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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36844

**COMMUTER RAIL DIVISION OF THE REGIONAL
TRANSPORTATION AUTHORITY D/B/A METRA
—TERMINAL TRACKAGE RIGHTS—
UNION PACIFIC RAILROAD COMPANY**

MOTION TO STRIKE

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Dated: June 25, 2025

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Due process prevents the Board from issuing a decision based on evidence to which one party had no opportunity to respond. Allowing parties to submit evidence at a late stage in a proceeding not only violates due process protections, but it deprives the agency of the ability to hear the parties' best evidence and leads to the inefficient administration of cases.

Metra, who bears the burden of proof in this proceeding, was required by Board rules to submit its best evidence and argument on opening and is precluded from offering alternative or supplemental arguments on rebuttal. Metra has flouted those rules.

First, Metra has submitted impermissible evidence on compensation under SSW principles. The heart of this case relates to the appropriate compensation for access to the UP Lines. Metra argued on opening that Union Pacific's offer was economically unreasonable, but Metra provided no evidence in support, nor did it put forward its own view of economically reasonable compensation (let alone compensation under condemnation principles). Instead, Metra waited to unveil an

expert opinion and purported SSW calculations until *after* Union Pacific submitted its reply evidence. It attempts to justify its late-filed evidence “[i]n the interest of completeness.”¹ But that is not the standard, nor is the record in any sense “complete” if one party is deprived of an opportunity to respond to new evidence. The Board’s rules are clear: this evidence should have been submitted on opening.

Second, Metra modifies its opening position to seek new relief: interim access to a wide array of facilities—including parking lots, offices, and undefined “other real estate and facilities”—for \$21 million, which Metra incorrectly claims preserves the status quo.² Metra’s opening position was that it was entitled to access without any form of compensation order by the Board. Metra specifically stated that it was “not asking the Board to set compensation at this time.” Metra may not now revise its position to seek interim compensation with a number proposed and supported for the first time on rebuttal.

The Board has rightly committed itself to the orderly and efficient administration of cases, which requires parties to provide their best argument and evidence in their opening submissions. The Board should enforce its rules and strike Metra’s impermissible evidence, as explained below.

¹ Metra Rebuttal at 36.

² *Id.* at 44.

ARGUMENT

I. The Board's Rules Required Metra to Submit Its Evidence on Opening.

“The interests of fairness and orderly handling of a case dictate that parties submit their best evidence on opening, so that each party has a fair opportunity to reply to the other’s evidence.” *Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. BNSF Ry.*, Docket No. NOR 42057, at 2 (STB served Apr. 4, 2003). “Board rules clearly direct that complainants put forth their best and most complete case on opening.” *Total Petrochems. & Refin. USA, Inc. v. CSX Transp., Inc.*, Docket No. NOR 42121, at 9 (STB served May 31, 2013). Metra, as the party that bears the burden of proof, was therefore required to submit a “fully supported case on opening.” *Duke Energy Corp. v. Norfolk S. Ry.*, 7 S.T.B. 89, 101 (2003); *see also Gen. Procs. For Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 445–46 (2001) (it is incumbent that the party who bears burden of proof “present its entire case in-chief in its opening evidence”). The Board has emphasized that rebuttal “may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions.” *Gen. Procs.*, 5 S.T.B. at 446.

It is not only fundamental due process issues that are at stake. Preventing improper rebuttal has another key virtue: ensuring the efficient administration of cases. The adversarial process allows the Board to hear both sides’ best evidence. But because late-filed evidence and argument would otherwise deprive the Board of the ability to hear both sides, the agency has accepted impermissible replies which unduly extend and complicate proceedings. As Chairman Fuchs stated recently, enforcement of the regulatory prohibition against replies to replies is needed “to

ensure fulsome initial filings, reduce burden on parties, and better use agency resources.” *See Norfolk S. Corp.—Acquis. of Control—Norfolk & Portsmouth Belt Line R.R.*, Docket No. FD 36836, at 10 (STB served Mar. 14, 2025).

