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April 14, 2008

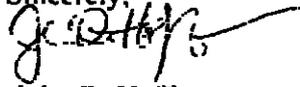
Hon Anne H Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW – Suite 1260
Washington, DC 20423-0000

RF STB Docket No AB-290 (Sub-No 286) - Norfolk Southern Railway
Company – Adverse Abandonment St Joseph County, IN – Reply of the
Chicago, Lake Shore & South Bend Railway Company to Petition to
Reopen

Dear Ms Quinlan

On behalf of The Chicago, Lake Shore & South Bend Railway Company, I am
enclosing its Reply to the Petition to Reopen filed by the City of South Bend, the
Brothers of the Holy Cross, Inc , and the Sisters of Holy Cross, Inc

Sincerely,



John D Heffner

Enclosure

cc All Parties

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-290 (Sub-No. 286)

**NORFOLK SOUTHERN RAILWAY COMPANY
-ADVERSE ABANDONMENT-
ST. JOSEPH COUNTY, IN**

**REPLY OF
THE CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY
TO PETITION TO REOPEN**

Respectfully Submitted,

John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 350
Washington, D.C. 20006
(202) 296-3334

Counsel for The Chicago, Lake Shore
& South Bend Railway Company

Dated: April 14, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-290 (Sub-No 286)

**NORFOLK SOUTHERN RAILWAY COMPANY
-ADVERSE ABANDONMENT-
ST JOSEPH COUNTY, IN**

**REPLY OF
THE CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY
TO PETITION TO REOPEN**

INTRODUCTION

On March 28, 2008, the City of South Bend, IN, the Brothers of Holy Cross, Inc., and the Sisters of the Holy Cross, Inc. (hereinafter collectively referred to as "Petitioners") jointly petitioned the Board pursuant to 49 CFR 1115.4 to reopen a decision issued on February 14, 2008, denying the above-captioned adverse abandonment application. Petitioners want the Board to reopen its decision citing to certain "new evidence" in the form of a letter from John Affleck-Graves, an Executive Vice President with the University of Notre Dame ("UND") that it claims was not previously available. Respondent The Chicago, Lake Shore & South Bend Railway Company ("CLSSB"),

a start up short line railroad that seeks to acquire the track that is the subject of this adverse abandonment proceeding, urges the Board to deny the Petition to Reopen. The alleged "evidence" is merely a new version of evidence previously submitted in this proceeding by Petitioners and is not "new evidence" warranting a reopening.

BACKGROUND

This proceeding has had a long and contentious history so the facts will only be repeated to the extent necessary for the Board's understanding.

CLSSB had originally sought to acquire the Norfolk Southern Railway Corporation ("NSR") line that is the subject of this proceeding. Petitioners aggressively opposed CLSSB's acquisition efforts by filing a Petition to Revoke and Stay CLSSB's exemption and persuaded NSR to defer selling the line to CLSSB. Petitioners then filed the subject adverse abandonment application on November 17, 2006, to ensure that the subject track would never be available for acquisition and/or resumption of service, whether by CLSSB, NSR itself, or anyone else. On February 17, 2008, the Board issued the decision that is the subject of this reopening attempt. In addition to denying the adverse abandonment, the Board dissolved the stay previously imposed in the exemption proceeding thereby

allowing NSR to sell and CLSSB to purchase and operate the subject rail line.

ARGUMENT

Petitioners' reopening attempt must be rejected for failure to meet the procedural deadlines and requirements of the Board's Rules of Practice at 49 CFR 1115 et al. Those rules provide for two forms of administrative appeal of a final decision. Section 1115.3 permits aggrieved parties to seek reconsideration of a Board ruling where the prior action will be affected materially because of new evidence or changed circumstances and/or involves material error and requires that the petition be filed within 20 days of the service of the assailed decision. The Board's rules at 49 CFR 1115.4 provide a second, narrower basis for relief that can be sought at anytime. Styled as a petition to reopen an administratively final action, the rules require the petition to state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances and require that the petition include a request that the Board make such a determination.

