuel Surcharge Antitrust Litigation, et al.*, 2025 WL 2097449 (D.D.C. June 24, 2025), *appeal pending* (D.C. Cir. No. Nos. 25-7103, *et al*.). A condition should be imposed that UP may rely on § 10706(a)(3)(B) only to the extent that it communicated with another rail carrier exclusively regarding an interline rate or integrally related matter, but not

[12] Furthermore, *Keogh* had its roots in the restrictions against discrimination, a principle that has effectively vanished.

insofar as the communication – be it in-person, by mail, phone, email, or other form of communication – pertained to other matters, including other routes or movements. The merger will cause UP to have too much traffic, and to be involved in too many interline arrangements, to allow protected communications to stray into other matters.

E. UPNS should be required to set competitive rates for all its traffic consistent with the revenue adequacy constraint

Applicants' thesis for their proposed merger is that the merger will make them more competitive and able to compete with trucks and otherwise grow their business in the watershed and other areas, that the benefits of their improved competitiveness and single-line service will be passed through to shippers and the public, and that the competitive forces that support the merger will also prevent them from exercising any increased market power. If the merger is approved, the Board should hold them to their word and require Applicants to pass the merger benefits through to customers and avoid rate increases based on the exercise of market power.

One appropriate means to do so is to utilize the revenue adequacy constraint under *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985), and apply it to all of the Applicants' traffic, including common carrier traffic falling below the jurisdictional threshold, otherwise competitive traffic, exempt traffic, and contract traffic. The revenue adequacy constraint addresses how a carrier that has achieved revenue adequacy, as Applicants have done, would act in a competitive market, in which Applicants claim they exist and operate and for which they claim to need to merge to be better able to compete. In a competitive market, Applicants would continue to recover their fixed costs or

overhead so as to achieve revenue adequacy, but they would not be able to take additional rate increases because doing so would cause them to lose profitable business.

Applicants would be allowed to adjust their rates to reflect cost changes, but only to reflect changes on a productivity-adjusted basis that reflected output costs as opposed to one driven solely by input prices. In other words, the RCAF-A and RCAF-5 are appropriate benchmarks because they take into account productivity gains. The AII, AII-LF, RCAF-U, and GDP-IPD are not because they reflect input prices only or, in the case of the GDP-IPD (or CPI or PPI), they reflect prices in the general economy, not railroad-specific costs. Use of the RCAF-A or RCAF-5 would allow UPNS to retain the benefits of their efficiency gains to the extent they exceeded the industry average due to their merger of other efficiencies. Individual factors might justify individual exceptions, but they would be subject to challenge and review, especially to the extent that UPNS claims they are justified by rate decreases elsewhere. Increasing customer A's rate to cover a rate decrease to customer B, without more, amounts to an impermissible cross-subsidy from a captive shipper to a competitive shipper when the carrier is already revenue adequate. The constraint might be subject to review if UPNS ceased to be revenue adequate, but the acquisition premium paid to acquire NS should not be considered for that purpose.

Again, the condition would require only that Applicants act as if they existed in a competitive market, not one where they possess and can exercise excessive market power. The condition would facilitate the pass through of efficiency gains resulting from the merger, fulfilling Applicants' claims that they seek to merge to enhance competition.

To do otherwise is to allow Applicants to exploit their market power that is increased as a result of the merger. The condition would also help guard against retaliation.

F. Fuel surcharges should not operate as a profit center, and the safe harbor should not apply

Fuel costs are an example of an expense that would be passed through in a competitive market without additional mark-up. Under competitive market principles addressed above, a firm is able to pass along cost increases without an additional mark-up. Extraction of an additional mark-up constitutes the exercise of market power inconsistent with a competitive market. Efforts to convert fuel cost recoveries into a profit center would not succeed in a competitive market because customers would shift their business to other providers that did not attempt to extract the additional mark-up.

The Board's safe harbor for fuel surcharges allows railroads to use their fuel surcharges as a profit center. The Board allows carriers to use absolute changes in the retail price of fuel (HDF) as the proxy price to recover their incremental fuel costs, but carriers purchase fuel at lower wholesale prices. Retail and wholesale price changes are highly correlated in percentage terms, but because the safe harbor uses the absolute change in the higher retail price, the safe harbor produces an overrecovery when fuel prices increase. The potential corrective impact of price decreases is muted when railroads raise their strike prices and/or set floors on fuel surcharge reductions. UP has exploited this mismatch, as reflected in total fuel surcharge revenues that exceed its total fuel costs, when the surcharges are supposed to recover only changes in incremental fuel costs. *E.g.*, Dan Bostek and Steve Blinn, *The Fuel Surcharge That Forgot It Was About*

Fuel (Sept. 10, 2026), https://www.linkedin.com/pulse/fuel-surcharge-forgot-daniel-bostek-9jfze/.

This practice would not occur in the type of competitive market that Applicants claim exists and that they seek to promote. The Board should hold Applicants to their word and require them to use fuel surcharges that recover only their incremental fuel costs. Any fuel surcharge should: (a) be based on actual fuel costs, meaning wholesale prices paid, not higher retail prices; (b) reflect actual changes in those costs; (c) incorporate improvements that the carrier or industry achieves in fuel efficiency over time; and (d) adjust to reflect cost decreases as well as cost increases, even if doing so results in negative fuel surchargers. These restrictions are necessary if the fuel surcharges are to operate as a cost recovery mechanism, as opposed to a profit center.

G. The cost of equity and overall cost of capital for UPNS should be no greater than that used for valuing the companies for their stockholders.

The S-4 for shareholder approval of the merger includes fairness opinions from three investment banks, Morgan Stanley, Wells Fargo, and Bank of America. Amended Application, Vol. 4, Ex. 7, starting at 4-705. Each fairness opinion seeks to value both UP and NS by employing a DCF analysis to discount each entity's future earnings to a fair market net present value using a cost of equity and/or overall cost of capital. The costs of equity and weighted average costs of capital are generally consistent with those previously presented by the Western Coal Traffic League (WCTL) in the Board's annual

cost of capital proceedings (EP 558).[13] These values are substantially below those that the Board regularly adduces in its annual determinations in EP 558.

Captive shippers, which are the shippers that are impacted by the cost of capital in terms of the jurisdictional threshold, stand-alone costs, and potentially the *SSW Compensation* formula insofar as trackage rights or reciprocal switching may be available,[14] should not be burdened with a cost of capital higher than that the railroads use in their dealings with their shareholders, particularly when those values are developed by several respected investment banks. Captive customers should not be treated worse than investors or required to subsidize owners with an above-market cost of capital. To do so is inherently anti-competitive and amounts to another form of subsidy.