But to ensure the orderly and fair administration of cases, the Board cannot simply enforce its prohibition on replies to replies without simultaneously enforcing its rule requiring parties to submit their case-in-chief on opening. *See M&G Polymers USA, LLC v. CSX Transp., Inc.*, Docket No. NOR 42123, at 9 (STB served Sept. 27, 2012) (“Principles of fairness and the orderly handling of cases require that ‘parties submit their best evidence on opening, so that each party has a fair opportunity to reply to the other’s evidence.’”); *Total Petrochems.*, Docket No. NOR 42121, at 9 (same). To do otherwise would encourage complainants to withhold key arguments and evidence and submit them later when respondents have no opportunity to respond, contravening the Board’s rules and basic precepts of fairness.

When a complainant submits impermissible evidence, the appropriate remedy is to strike that evidence from the record. *See, e.g., Consumers Energy Co. v. CSX Transp., Inc.*, Docket No. NOR 42142, at 5 (STB served Dec. 9, 2016); *Sunbelt Chlor Alkali P’ship v. Norfolk S. Ry.*, Docket No. NOR 42130, at 8–9 (STB served June 20, 2014); *M&G Polymers*, Docket No. NOR 42123, at 9 n.24.

II. Metra Has Submitted Improper Rebuttal on SSW Compensation That Could and Should Have Been Presented on Opening.

On opening, Metra claimed that Union Pacific's proposed rate is "economically unreasonable and monopolistic."³ Metra provided no evidence to support this claim. Nor did Metra state what it believed would be an economically reasonable rate. On reply, Union Pacific demonstrated that its proposed rate is not only economically reasonable, but it is conservative. Union Pacific did so through the verified statement of Professor Julie M. Carey, who independently assessed the reasonableness of Union Pacific's proposed rate by reviewing both recent comparable rates agreed to in arms' length transactions and valuations of the UP Lines.

In its rebuttal, Metra states that "[i]n the interest of completeness" it is providing evidence now of what it believes is a reasonable rate.⁴ That evidence, and all of Metra's arguments relying on it, should be stricken from the record. Rebuttal arguments are limited to responding to the reply presentation of the opposing party, and should not introduce new evidence. While Mr. Mulholland's statement responding to Professor Carey is permissible (albeit unpersuasive) rebuttal evidence, it is classic "sandbagging" for Metra to introduce SSW calculations on rebuttal. *See Consumers Energy*, Docket No. NOR 42142, at 5 (granting a motion to strike when complainant referenced demurrage costs on opening but "wait[ed] for rebuttal to calculate its rail demurrage costs," thereby "depriv[ing] CSXT of the

³ Metra Opening at 2.

⁴ Metra Rebuttal at 36.

opportunity to respond in full”); *Sunbelt*, Docket No. NOR 42130, at 10 (granting motion to strike when complainant provided no empirical support for the size of road master districts on opening and instead waited until rebuttal to submit expert testimony to support that position). This new evidence could have and should have been submitted earlier.⁵

Metra’s attempt to introduce SSW evidence in response to Union Pacific’s motion to dismiss should likewise be stricken. The motion to dismiss related only to jurisdictional grounds, yet Metra used that filing to introduce into the record new argument and evidence regarding the reasonableness of Union Pacific’s offer. Such argument and evidence should have been submitted on opening, where Metra asserted its view that Union Pacific’s offer is unreasonable. Instead, Metra waited until its reply on an unrelated motion—another point at which Union Pacific has no opportunity to respond—to argue the rate Union Pacific is proposing is “at least triple a reasonable calculation under the capitalized earnings framework of the SSW Compensation formula.”⁶ Metra then submitted as an exhibit “representative calculations,” which were neither accompanied by a verified statement nor workpapers. The fact that Metra couched its arguments in terms of the proposed

⁵ Metra has pointed to capitalized earnings under SSW during commercial negotiations for several years, and appears to have had these particular calculations since May 2025, as Mr. Mulholland concedes that his calculations under SSW were the basis for Metra’s federal court allegation regarding what it claims is the appropriate rate range. *See* Metra Rebuttal, Verified Statement of Robert D. Mulholland at 23, 27; Metra First Amended Complaint, *Commuter Rail Div. of the Reg’l Transp. Auth., d/b/a/ Metra v. Union Pac. R.R.*, No. 25-cv-2439 (N.D. Ill. filed May 27, 2025), ¶ 6.