Petitioners seek reopening under the second provision, 49 CFR 1115.4, asserting that reopening is "based on new evidence that was not previously available to Petitioners,"

a letter dated March 26, 2008, from John Affleck-Graves, Executive Vice President of UND and submitted as Attachment A. The gist of Mr. Affleck-Graves' letter is that "[UND] does not currently ship using this line, nor does it intend in the future to utilize this rail line for any shipping purposes, whether to receive or deliver goods to or from the University." Petitioners would have the Board believe that the letter meets the requirements of section 1115.4 by asserting that this letter only "came available after the Board issued its decision on February 14, 2008." In fact, the letter just represents a new iteration of a statement by Mr. Affleck-Graves that was previously submitted to the Board back in 2006 and again in 2007.

The Board should recognize Petitioners' letter as a last minute ploy to get the Board to review a decision for which an administrative appeal should have been filed within 20 days of its February 14 service date or by March 5, 2008. Having missed that deadline, Petitioners are now attempting to persuade the Board to accept its appeal as a petition to reopen.

Mr. Affleck-Graves' letter is by no means new. Rather it is the latest incarnation of a statement that Petitioners attribute to Mr. Affleck-Graves that was previously submitted to the Board on at least two prior

occasions. For example, on June 22, 2006, Mr. Affleck-Graves told the *South Bend Tribune* that "[t]he university has no intention of entering into an agreement with the South Bend shortline railway company to deliver coal [n]ow and in the foreseeable future, we'll have our coal delivered by truck." See, article attached as Exhibit B. Seven months later on January 22, 2007, Petitioners submitted the same message in its Reply Comments and Argument in Support of Adverse Abandonment Application" where they cited to that quote in footnote 40 at the bottom of page 19. A copy of the pertinent page is attached here as Exhibit C. The Board should note the great similarity between the language in the article and that in the March 26 letter. A logical conclusion is that after the Board issued its February 14 decision denying the adverse abandonment, Petitioners arranged for Mr. Affleck-Graves to put his prior statement in a letter form in one last attempt to get the Board to change its mind.

Petitioners have filed this appeal to challenge the Board's conclusion that "there is traffic suitable for rail that could move over the lines, that there is a railroad willing to carry that traffic, and there is at least one shipper capable of receiving that traffic .the shipper is presumed to be [UN']". They are wrong. The customer s

Buckeye Industrial Minerals' which is the consignor. UND is the consignee which receives the coal by rail from NSR at South Bend and has the cargo trucked over City Streets to the UND power plant. Historically, Conrail moved that traffic over what are now the NSP lines that are the subject of this proceeding and Conrail delivered the coal directly to the UND power plant. CISSB was well along in persuading Buckeye to go back to handling the traffic in an all-rail move from its origin over NSR to the UND power plant utilizing CISSB for the last part of the haul.

CISSB concedes that Mr. Affleck-Graves has twice advised the Board that UND does not desire to use its rail service when it stated that "[c]ow and in the foreseeable future, we'll have our coal delivered by truck." But CISSB reminds the Board that there is a story behind that statement. After CISSB had marketed its services to Buckeye and obtained rates from NSR, the City of South Bend prevailed upon Mr. Affleck-Graves not to use CISSB's services. Timothy A. Rouse representing the City of South Bend Common Council then wrote UND officials including Mr. Affleck-Graves a letter dated June 13, 2006, which CISSB has previously included with its submissions to the Board, stating:

¹ Buckeye Industrial Minerals was acquired by PEZ, Inc., in 2006.

The City of South Bend values the many contributions made by the University to our community. However, it appears that the minimal economic benefit of transporting coal by rail instead of truck (sic) which the university may realize will undoubtedly cause detrimental effects on the South Bend community.

The multi-faceted adverse affects of the proposed railroad spur line to the University of Notre Dame has the potential of harming the relationship between South Bend and Notre Dame. In light of the University's many positive outreach efforts, such as establishing a downtown office and revitalizing the neighborhoods around campus, we believe that this new business proposal on coal acquisition *may cause irreparable harm to our future relationship.* (emphasis supplied). Letter from the City of South Bend Common Council dated June 13, 2006 attached as Exhibit D.

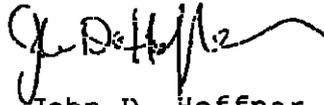
The obvious implication of that letter is a thinly veiled threat to UND. The University had better not use CLSSB's services to move its coal if it knows what's good for it (i.e., wishes to remain in the good graces of the City of South Bend). Immediately thereafter, UND abandoned any interest in receiving coal by rail at its siding.