The values presented by the three investments banks are not out of line with the values for the rest of the industry. CP, CN, and the former KCS all relied on similar values, including values from Morgan Stanley and Bank of America in the acquisition or

[13] There are some discrepancies in the Morgan Stanely values. Morgan Stanely uses a cost of equity of 9.5% for NS (p. 116) and 9.0% for UP (p. 120), but uses a weighted average cost of capital of between 7.8% and 8.6% for NS (p. 117) and between 8.0% and 10% for UP (p. 142). UP's maximum cost of equity value of 9.6% does not support a higher overall cost of capital of 10.0%. The values are also inflated relative to the values of around 7.0% that Morgan Stanley uses in its regular analyst reports.

Use of a higher cost of equity (discount rate) for an acquisition has been explained as reflecting a desire to reduce the value of the firm under review, which can make an acquisition offer appear more attractive. Gregory W. Eaton, *et al*., *The Cost of Equity: Evidence from Investment Banking Valuations*, Journal of Financial and Quantitative Analysis, Vol. 60, No. 7 (Nov. 2025), pp. 3228-3266.

[14] *SSW Compensation* calculations might also apply to so-called competitive traffic.

attempted acquisition of KCS. Furthermore, CSX has used a long-term cost of capital value of 8% in its annual report, proxy statements, and executive compensation.

The further consolidation of the rail industry should also prompt the Board to revisit its entire cost of capital methodology (although it scarcely needs a merger to find reasons to do so). The merger would leave only two carriers, UP and CSX, that qualify for the composite sample, and half of the cost of equity would effectively be set by perhaps no more than two analysts for two carriers. That is not a sufficiently robust sample, particularly when there is a lack of transparency as to how their estimates are made and to the extent they duplicate other items already accounted for in the MSDCF calculations, leading to double or triple counts for certain inputs. It is apparent that the Board's methodology consistently yields substantial overstatements of the cost of capital values that the railroads themselves and investors utilize.

UPNS should not be able to exploit customers with a cost of capital higher than what it uses for its own investors.

H. UPNS should be required to provide open gateways and other conditions, including mileage-based proportional rates, to avoid and minimize foreclosure problems

A major problem with mergers is economic foreclosure by closing gateways and thereby foreclosing use of UP or NS competitors in conjunction with UPNS.

Before the merger, a shipper might be captive to UP or NS for part of its movement, but have the ability to use other carriers on connecting segments and thus potentially benefit from some measure of intramodal competition for both competitive and captive shippers. Without appropriate conditions, the proposed merger would

eliminate this measure of choice and competition associated with neutral connections. A shipper that is captive to UP or NS for part of its movement would face foreclosure to use potential alternatives, particularly at key interchanges such as Chicago, which serves approximately 25% of the nation's rail traffic and nearly half of all intermodal traffic. *E.g.*, https://www.createprogram.org/impact-on-rail-industry/. In order for there to be effective competition, there needs to be effective choice. UPNS purport to recognize this concern and propose a general gateway condition based on the approach taken in the CPKC merger, but the approach is inadequate to preserve competition.

In the CPKC merger decision, the Board determined that the merged carriers should be required to maintain gateways for both new and existing business, which is an appropriate concept, but it was not well-executed. There was only one main gateway, the remedy was not self-executing, and shippers could obtain a written justification only if the increase exceeded inflation, as measured by the RCAF-U or the AII-LF plus fuel surcharge. *E.g.*, Russell Pittman, *Should Conditions Regarding Non-Discrimination Be Imposed in Vertical Mergers? The Surface Transportation Board on the Acquisition of the Kansas City Southern Railway by the Canadian Pacific*, DOJ EAG 24-3 (December 2024), available at https://www.justice.gov/atr/should-conditions-regarding-non-discrimination-be-imposed-vertical-mergers-surface.

In the CPKC merger, UP backed away from its vigorous prior support for the "one lump" theory, recognizing that the rigorous conditions required for the theory to work are seldom met in the real world. UP also sought broad open gateway relief based on a pro rated mills per ton mile standard, for which a which Rule 11 rate or equivalent division

would be available to the shipper or connecting carrier on request, allowing the non-merging carriers to compete. BNSF and a group of shipper associations sought the same basic relief. While they were only partially successful, CPKC was considered under the old merger rules.

While the objective is sound, the execution is lacking. Use of the RCAF-U or AII-LF allows the merging carriers to increase their rates and/or foreclose competition by more than the inflation in actual costs they experience due to the exclusion of productivity. The following table (previously presented in this filing) illustrates the change in the different price and cost indices over the ten-year period from the first quarter of 2015 to the first quarter of 2025:

Table 2
Comparison of Price/Cost Indices

Period	RCAF-U	AII-LF	RCAF-A	RCAF-5	GDP-IPD
1Q15	0.830	83.200	0.352	0.333	96.769
1Q25	0.957	106.900	0.367	0.347	127.577
Percentage Increase	15.30%	28.49%	4.26%	4.20%	31.84%

The increases in railroad input prices far exceed the increases in actual railroad costs.

Use of the RCAF-U allows the merging carriers to pocket the gains of industry-average productivity. The higher rates also suppress the ability of other carriers to compete because the gateway is "open" only on terms that excessively favor the merging parties. In a competitive market, competition would cause the benefit of that productivity to be passed through to customers, along with the value of the efficiencies gained by the merger. The specific approach is thus antithetical to the notion of enhancing productivity for the benefit of consumers. Use of the AII-LF is even worse as the AII-LF increases

faster than the RCAF-U (particularly as the implicit fuel component is increased by the AII-LF), and the fuel surcharge safe harbor facilitates overrecovery because of the increasing spread between retail and wholesale gas prices and the failure to adjust for improved fuel efficiency.

Shippers need to be able to choose from other carriers at existing UPNS interchange/gateway locations, particularly Chicago. A related problem is the need to limit application of the long-haul preference under 49 U.S.C. § 10705(a)(2)(C). An appropriate measure is that existing gateways should be maintained, and shippers should have the option to utilize other carriers at existing interchanges, more proximately potential interchanges, and more distant interchanges, without penalty. Whether the rate is a penalty should be measured against whether it is higher than the preexisting rate as adjusted by the lowest of the RCAF-A, the mills per ton-mile for the rate that UPNS proposes to charge for the entire movement to the extent it occurs over UPNS, or the mills per ton-mile that UPNS charges other shippers for similar commodities moving through the gateway to similar destinations,.

An adjustment is needed to the prorated mills per ton-mile calculation where the competitor movements may be short, particularly relative to the UPNS segments. An appropriate approach is the "Modified Straight-Mileage Prorate" that assigns a 100-mile block or credit for the additional costs of originating or terminating traffic, as was done prior to adoption of ATC for cross-over traffic in stand-alone cost rate cases. EP 657 (Sub-No. 1), *Major Issues in Rail Rate Cases* (STB served Oct. 30, 2006), at 28.