⁶ Metra Reply to Motion to Dismiss at 19.

Condition of Entry is irrelevant—that had nothing to do with Union Pacific’s motion to dismiss and the rate Union Pacific proposes to charge as part of its Condition of Entry is the same rate offered in May 2025.

Metra appears to use its purported SSW calculations both to bolster its opening assertion that Union Pacific’s rate is unsupported and to support its newly introduced argument (which should also be stricken as discussed below) that interim compensation of approximately \$21 million satisfies condemnation principles, as required by law. Yet Union Pacific is precluded at this point from being able to meaningfully assess and respond to this new evidence and argument.

This evidence goes to a key issue in this case. The dispute between the parties is fundamentally about compensation, and Union Pacific’s rights as a property owner are at stake in this condemnation proceeding. It would be fundamentally unfair—and a violation of the statute—if the Board were to order access and set interim compensation without providing Union Pacific with an opportunity to meaningfully respond to these terms, including on the issue of consistency with condemnation principles, as is required by law.

Even at first glance, there are serious issues with Metra’s late evidence that would need to be addressed through the adversarial process. The capitalized earnings approach sets grossly insufficient compensation where there is limited freight traffic on a line. In the case of the McHenry branch, where there is no freight traffic at all, capitalizing the net present value of zero earnings would result in a zero valuation. Legal and evidentiary briefing by both sides will be needed to

address that issue and many others, but that cannot happen because Metra introduced this methodology for the first time on rebuttal. Taking a step back, discovery, briefing, and evidentiary submissions would also be required on the appropriate methodology—especially in this context, where, given the value of the rail corridors in the heart of Chicago, any reasonable market rental factor would result in compensation well above the calculations proposed by Metra.

If the Board concludes Metra has satisfied its burden of proof for terminal trackage rights, Union Pacific explained that it is willing to accept as an interim term its proposed access fee until proper compensation under condemnation principals is adjudicated. It is not, however, waiving its right to have full compensation set in accordance with condemnation principals “paid or adequately secured” before Metra may begin to use any facilities under 49 U.S.C. § 11102(a). This right is set by statute and fundamental Constitutional principles. In addition to its rights under the Hobbs Act, Union Pacific would have the right to file an immediate civil action against Metra to challenge the interim compensation. *See* 49 U.S.C. § 11102(b).

III. On Rebuttal, Metra Modified Its Position When it Improperly Submitted Its Own Proposed Interim Terms and Conditions.

In its application, Metra was emphatic that it was “not asking the Board to set compensation at this time,” and espoused the view that—despite the clear statutory directive—compensation need not be decided before trackage rights usage

may commence.⁷ Likewise on opening, Metra argued that “the Board under § 11102(a) should not determine the appropriate compensation to be paid for Metra’s use of UP’s facilities at this point in the proceeding” and attempted to distinguish the statutory requirement that compensation be “paid or adequately secured before” use.⁸

In reply, Union Pacific demonstrated that use of its lines could not commence without compensation being paid or adequately secured. But because compensation proceedings are lengthy, Union Pacific offered interim terms and compensation that it would accept until final terms and conditions were established.

Rather than simply responding to Union Pacific’s proposed terms, Metra goes a step farther and now changes its position to affirmatively seek its own interim terms and conditions. It now argues—for the first time—that “if the Board grants tracks [sic] right, or while the Board is considering Metra’s application, interim compensation is appropriate.”⁹ And to support this reversal of position and request for relief, Metra includes a declaration it recently submitted in federal court and two Memoranda of Understanding between the parties.

As in the *M&G* case, “the theory advanced by [Metra] on rebuttal is inconsistent with the positions it adopted on opening.” *M&G Polymers*, Docket No. NOR 42123, at 10. Metra is not simply responding to Union Pacific’s arguments, as

⁷ Metra Application at 25.

⁸ Metra Opening at 43.

⁹ Metra Rebuttal at 41.

rebuttal is intended to do. Metra is now asserting arguments “that are in direct conflict with those proffered on opening.” *Id.* And to support its new request for interim relief, Metra is providing evidence and argument for the first time on rebuttal. However, complainants may not “alter the core assumptions upon which its case-in-chief is based without filing a separate petition to supplement the evidentiary record,” to which Union Pacific would have an opportunity to respond. *Duke Energy*, 7 S.T.B. at 101. Given that Metra did not do that, its rebuttal evidence should be stricken.

Like its newly introduced SSW evidence, Metra’s new request for interim terms and conditions raise a host of issues that require adversarial briefing by both parties. For example, Metra’s application for terminal trackage rights “relates to the three UP Lines,” which it defines in its application as “the UP-N line” from OTC to Kenosha (MP 51.6), the “UP-NW line” to Harvard (MP 62.8), “with a branch to McHenry” (MP 58.2), and “the UP-W line” to Elburn (MP 43.5).¹⁰ Nowhere in its application did Metra suggest it was seeking terminal trackage rights for “parking lots” and “offices.” But under its new terms and conditions, without even addressing the statutory requirement limiting access to terminal facilities or “main line track” a reasonable distance outside the terminal, Metra asks for access to that property. Even more problematic is the request that the Board order access to undefined

¹⁰ Metra Application at 7–8. In its discovery requests, Metra likewise defined the UP Lines “for which Metra has applied for terminal trackage rights” as being the “UP-North or UP-N, the UP-Northwest or UP-NW, and the UP-West or UP-W *railroad lines* of UP.” Metra First Set of Discovery Requests, Definitions ¶ 14 (emphasis added).

“other real estate and facilities.”¹¹ If Metra cannot identify the facilities, how can the Board determine whether it has jurisdiction to order access? These are core issues to which Union Pacific is entitled to respond.

Union Pacific has not had an opportunity to meaningfully evaluate Metra’s proposed interim terms offered for the first time on rebuttal. Metra couches its new request for interim terms and compensation as “preserv[ing] the status quo in all material respects.”¹² That may be because Metra appears to derive some of its terms from the PSA—an agreement that by its terms expires at the end of this month and that both parties agree is no longer appropriate. Take for example the scope of property: Under Metra’s new proposal, the property mandated for use under a Board order would cover, among other things, “mechanical yards.”¹³ But the Ninth Amendment to the PSA specifies that the obligation to furnish property does not include nine mechanical yards because—as the Kane declaration acknowledges¹⁴ and Professor Carey explains¹⁵—those properties are governed by

¹¹ Metra Rebuttal at 44.

¹² *Id.* at 42.

¹³ *Id.* at 44 & Ex. A.

¹⁴ Metra Rebuttal, Exhibit C, Declaration of Jennifer Kane, *Metra*, No. 25-cv-2439 (N.D. Ill. filed June 11, 2025), ¶ 34 (the parties “are separately negotiating the purchase and lease of yards and mechanical facilities”). The Kane declaration was filed by Metra in support of its motion for a temporary restraining order in federal court. Union Pacific filed declarations in support of its opposition, including one declaration that specifically responded to the Kane declaration. The pleadings are available on the court’s docket, but for the Board’s convenience, Union Pacific is attaching its responsive declaration. *See* Attachment A, Declaration of Katherine Novak, *Metra*, No. 25-cv-2439 (N.D. Ill. filed June 17, 2025).

¹⁵ Union Pacific Reply Statement, Verified Statement of Julie Carey at 22–23.

separate agreements. Metra submits a Memorandum of Understanding (“MOU”) from April 2, 2024 to support its new compensation request, but its characterization of that MOU (from the Kane declaration) is incorrect and omits key language on what is included within current compensation and the fact that it “is binding only to the extent of the underlying agreements.”¹⁶ That MOU and other issues are addressed by the parties in their arguments in federal court. But Union Pacific cannot meaningfully address them here because Metra submitted its new request for alleged status quo relief on rebuttal, thus depriving Union Pacific from providing and the Board from receiving briefing on the appropriateness of those terms.

CONCLUSION

For the reasons explained herein, the impermissible evidence detailed in this Motion should be stricken from the record and the Board should not rely on any such evidence in its resolution of this proceeding.

¹⁶ Metra Rebuttal, Exhibit D at 2.

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Respectfully submitted,

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Dated: June 25, 2025

CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of June 2025, the foregoing Motion to Strike was served by first-class mail or more expeditious means on all parties of record in this proceeding.