Beyond the rates themselves, other carriers need to receive equivalent service at the gateways. A competitor that can offer an equivalent, or even superior, rate will not be able to compete if UPNS favors its own trains and cars at interchange/gateway locations. The Board should impose rigorous reporting conditions so that shippers and competitors can determine if equivalent service is being provided or if UPNS is favoring itself, and the Board should be quick to impose robust remedies, including penalties, if such conduct is detected.

Preserving existing gateways is essential for preserving the existing level of competition and limiting foreclosure. Allowing shippers to use another carrier at the gateways will preserve competition so that shippers will have an opportunity to obtain some measure of the benefit of competition and efficiencies that may result from the merger. Setting and enforcing appropriate conditions may be challenging, but the merger should not be allowed to occur unless such conditions are adopted and implemented fully.

IV. Conclusion

For the reasons stated, the Board should deny Applicants' application for authority to merge. If the Board decides otherwise and finds that the merger is consistent with the public interest, it should impose the conditions identified above, and others, to limit Applicants' excessive exercise of market power and protect the public interest.

Respectfully submitted,

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Dated: November 18, 2026

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2026, a copy of the foregoing document was served by email or first class mail on the service list for FD 36873.

/s/ Robert D. Rosenberg

Exhibit A

Joint Written Submission of
Freight Rail Customer Alliance
and National Coal Transportation Association

In

EP 775, Growth in the Freight Rail Industry, dated August 16, 2024

308603

ENTERED
Office of Proceedings
August 16, 2024
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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

GROWTH IN THE FREIGHT RAIL INDUSTRY	)	**Ex Parte No. 775**

JOINT WRITTEN SUBMISSION OF FREIGHT RAIL CUSTOMER ALLIANCE AND NATIONAL COAL TRANSPORTATION ASSOCIATION

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Dated: August 16, 2024

BEFORE THE
SURFACE TRANSPORTATION BOARD

GROWTH IN THE FREIGHT RAIL INDUSTRY	))))	**Ex Parte No. 775**

JOINT WRITTEN SUBMISSION OF
FREIGHT RAIL CUSTOMER ALLIANCE
AND NATIONAL COAL TRANSPORTATION ASSOCIATION

The Freight Rail Customer Alliance ("FRCA") and National Coal Transportation Association ("NCTA") respectfully submit this written submission to accompany their in-person presentation to the Surface Transportation Board ("Board" or "STB").

I. FRCA and NCTA Representatives for the Hearing

The principal representative for FRCA and NCTA at the hearing will be Emily F. Regis, the long-time Fuel Services Manager of Arizona Electric Power Cooperative, Inc., who serves as President of both FRCA and NCTA. Ms. Regis will be accompanied by Robert Rosenberg of Slover & Loftus LLP, as counsel for FRCA and NCTA.

II. Identity and Interest of FRCA and NCTA

FRCA, www.railvoices.org, is an umbrella membership organization that includes large trade associations representing more than 3,500 electric utility, agriculture, chemical, and alternative fuel companies and their consumers. The mission of FRCA's

growing coalition of industries and associations is to obtain changes in Federal law and policy that will provide all freight shippers with reliable rail service at competitive prices.

NCTA, www.moveNCTA.org, is a non-profit corporation comprised of electric utilities, coal producers, shippers of coal-related commodities, and entities that produce, repair, and manage all facets of railcar component parts and systems as well as services for railcar operations. Its primary purpose is to promote the exchange of ideas, knowledge, and technology associated with the transportation and beneficial uses of coal and related bulk commodities, including coal ash, cement, and lime, among others.

III. Summary

FRCA and NCTA commend the Board for holding this hearing on the very timely and important topic of the lack of growth in the railroad industry.

The lack of growth and decline in rail volumes is largely attributable to the lack of competition within, and the related exercise of market power by, the railroad industry. Railroads have pursued higher rates and lower operating ratios at the expense of volume growth and service quality, to the detriment of shippers and the general public interest. Those rate increases have resulted in excess or monopoly profits, as the railroads long ago began outearning their cost of capital as measured by the investment community. *E.g., When Pigs Fly III: Silk Purses from Sow's Ears*, UBS Research (Rick Paterson, analyst), dated April 18, 2006.

Coal volumes have declined in recent years due in part to environmental restrictions and market forces, particularly the rise of renewables and low-priced natural gas. However, railroads have also contributed to coal's decline in various ways,

including disproportionate rate increases, poor, unreliable, and unpredictable rail service, and poor customer support. In particular, there are substantial volumes of coal that the railroads were unable and/or unwilling to transport in 2021-2023. The railroads' failure to serve harmed their utility customers and the communities the utilities serve. The service problems that erupt recurrently show that market incentives alone, *i.e.,* the railroads' need to be paid for transportation services rendered, are not sufficient to cause the railroads to provide adequate and reliable transportation service.

Since market forces alone are insufficient to constrain rate increases and achieve reliable and adequate rail service, regulatory involvement is appropriate. In particular, the Board should implement and enforce the common carrier obligation and the revenue adequacy constraint. Meaningful application and enforcement of the common carrier obligation is needed to provide assurance that the railroads can and do provide service that is reasonably needed and should be a requisite for the railroads to enjoy their many privileges. Application of the revenue adequacy constraint is needed so that the railroads do not engage in economic withholding, such as turning down and otherwise discouraging economically profitable traffic, especially to lower their operating ratios when those ratios are already low enough for the carriers to have achieved revenue adequacy.

In addition, the railroads should be required to provide adequate customer support and adopt terms and conditions that make it easier, not more difficult, for shippers to use rail transportation for commodities such as coal.

IV. Discussion

A. Key premises of the Staggers Act and other deregulation no longer hold.

A key premise of deregulation by first the Interstate Commerce Commission and later the Board under the Staggers Rail Act of 1980, the ICC Termination Act of 1995, and related legislation is that the railroad industry needed to be freed from excessive regulation to enable it to flourish and grow in order to benefit not only the railroad industry, but also the shippers and public that the industry ostensibly serves.

The railroad industry has certainly been freed from excessive regulation. Following enactment of the Staggers Rail Act, the railroad industry generally responded at first by increasing volumes and lowering rates, and the railroads and shippers both benefited. Shippers, particularly coal shippers, have certainly contributed the revenues to enable the railroads to achieve revenue adequacy. However, railroads, beginning early in the early 2000s, following a series of major railroad mergers, became more concerned with increasing their rates and profits and, more recently, reducing their operating ratios than growing their volumes.