/s/ *Stephen S. Laudone*

Stephen S. Laudone

ATTACHMENT A

Declaration of Katherine N. Novak

ECF No. 46-1

*Commuter Rail Division of the Regional Transportation
Authority, d/b/a/ Metra v. Union Pacific Railroad Company,
No. 25-cv-2439 (N.D. Ill. filed May 27, 2025)*

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

COMMUTER RAIL DIVISION OF THE REGIONAL
TRANSPORTATION AUTHORITY,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

No. 1:25-cv-2439
Hon. John J. Tharp, Jr.

Declaration of Katherine N. Novak

I, Katherine N. Novak, declare as follows:

1. I am currently General Director Interline Operations for Union Pacific Railroad Company. I have held my current position since January 2024, but have served in a variety of positions at Union Pacific since 2006.

2. I make this declaration based on my own personal knowledge and business records readily available to me in my role as General Director Interline Operations. If called to testify, I could and would competently testify to the matters set forth herein.

3. In my role, I have been involved in Union Pacific's relationship with Metra. That includes the ongoing, day-to-day operations of Metra service on the UP Lines subject to the Purchase of Service Agreement ("PSA"), including its amendments, as well as negotiations over Metra's continued future access to those lines.

4. Similarly, my role affords me the opportunity to be involved in Union Pacific's other passenger railroad relationships and negotiations related to those relationships. These relationships include Union Pacific's work with the Illinois Department of Transportation ("IDOT")

for the Chicago to Rockford intercity passenger rail service; Union Pacific's agreement with the Los Angeles-San Diego-San Luis Obispo Rail Corridor Agency ("LOSSAN") for the Pacific Surfliner service; Union Pacific's agreement with the American Rocky Mountaineer Service; and several other arrangements. For each of these, I have been involved with negotiations between Union Pacific and the passenger rail provider regarding a range of issues including contract terms, service issues, capital expenditures, and franchise access fees.

5. Metra declarant Jennifer Kane makes a number of unsupported statements that contradict what Union Pacific sees in the marketplace for passenger rail arrangements. But one point Ms. Kane makes with which I absolutely agree is that "[t]he current PSA is an outdated, overly complex legacy contract that no longer serves as an appropriate framework for the economic relationship between Metra and Union Pacific, particularly now that commuter rail operations have transitioned from Union Pacific to Metra." Kane Decl. ¶ 21. Moreover, I agree that "the PSA includes byzantine terms ... that have made administration of the PSA problematic for both parties even before Union Pacific's decision to discontinue its operation of commuter rail service." Kane Decl. ¶ 22.

6. That is why Union Pacific has been working since 2019 to reach a new, long-term agreement with Metra. Part of that work was to incorporate Union Pacific's broader approach to passenger rail, which would allow for consistency across its network.

7. Over the past years, Union Pacific developed a framework for approaching the valuation of franchise access fees for passenger rail. Although the beginning of this work predates my time in my current role, I inherited it from my predecessors and it has guided Union Pacific's approach to contractual arrangements for passenger rail services to access our rail lines.

8. Union Pacific's approach was to develop a per-train-mile franchise access fee, a single metric that allows for easy comparison across multiple rail lines and services. Based on Union Pacific's internal costing data, it was ultimately determined that the value of passenger capacity on a freight rail line was \$18.00 per train mile, a figure that has since risen with inflation.

9. That per-train-mile amount has formed the basis for Union Pacific's negotiations not only with Metra, but also with other passenger rail services. Those other passenger services have reached mutually acceptable agreements with Union Pacific on this basis. For example, Union Pacific's agreement with the American Rocky Mountaineer Service states the access fee on a dollars-per-train-mile basis, at a rate that actually exceeds Union Pacific's offer to Metra.

10. Union Pacific has never agreed that the Surface Transportation Board's "SSW Framework" should be used, in any way, to value Metra's access to or use of Union Pacific's rail lines. However, even if it were, Union Pacific conveyed to Metra that it believed that the "capitalized earnings" approach was not appropriate and that, under a different SSW methodology referred to as "RCNLD," the access fee would be significantly higher than what Union Pacific was offering.