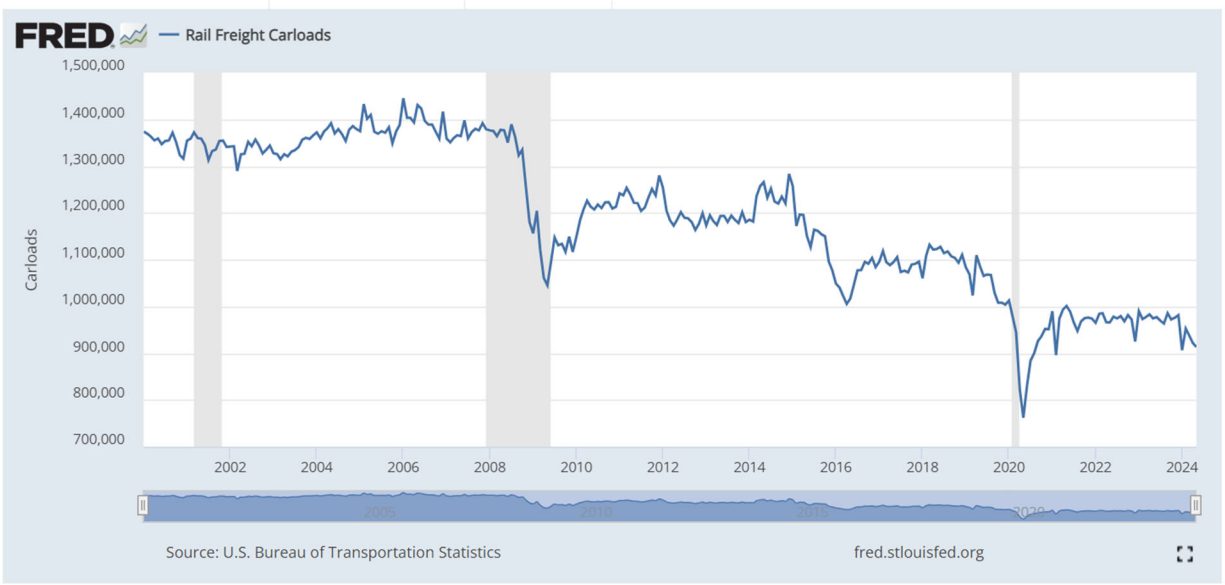
Quality of service has suffered. Railroads were to be incented to provide service because they would not be paid unless they delivered the freight. Railroads instead are now more concerned with handling traffic "efficiently" than with increasing their volumes and market share. The railroads' emphasis on reducing headcounts, running longer trains, and avoiding capital expenditures such as for lengthening passing sidings to accommodate their longer trains has led to congestion, delays, crew shortages,

unreliable and unpredictable service, poor customer relations, and foregone volumes. The railroads have benefited, as reflected in their soaring stock prices, even as service has been degraded and volumes reduced.

B. Despite projections of substantial growth, railroad volumes have not grown since 2000.

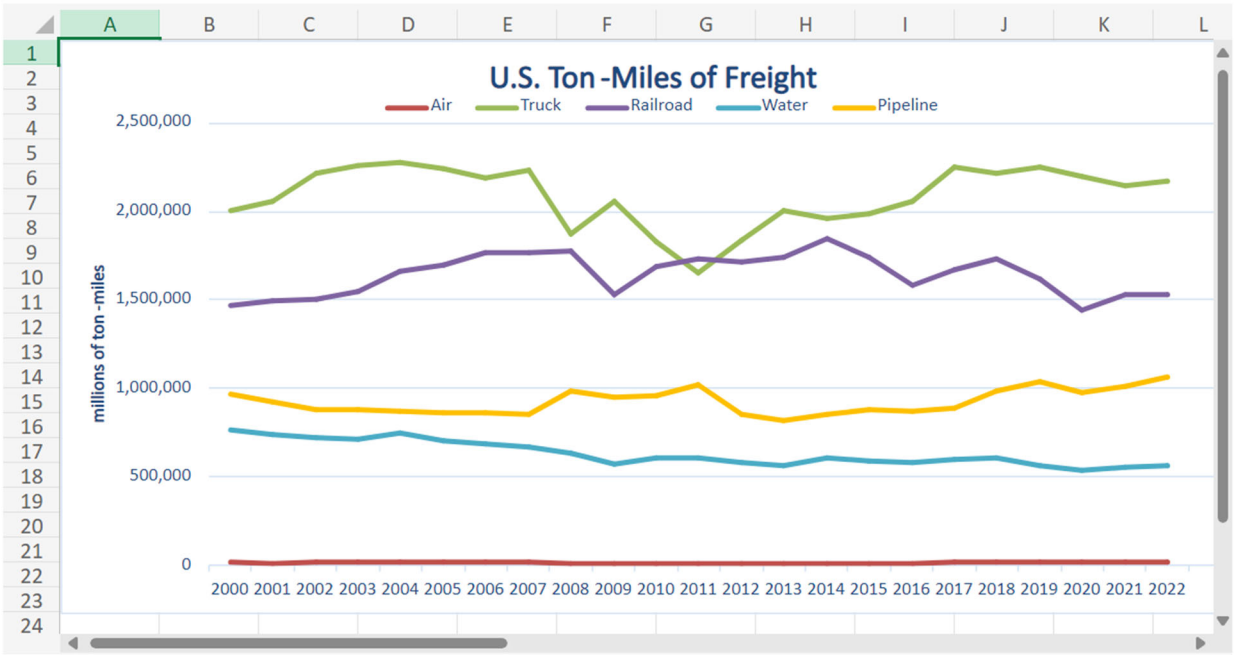
Following the enactment of the Staggers Rail Act, railroad volumes grew substantially. For example, data from the Bureau of Transportation Statistics ("BTS") shows that Class I ton-miles of freight grew from 876,984 million in 1985 to 1,595,242 million in 2001, an increase of 82%. *See* https://www.bts.gov/archive/publications/national_transportation_statistics/2004/table_01_46.

However, that trend has not continued. BTS data referenced in the Board's notice for the hearing shows a 27% reduction in rail carloads over the past decade and a 33% decrease since 2000.



See https://fred.stlouisfed.org/series/RAILFRTCARLOADSD11.

While railroads have grown their rail intermodal traffic over that period by a substantial amount, the increase in that traffic has not offset the decrease in carloads. Specifically, BTS data shows that rail freight ton-miles are essentially the same as they were in 2000 and 2009, despite some increases in interim years, even as truck freight ton-miles have increased since 2000 and especially since 2011.



See https://www.bts.gov/content/us-ton-miles-freight. In other words, traffic has been available, but the railroads have not obtained it.

The lack of growth in rail freight since 2000 is especially disconcerting since well-credentialed studies from the 2000s projected substantial and sustained increases in freight traffic over the next thirty years. *See* https://store.transportation.org/Common/DownloadContentFiles?id=1821 (Executive Summary for 2002 AASHTO Study, prepared by Cambridge Systematics);

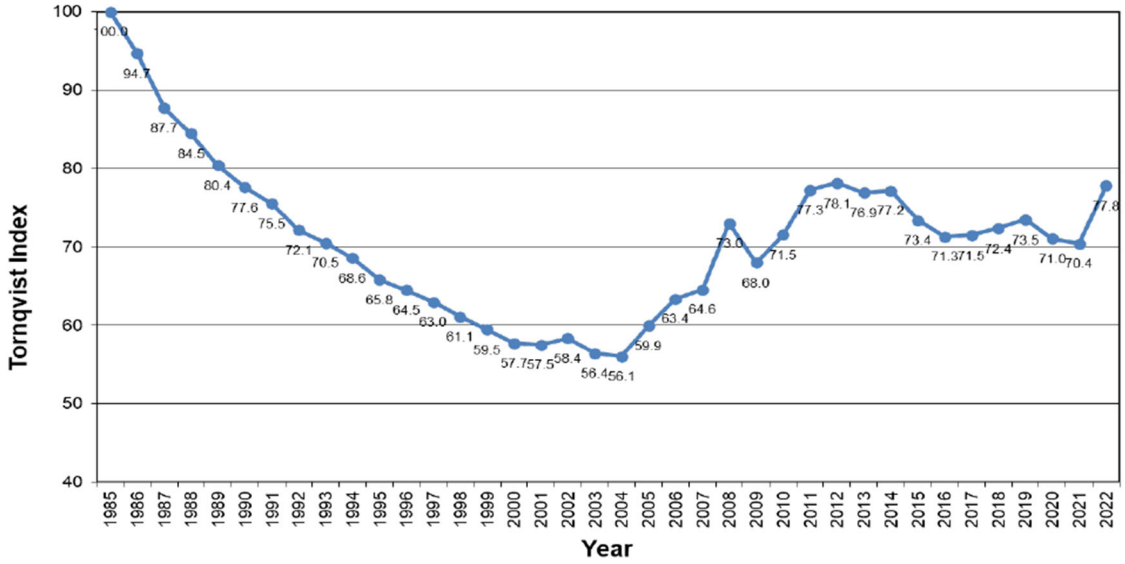
https://downloads.regulations.gov/OSM-2010-0021-0124/content.pdf (September 2007 study by Cambridge Systematics for the Association of American Railroads ("AAR")).

C. The railroads have instead focused on raising rates and profit margins at the expense of volumes.

The key question is whether this lack of growth in railroad volumes occurred despite the railroads' efforts to avoid it, or whether the railroads' actions and decisions contributed to the decline. As explained below, available data shows that railroads' actions, particularly their emphasis on raising their rates, contributed to the decline.

Data compiled and analyzed by the Board's Office of Economics shows that the Class I railroad rates, in real terms, declined substantially, while their rail volumes were increasing, until roughly 2001, and that the rates began increasing substantially in real terms circa 2004, when volumes stabilized and began decreasing.

Figure 1. Rail Rate Index Based on Real Revenue Per Ton-Mile, 1985=100



See https://www.stb.gov/wp-content/uploads/Annual_Rail_Rate_Index_Study_2022.pdf. Notably, the Board's analysis relies on a Tornqvist index that adjusts for changes in the traffic mix, such as the growth in coal (in earlier years) and intermodal, in contrast to presentations that rely on average revenue per ton-mile often favored by the AAR. *E.g.,* https://www.aar.org/issue/freight-rail-economic-regulation/#economic-staggers.

The inflection point in railroad rates circa 2004 is no coincidence. During this period, the railroads were adopting widespread use of separate fuel surcharges, which had the effort of separating rate changes from cost changes.[1] The western railroads also sought to adopt "public pricing" for their coal transportation. All of these matters contributed to the surge in railroad rates. In addition, the railroads experienced service problems during this period, and were unable to meet utility demand for coal, especially in the face of spiking gas prices (noted *infra*).[2]

It should come as no surprise that higher prices generally result in reduced volumes, even for so-called captive traffic. Railroads have been willing to sacrifice volumes for the sake of higher rates and higher profits. Their willingness and ability to

[1] The initial fuel surcharges were based on percentage of rate, rather than actual costs. After the Boad intervened, the surcharges for non-intermodal traffic were generally linked to changes in the retail price of diesel fuel, allowing fuel surcharges to continue to function as a "profit center," despite Board policy ostensibly prohibiting that outcome.

[2] *E.g.,* FERC Docket No. AD06-8-000, *Discussions With Utility and Railroad Representatives on Market and Reliability Matters*, 71 Fed. Reg. 33746 (June 12, 2006) (notice for FERC in-person hearing held June 15, 2006).

do so is a manifestation of market power, *i.e.,* in a competitive market, the loss of volume at least offsets the increased revenues and margins from the higher prices.

In more recent years, the trends and problems have been greatly exacerbated by the railroads' devotion to Precision Scheduled Railroading ("PSR") and reducing their operating ratios. The railroads have demonstrated their willingness to forego otherwise profitable traffic to pursue those operating ratio reductions.

The railroads have also demonstrated their commitment to taking rate increases in excess of the rate of inflation. Again, in a competitive market, such actions would be self-defeating because desirable traffic would depart for lower-priced alternatives. Similarly, in a competitive market, productivity improvements would be passed through to customers, and not retained. The railroads' ability to lower their operating ratios by reducing their volumes is thus a further indication that the market is not competitive and that the railroads are exercising their market power.

The resulting harm to society and consumer welfare is not limited to forcing captive and even so-called competitive shippers to pay higher rates than necessary to enable the railroads to achieve and exceed revenue adequacy. Excess payments leave customers with fewer dollars to cover their other needs and producers with less to cover their other inputs, including employee wages. The volume reductions resulting from the imposition of higher rates constitute "deadweight" loss of output for both production and consumption, which reduces output, growth, employment, and social welfare generally.

The higher rates and even volume reductions might be tolerable if the railroads were not generating sufficient returns to sustain their operations, *i.e.,* achieve revenue adequacy, or if the forgone traffic were unprofitable. But the Staggers Rail Act was enacted 44 years ago, and the railroads have had ample opportunity to address marginal traffic and abandon unprofitable segments. The railroads have achieved revenue adequacy as measured under the STB's bloated cost of capital, and did so nearly twenty years ago as viewed the investment community, despite the substantial asset write-ups due to railroad mergers.[3]