11. Ms. Kane misstates the compensatory purpose of the franchise access fee by asserting that it represents "passive income for Union Pacific." Kane Decl. ¶ 36. Union Pacific developed its franchise access fee based on the economic value of making capacity on its lines available to passenger service. Line capacity has an underlying value to a railroad, and providing that capacity to another carrier is likewise valuable.

12. Ms. Kane takes exception to aspects of Union Pacific's proposals that are actually quite common in the rail industry and, indeed, can be found in other Union Pacific agreements with passenger services. For example, Ms. Kane objects to Union Pacific's proposal that Metra

continue to provide actual-cost reimbursement for engineering. Kane Decl. ¶ 30. But this is an arrangement found in several of Union Pacific's other current agreements with passenger rail operators. For example, Union Pacific's agreement with IDOT for the Rockford service provides that IDOT pays an incremental operations and maintenance fee for incremental maintenance costs related to passenger service.

13. Ms. Kane also objects to the idea of additional real estate rental fees for non-track Facilities, including for "mechanical and station facilities." Kane Decl. ¶ 30. But Metra has repeatedly recognized that these kinds of facilities are subject to separate arrangements and compensation. Under the parties' January 5, 2024 Memorandum of Understanding, Metra agreed to separately lease mechanical properties. And, as Ms. Kane acknowledges, the parties "are separately negotiating the purchase and lease of yards and mechanical facilities." Kane Decl. ¶ 34.

14. Ms. Kane also claims that Union Pacific's proposals have omitted key terms and conditions related to performance. Kane Decl. ¶ 33. However, as recently as May 21, 2025, Union Pacific sent a long-term contract offer to Metra that included provisions related to performance payments and performance standards. These provisions are standard in Union Pacific's long-term agreements with other passenger rail services.

15. Ms. Kane further states that Union Pacific's proposals do not take account of Metra's prior and ongoing capital contributions to the UP Lines that it uses. Kane Decl. ¶ 33. She reaches back to 1981 to credit Metra with \$1 billion in capital improvements. *Id.* ¶ 7. But for any investments Metra made two, three, or four decades ago, it has benefited directly for the entire intervening time. Further, those investments generally were and are primarily for Metra's benefit, not Union Pacific's.

16. Union Pacific's offered rate is also consistent with other circumstances where a passenger rail service pays an access fee and is also making capital contributions to the network needed to support the passenger service. For example, in the IDOT agreement, the state has agreed to pay both an access fee higher than what Union Pacific has sought from Metra and 100% of certain infrastructure costs.

17. Union Pacific supports efforts to preserve commuter rail service on the UP Lines, and stands ready to negotiate with Metra to reach a long-term agreement. Most recently, as Ms. Kane acknowledges, Union Pacific conveyed an offer to Metra on May 21, 2025, and Metra still has not made a counteroffer. Kane Decl. ¶¶ 42, 46.

18. In the meantime, on June 4, 2025, Union Pacific established a Condition of Entry ("COE") to govern continued Metra service on the UP Lines after the PSA expires. The COE is designed to allow Metra to continue operating. Because there is no negotiated agreement in place for the post-June 30th period, some terms and conditions must govern any service on the UP Lines after that date. This is true not only for compensation, but also for other key provisions such as maintenance, dispatching, indemnification and liability, insurance and so forth. No railroad can allow a third party to access its lines or property in general without these basic provisions.

19. Indeed, the COE goes directly to the concern Ms. Kane raises regarding a change of service request made by Metra to accommodate a NASCAR event on July 5–6, 2025. Kane Decl. ¶¶ 48–50. Changes of service on Union Pacific lines are generally made pursuant to the governing agreement between Union Pacific and the other railroad. When Metra made the request in May for the NASCAR event, no contract was in place for the post-June 30 period. The COE, however, specifically contemplates "special trains" for events like "Ravinia and NASCAR." Thus, with the COE in place, a framework will govern this kind of request.

20. The COE is not designed to be the long-term agreement governing Metra's access to UP Lines. Union Pacific is aware that a passenger rail service would have its own desired provisions, which is why Union Pacific remains willing to negotiate with Metra to adopt a long-term agreement. The COE represents a stop-gap to govern until the parties can negotiate a long-term arrangement, and it does not rule out the parties' continued communication and negotiation to address any issues that may arise.