D. The railroads have also discouraged coal volumes through high rates, poor service, and other means.

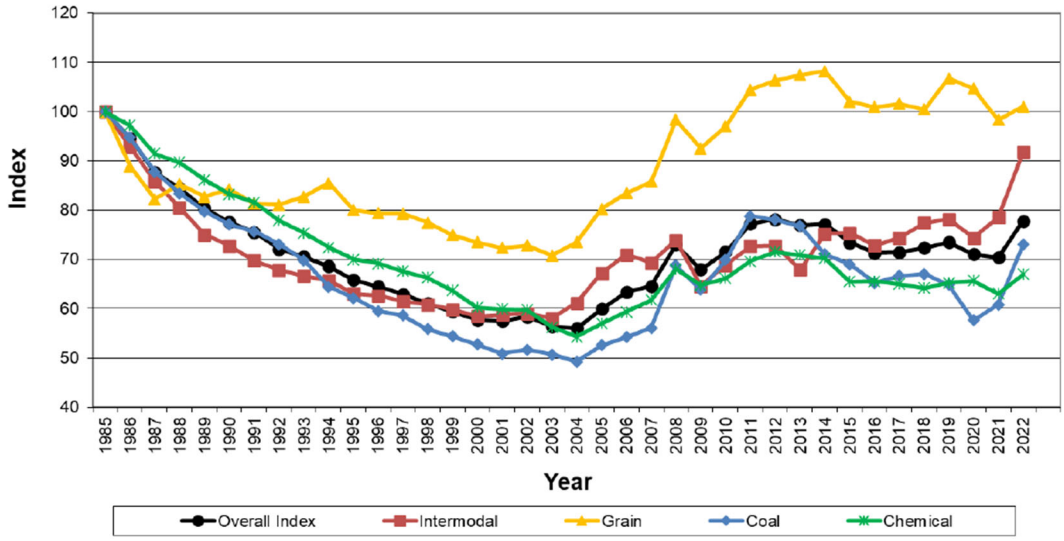
It is no secret that utility consumption of coal for generating electricity has declined in recent years. Those reductions result primarily from a combination of environmental restrictions and competitive pressures, particularly low gas prices and increased reliance on renewables. As with other commodities, coal transportation reflects a "derived demand," meaning electrical power, and electric utilities and other generators and suppliers generally supply power at the lowest cost possible consistent with other considerations, particularly reliability and, as noted, environmental restrictions. Electric utilities and generators have no control over these factors, particularly fluctuations in natural gas prices, and little ability to predict their course, despite the use of marketing and forecasting models developed by industry-wide experts.

[3] The BNSF and CPKC accounting records reflect goodwill, with tangible asset valuations exceeding fair market value.

Within this context, railroads have taken several actions that have contributed to the decline in coal traffic and failed to take other actions that could have mitigated the volume declines.

The first is that they have increased rates on coal disproportionately to their other traffic. This development is depicted in Figure 4.1 from the Board's Tornqvist study referenced previously:

Figure 4.1 Rail Rate Indices for Commodity Groups, 1985=100



From 2004 to 2022, the railroads increased their rates on coal by 49% (73/49), whereas they increased their overall rates by 39% (78/56).[4] The additional increase of 1,000 basis points, or 24.6%, on coal demonstrates how the railroads increased coal rates disproportionately to their other traffic, contributing to the decline in coal volumes. The

[4] The actual index values are taken from https://www.stb.gov/wp-content/uploads/Rate-Study-Workbook-Documentation-1985-2022.xlsx.

rate increases are particularly significant for coal from the Powder River Basin ("PRB") in Wyoming and Montana because the price of coal transportation often exceeds the f.o.b. mine price of the coal itself. The rate increases show how the railroads favored profits and margins over volumes.

The Board's Tornqvist analysis uses the Gross Domestic Product Implicit Price Deflator ("IPD") to state nominal rates in real (inflation-adjusted) terms. Study at 6. The IPD tends to overstate the inflation that railroads experience in terms of their actual costs, especially after accounting for productivity. For example, over the decade from 4Q12 to 4Q22, the IPD increased by 28% (120.039/93.885),[5] which equates to a compound annual growth rate of 2.5%. In contrast, the RCAF-U increased by 15% over that period (1.0/0.869), a compound annual growth rate of 1.4%.[6] More significantly, the RCAF-A increased by 7.1% (0.407/0.380), a compound annual growth rate of 0.7%. Use of the IPD in the Board's Tornqvist study thus masks the level of escalation in rail rates relative to inflation in actual railroad costs.

Accordingly, the very slight decline in real rates shown in the Tornqvist study for overall traffic (Figure 1) from the seemingly post-2000 apex in 2012 (78.1) to

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[5] *See* https://apps.bea.gov/iTable/?reqid=19&step=3&isuri=1&1921=survey&1903=13#eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwyLDMsM10sImRhdGEiOltbIk5JUEFfVGFibGVfTGlzdCIsIjEzIl0sWyJDYXRlZ29yaWVzIiwiU3VydmV5Il0sWyJGaXJzdF9ZZWFyIiwiMjAyMyJdLFsiTGFzdF9ZZWFyIiwiMjAxMiJdLFsiU2NhbGUiLCIwIl0sWyJTZXJpZXMiLCJRIl1dfQ==.

[6] The RCAF-U and RCAF-A values are available at https://www.aar.org/wp-content/uploads/2024/06/RCAF-History-2024Q3.pdf.

2022 (77.7), as shown in Figure 1 of the study, is illusory. The annual increase that the railroads experienced in their costs was 0.7%, not 2.5%. Deflating the nominal index values (143.3 and 180.6) by the corresponding RCAF-A values (0.380 and 0.407), shows a real compound annual increase in railroad rates, in excess of cost inflation, of 1.6%.[7]

Second, the railroads have been unable or unwilling to ship coal that was available for transportation. This service deficiency was especially evident during the 2021-2023 time frame, as reflected in two complaints filed against BNSF at the Board.[8] However, the problems were not confined to NTEC and Evergy. To the contrary, NCTA has periodically conducted on-time surveys among its members. Those surveys, portions of which have been presented at meetings of the Board's Rail Energy Transportation Advisory Committee ("RETAC"),[9] show substantial, even massive railroad failures to meet utility nominations.[10] In particular, the presentation for the April 26, 2023 meeting showed that 20% of survey respondents for the second half of 2022 experienced more

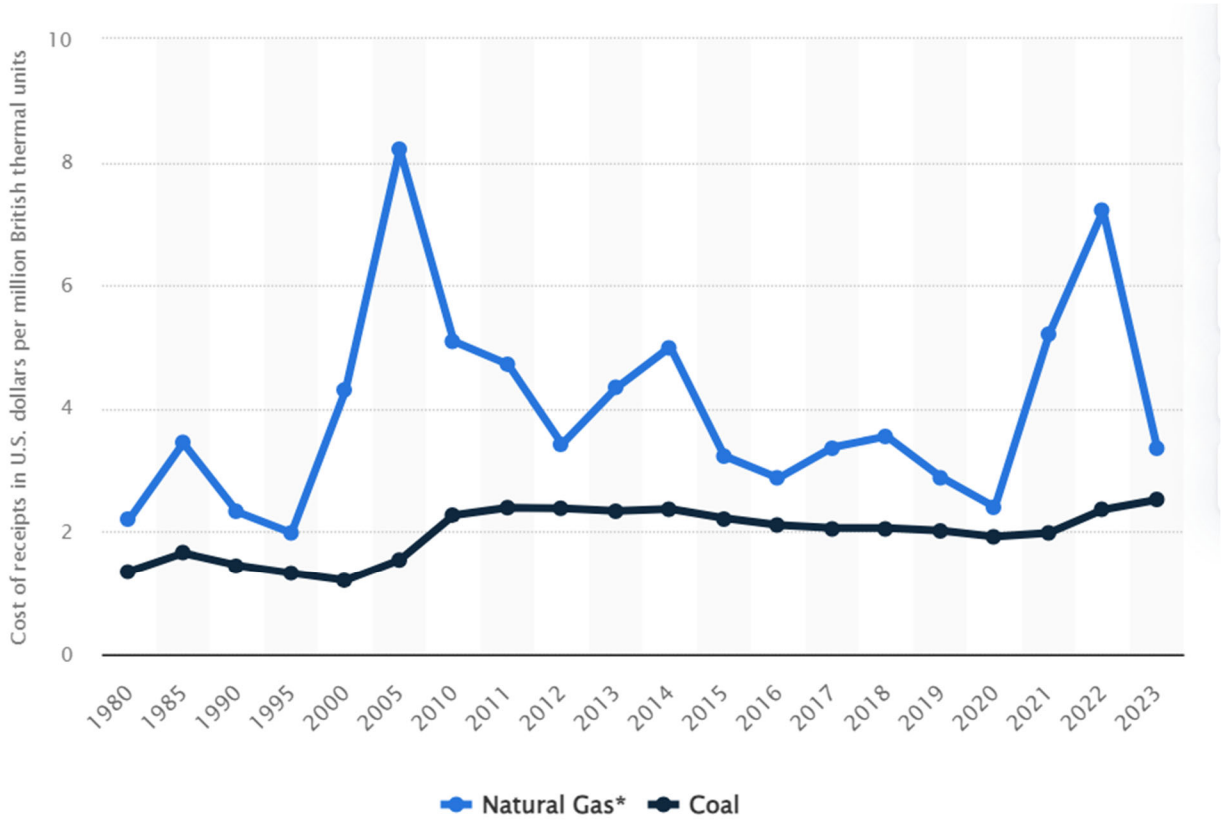
[7] (180.6/0.407)/(143.3/-0.380)=1.177, which has a tenth root of 1.016.

[8] *Navajo Transitional Energy Company, LLC—Ex Parte Petition for Emergency Service Order*, NOR 42178; *Evergy, Inc., Evergy Metro, Inc., and Evergy Kansas Central, Inc. v. BNSF Railway Company*, NOR 42180.

[9] Ms. Regis serves on RETAC and presented the survey results at some of the RETAC meetings.

[10] *E.g.,* https://www.bnsf.com/about-bnsf/financial-information/pdf/performance-summary-2q-2024.pdf (Nov. 16, 2021 meeting); https://www.stb.gov/wp-content/uploads/RETAC-UTILITIES-april-20-2022.pdf (Apr. 20, 2022 meeting); https://www.stb.gov/wp-content/uploads/STB-RETAC-utility-2022-1022.pptx (October 26, 2022 meeting); https://www.stb.gov/wp-content/uploads/Utilities-Industry-Segment-Update-PDF.pdf (Apr. 16, 2023 meeting); https://www.stb.gov/wp-content/uploads/RAILROADS-October-2023-Slide-Deck.pdf Oct. 18, 2023 meeting).

than $50 million individually in increased costs. While the railroads may have foregone profits on the unshipped volumes, the harm inflicted on utilities and their customers was far greater, as potential coal generation was displaced with natural gas generation (or purchases of power generated elsewhere with natural gas). As shown below, prices for replacement natural gas might be as much as quadruple the cost of coal.



See https://www.statista.com/statistics/189180/natural-gas-vis-a-vis-coal-prices/. The chart depicts the gap between coal-fired and natural gas-fired power from 1980 through 2023, including spikes during periods of railroad service meltdowns around 2006, 2014, and 2022. As the figures depicted are national averages, they mask the impact on Western coal, which typically has a delivered cost far lower than Eastern coal.

The railroad service meltdowns injured others. For example, the Wyoming Mining Association estimated a reduction in Wyoming coal production of 50 million tons in 2022 alone and a loss of about $100 million in Wyoming severance tax revenues. *See* https://cowboystatedaily.com/2023/01/22/rail-service-cost-wyoming-100-million-in-coal-revenue-in-2022/.

In that regard, it is important to understand that the loss of the coal-burning opportunity is permanent, *i.e.,* a "make up" delivery does not allow the utility to alter its dispatch decisions retroactively. Utilities make decisions whether to dispatch coal-fired plants and consume coal in real time based on cost and related factors.[11] Coal may have a favorable position in the utility's portfolio stack or the market at one time, but not at another time. If coal is not available at the earlier time, then the coal cannot be burned. Coal delivered at a later time will generally not be burned unless and until the economics are favorable.

Use of a stockpile may mitigate these problems, but only within limits. Power plants do not have unlimited space for stockpiling coal, and the cost of maintaining a stockpile is considerable, although many utilities have chosen to increase their stockpiles to guard against the rail service problems that have become more recurrent in recent years. Stockpiled coal requires paying the railroad and the coal supplier in advance of when the coal is consumed. For example, a 300,000-ton stockpile

[11] In some instances, the utility or other generator may not make its decisions on its own, particularly where dispatch is controlled by a regional authority such as an independent system operator, regional transmission organization, or power pool.

of PRB coal with an f.o.b. mine price of $15/ton plus a transportation cost of $20/ton represents an investment of $10.5 million, which translates into an annual carrying cost, at a 10% cost of capital, of $1.05 million. That $1.05 million constitutes a 17.5% additive to the cost of the coal transportation itself ($1.05 million/$6 million). Furthermore, the stockpile requires management to limit oxidization (including loss of heating value) and self-combustion.

The larger problem is that when railroad service suffers a meltdown, as it did in 2005-2007, 2013-2014, and 2021-2023, shippers are unable to receive adequate deliveries, or obtain reliable information as to what volumes are delivered, and are forced to curtail coal generation to preserve the stockpile in order to maintain reliability, that is, to ensure that the lights stay on and brownouts and blackouts are avoided. Utilities face severe consequences, such as federal penalties of up to $1.5 million per violation per day, for failing to maintain reliability. While utilities are generally able to preserve reliability, the cost of doing so can spike when the railroads do not deliver adequate volumes of coal, which results in the large economic harms reported in the NCTA surveys.[12] In that regard, it should be noted that utility coal is relatively easy for the railroads to transport compared to other commodities, *e.g.,* shippers frequently supply the railcars, the coal moves in long trainsets that reduce the number of trains required to transport the product,

[12] An exacerbating factor is that railroads may first insist on knowing the size of the plant's stockpile and then reduce coal deliveries if they deem the stockpile sufficiently adequate. Utilities seeking to manage their stockpiles responsibly in such circumstances may be caught in a Catch-22 and/or moral hazard.

the trainsets shuttle intact between origin and destination with little if any switching, the coal is generally loaded and unloaded quickly on loop tracks provided at the mine and the power plant, and the mines and receiving facilities generally operate on a 24x7 basis.