21. Even so, Ms. Kane is wrong to assert that the COE contains "numerous terms and conditions, across a variety of topics, which are unreasonable and represent a dramatic degradation in Metra's rights under the existing PSA." Kane Decl. ¶ 54. First, as Ms. Kane and I agree, the existing PSA is no longer appropriate. Second, while Ms. Kane describes many COE terms as unreasonable, she does not assert that they depart from any industry standards or common practices. Nor does she offer any baseline to compare these terms against.

22. In truth, many COE provisions that Ms. Kane criticizes appear in other real-world agreements negotiated between Union Pacific and other passenger rail services, and others reflect the fact that the COE is a temporary default arrangement which Union Pacific is willing to negotiate and modify as needed. For example:

- a. Ms. Kane claims it is unreasonable for Metra to pay to use physical infrastructure funded by Metra and other sources. Kane Decl. ¶ 55.a. But she does not assert that passenger services typically (or ever) have free access to physical infrastructure funded through public grants.
- b. Ms. Kane claims that the COE includes 0.2 miles of track owned by Metra. Kane Decl. ¶ 55.b. Even if this were accurate, it would be accounted for in the fact that compensation is based on a per train mile basis. If there is a *de minimis* amount of

track that should be excluded, that would be captured there with a reduced per train mile payment.

- c. Ms. Kane claims that the COE “unreasonably degrades Metra’s ability to make previously routine service changes.” Kane Decl. ¶ 55.c. It is true that Section 2.3 of the COE states that Union Pacific has no obligation to accept changes and Section 2.1 limits service to the officially published schedule as of the agreement’s effective date. But the COE is a default, from which the parties can depart; Union Pacific remains open to any requests from Metra about necessary service changes.
- d. Ms. Kane claims that Metra’s ability to perform capital improvements is somehow degraded by the COE. Kane Decl. ¶ 55.d. No support is provided for this statement and, of course, Union Pacific shares Metra’s desire to ensure that capital work is undertaken as necessary to ensure safety and efficiency on the UP Lines for both freight and passenger services.
- e. Ms. Kane claims that Metra is restricted from reducing service. Kane Decl. ¶ 55.f. But this is inaccurate. The COE provides that Metra *may* provide the service according to its public schedule but is not required to do so. Moreover, the service change provisions refer to “additional” trains, not reduced trains. Should Metra desire to reduce trains, it would simply mean a reduction in the per-train-mile charge.
- f. Ms. Kane claims that the COE’s access fee is unreasonable and “does not provide for the use of all facilities currently employed in commuter service.” Kane Decl. ¶ 55.g. As explained above, the fee is based on Union Pacific’s existing approach to passenger service across its network, which is reflected in commercially

reasonable agreements negotiated with other passenger rail services. The franchise access fee does not cover all facilities used for commuter service because, by its nature, it addresses only the value of the track capacity that Metra consumes. Indeed, Metra has already agreed to negotiate separate access and compensation for non-track properties.

- g. Ms. Kane claims that the use of train miles in the COE rather than car miles is an inappropriate metric. Kane Decl. ¶ 55.h. This is incorrect. None of Union Pacific's mutually negotiated agreements with other passenger rail services use car miles as the payment metric. They typically use train miles because this metric is more transparent; the number of trains can be observed much more easily via schedules than the number of cars in a train. Moreover, although passenger trains typically have fewer cars than freight trains, there are times when Union Pacific has to require passenger train services (for example, LOSSAN) to use additional cars to ensure there is no loss of shunt—a form of electrical connectivity necessary for certain activities such as dispatching. A per-car-mile fee would create challenges in those situations. In addition, although passenger trains may be shorter, the costs of operating trains on a line are not based on length alone. Passenger trains move more quickly than freight trains, and thus take up more track capacity—that is, more space must be cleared to account for the speed which they will catch-up to other trains.
- h. Ms. Kane claims that Union Pacific unreasonably reserves for itself decisions about how to address a hypothetical catastrophic loss of rail infrastructure. Kane Decl. ¶ 55.i. But as she acknowledges, Metra can choose to restore any destroyed

infrastructure if Union Pacific decides not to. It is reasonable for Union Pacific to make this decision in the first instance about its own property. And the COE does not “disregard[]” any separate contractual duties between the parties with respect to Metra-funded improvements, *id.*, but rather leaves any such obligations in place.

- i. Ms. Kane claims the COE “unreasonably and unnecessarily provides for only 14 days” notice before “potential rail line or station closure due to engineering activity.” Kane Decl. ¶ 55.m. But this is merely the bare minimum notice required before specific closures, which is standard in Union Pacific’s similar contracts. Union Pacific’s normal practice is to plan such engineering activity for the entire year and provide months of advance notice to passenger services, with updates on the exact timing of project. Union Pacific will do the same for Metra.
- j. Ms. Kane claims that the COE is unreasonable in requiring Metra employees to “obtain special rights” for routine access to the UP Lines. Kane Decl. ¶ 55.o. But what the agreement actually requires is a broader “right of entry agreement” between the parties—a standard provision to ensure appropriate access, security, and safety on railroad property. For example, Union Pacific’s agreement with American Rocky Mountaineer calls for a similar agreement.
- k. Ms. Kane claims that the COE gives Union Pacific the “unilateral ability” to remove and prohibit people from Union Pacific’s property. Kane Decl. ¶ 55.p. It is not unreasonable, but standard, for Union Pacific or any property to reserve the right to bar from its rail facilities people whose conduct present “safety concerns.”
- l. Ms. Kane claims that the COE “fails to account for a potential change in access compensation, engineering, or capital costs paid by Metra if additional freight or

passenger traffic is added to the UP Lines.” Kane Decl. ¶ 55.r. First, a train-mile access fee does adjust depending on service levels. Second, as cost-basis expenses, engineering and capital will also adjust. Third, Metra seems to suggest that a new third-party operator could begin service on the line, which is an extreme hypothetical that the COE reasonably does not anticipate.

- m. Ms. Kane says the COE “unreasonably fails to provide any assurances of on-time performance or a mechanism to coordinate on or cure disputes about dispatching practices impacting performance. Kane Decl. ¶ 55.s. The baseline COE is not an appropriate document for complicated service performance metrics, but Union Pacific remains open to continued negotiation with Metra, and it agrees that such provisions are appropriate for a long-term agreement.
- n. Ms. Kane claims that the COE shifts liability from Union Pacific to Metra. Kane Decl. ¶ 55.t. But these specific indemnification and liability provisions are Union Pacific’s standard starting point in negotiations with any passenger service. Other passenger services have accepted them (with minor modifications due to state law). For example, in the American Rocky Mountaineer agreement, the passenger service similarly “assumes liability.” And Union Pacific is willing to negotiate departures from them if necessary to secure a long-term agreement.
- o. Ms. Kane claims that the COE requires Metra to indemnify Union Pacific even for “conduct, events, and occurrences having nothing to do with Metra’s commuter rail operations.” Kane Decl. ¶ 55.u. This is inaccurate. The COE states that Metra is *not* assuming liability for or agreeing to indemnify, defend, or hold harmless Union

Pacific for incidents that do not involve a Metra train, Metra services or equipment, or Metra contractor services or equipment.

- p. Ms. Kane claims that the COE unreasonably requires Metra to cover all legal expenses even if Union Pacific opts to defend itself, but fails to note that the COE requires that such expenses be fair and reasonable. Kane Decl. ¶ 55.v. Union Pacific cannot unilaterally foist inappropriate expenses on Metra.
- q. Ms. Kane claims that the COE requires Metra to purchase, “at its expense,” insurance for punitive damages, an expense that Union Pacific currently reimburses under the PSA. Kane Decl. ¶ 55.w. But Union Pacific intends to continue those reimbursements, which are required by Illinois law.
- r. Ms. Kane states that the COE is unreasonable in requiring a cure of any breach within 60 days. Kane Decl. ¶ 55.x. But that language is found in other Union Pacific agreements. In fact, Union Pacific’s agreement with American Rocky Mountaineer contains a 30-day cure provision.

23. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.



Dated: 6/17/2025

Katherine N. Novak