The following table summarizes responses from recent NCTA surveys regarding the level of railroad service and service problems experienced by respondents:

	Longer than typical or historic transit times	Lack of railroad crews causing delays	Delayed train pick ups	Trains being doubled in transit	Lack of locomotive power available	Poor communication from the rail carriers	Missed car switches	Increased charges by the railroads
July 2021-Dec 2021	75%	91%	68%	59%	75%	50%	32%	26%
Jan 2022-June 2022	90%	90%	90%	52%	68%	40%	32%	20%
July 2022-Dec 2022	69%	88%	82%	57%	57%	31%	25%	25%
Jan 2023-June 2023	60%	87%	53%	45%	65%	40%	20%	27%
July 2023-Dec 2023	14%	57%	85%	43%	43%	43%	28%	14%

The table shows that the vast bulk – as much as 90% of respondents in the first half of 2022 – experienced service problems as measured by transit times in the 2021-2022 time period. Those problems included delays due to lack of train crews, delayed train pick-ups, and unavailability of power. While service as measured by transit times did improve in the second half of 2023 (when natural gas prices were very low and coal consumption was reduced), problems still persisted, *e.g.,* more than half of respondents reported train crew problems and 85% reported delayed pick-ups. In short, service problems remain pervasive.

The surveys identify another frequent problem, poor communication by the rail carriers. This problem is not confined to coal and reflects the railroads' unwillingness to invest in adequate human resources. The communication problems feed into other problems, as shippers will be forced to conserve coal when they cannot obtain accurate and responsive information as to what level of service they will receive.

A fourth problem is that the railroads insist on rigorous terms and conditions for their shippers that limit or discourage coal volumes, but do not hold themselves to similar terms and conditions. Shippers are subject to charges and other penalties if they delay trains, but the railroads are not. The level of railroad service is highly variable and unpredictable, and, as noted, railroad communications are often lacking. In contrast, the railroads generally insist that shippers nominate in advance and ship volumes in monthly ratable amounts. Accordingly, when coal burns and demand fluctuate in response to market conditions that utilities do not control and cannot always accurately predict, there is often no firm commitment from the railroads to transport the coal when it is needed. Shippers become cautious and conservative in nominating volumes in advance, when future conditions are unknown. As a result, coal that shippers want to transport, and that is profitable for the railroads to handle, does not get shipped.

A very recent example is BNSF's amendment of its 6041-B Rule Book to require shippers to provide information on the stockpile level in both tons and "full burn days." This information is highly confidential and proprietary and can be difficult to assemble. Moreover, BNSF has not explained the need for this information, although it is presumably to be able to allocate service among its customers, which gives BNSF the ability to choose winners and losers. While a shipper in dire circumstances might be willing (or coerced) into providing this information as a condition of receiving service, BNSF should not be allowed to require the information as a matter of course. BNSF should certainly not be allowed to require such information when BNSF itself provides

poor, inadequate, inconsistent, and unpredictable service and also fails to provide adequate customer communications.

The core problem is that railroads have excess market power that allows them to impose onerous conditions that serve to reduce available volumes. The railroads desire to eliminate or shift risk to their customers, but the ultimate result is market dysfunction, all the more so when railroads are more motivated to lower their operating ratios and increase their efficiency than to grow their volumes.

E. The needed solutions include implementation and enforcement of the common carrier obligation and revenue adequacy rate constraint.

The regulatory responses to the railroad volume issue should include implementation and enforcement of the common carrier obligation and revenue adequacy constraint.

Enforcement of the common carrier obligation is needed to ensure that the railroads have adequate incentive and capability to provide needed service. Recent experience has shown that the railroads are willing to shun otherwise profitable traffic that does not contribute sufficiently to lowering their operating ratios. The railroads are also willing to forego investing in capacity and resiliency for the same reason. Their actions leave the railroads unable to provide service upon reasonable request, and available volumes and needs go unserved and unmet. Also distressing is that the railroads have chosen to focus their efforts instead on growing intermodal traffic, where there is at least the potential for transportation by some other mode.

Even if the Board elects to continue addressing the common carrier obligation on a case-by-case basis, the Board can and should establish both standards and an enforcement mechanism, such as clear availability of injunctive relief and penalties or damages, for failure to provide adequate service. While much of the railroads' traffic moves under contracts or exemptions, the Board should still establish a common carrier baseline that shippers can utilize in deciding whether to enter into contracts and on what terms and that the Board can utilize for determining if exemptions should be revoked or revisited. In that regard, contracts often incorporate the common carrier standard as the level of service to be provided under the contract.

In addition to adding teeth to the common carrier obligation, the Board also needs to address the rate component of the transportation equation, as the data shows that railroads can and do control and reduce their volumes by increasing rates, which can also serve to lower the operating ratio.

To that end, the Board should flesh out and enforce the revenue adequacy constraint. There should be no question that the railroad industry has generally achieved revenue adequacy as measured by the Board's own railroad industry cost of capital, and even more so utilizing the lower cost of capital recognized by the financial and investment community and even the carriers themselves, *e.g.,* the 8% that CSX presented in its most recent annual report.[13]

[13] The lone exception to revenue adequacy may have been KCS, but its perceived revenue inadequacy proved no obstacle to the CP and CN bidding war that resulted in a massive acquisition premium and large goodwill write-up.

Revenue adequacy is not an end in and of itself, but instead a means for assuring that railroads have the ability to meet the other objectives of the national transportation policy at 49 U.S.C. § 10101, provide service upon reasonable request, serve captive traffic at rates that do not exceed reasonable maximums, and follow reasonable practices. Shippers, particularly coal shippers, have provided funds to enable railroads to achieve revenue adequacy. Now that one of the prime objectives of the Staggers Act has been achieved, shippers and the public should receive an appropriate return on their investment. That return is frustrated, even negated, when railroads elevate their operating ratios over service.

IV. Conclusion

The reason that railroad volumes, especially carloads, have declined is, simply stated, that the railroads would prefer to handle less traffic at higher rates with degraded service. They wield the market power to do so, and exercising that power reduces their operating ratios and increases their profits and profit margins. Customer needs and the public interest are undercut by investor incentives.

The appropriate response for the Board is to restore the incentives that the marketplace is unable to or cannot provide. The appropriate tools available to the Board are to enforce the common carrier obligation to provide service upon reasonable request, rather than allow or encourage the carriers to withhold service, and to flesh out and apply the revenue adequate constraint.

Respectfully submitted,

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