But times change. Nobody in June 2006 could have predicted that diesel fuel prices would be heading towards \$5.00 per gallon and probably higher. Americans including the Bush Administration have come to accept that Global Warming is a fact of life. Transportation planners are beginning to realize that our country's heavy reliance on trucks for moving goods and on cars and planes for moving people is no longer sustainable. For the first time

Americans are beginning to recognize that railroads represent the transportation mode of the future. And once a railroad is abandoned, the cost and ability to restore it to service becomes exponentially greater, if not exorbitant. Yes, even UND and the City may eventually realize that preserving the rail service option for the university's power plant is a wise decision.

The Board was right to deny the adverse abandonment application in the first place and it should likewise reject the Petition to Reopen.

Respectfully Submitted,



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(202) 296-3334

Counsel for The Chicago, Lake Shore
& South Bend Railway Company

Date: April 14, 2008

CERTIFICATE OF SERVICE

I, John D Heffner, certify that a copy of the Reply of The Chicago, Lake Shore & South Bend Railway Company to Petition to Reopen was served on April 14, 2008 to the following

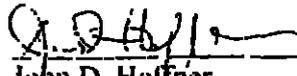
Mr Sandia M Seanor
Executive Director
Michiana Council of Governments
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South Bend, IN 46601

Sister Joy O'Grady, President
Sister of Holy Cross
501 Bertrand Hall - St. Mary's
Notre Dame, IN 46556-5000

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227 West Jefferson Boulevard
South Bend, IN 46601



John D Heffner

EXHIBIT A



**UNIVERSITY OF
NOTRE DAME**

OFFICE OF THE EXECUTIVE VICE PRESIDENT

400 Main Building
Notre Dame, Indiana
46556-5602 USA

John E. Affleck-Graves

Telephone (574) 631-4700
Facsimile (574) 631-0818

March 26, 2008

Surface Transportation Board
Chairman Charles D. Nottingham
Vice Chairman Francis P. Mulvey
Member W. Douglas Bortrey
395 E Street, S.W.
Washington, D.C. 20423-001

Re: AB 290-286 Norfolk Southern Railway Company - Adverse Abandonment - St. Joseph County, Indiana

Dear Chairman Nottingham:

Please be advised that I am the Executive Vice President of the University of Notre Dame du Lac located in St. Joseph County, Indiana. I have had the opportunity to review the Surface Transportation Board's Decision in the above noted Docket Number. In doing so, I note that the University of Notre Dame is addressed as a "potential" shipper and user of the subject railway line which has been petitioned to be abandoned.

Please let me be clear in this correspondence that the University of Notre Dame du Lac does not currently ship using this line, nor does it intend in the future to utilize this rail line for any shipping purposes, whether to receive or deliver goods to or from the University. We currently receive our coal shipments off of the Norfolk Southern Railway via trucking from a transload facility. This has and will continue to serve our needs very well. Further, there is no need for rail delivery of any other commodity to the university.

We do not believe that renewed rail service along the line proposed to be abandoned is in the best interests of the University nor the community at large. We have no contract with nor do we have any intent to contract with any rail operator along this line.

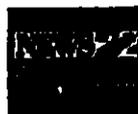
I hope that this letter clears any misconception of the University's intentions regarding the rail line concerned in this matter.

Sincerely,

**John Affleck-Graves
Executive Vice President**

**Cc. City of South Bend
Brothers of Holy Cross
Sisters of the Holy Cross**

EXHIBIT B

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June 22, 2006

Notre Dame drops coal-by-rail option

In keeping with city's wishes, university will stay with truck delivery

By **MARGARET FOSMOE**
Tribune Staff Writer

SOUTH BEND — The University of Notre Dame has no plans to establish a business contract with a company that hopes to buy and reopen an old rail line running from the city's west side to campus.

"The university has no intention of entering into an agreement with the South Bend short-line railway company to deliver coal," John Affleck-Graves, Notre Dame's executive vice president, said on Tuesday. "Now and in the foreseeable future, we'll have our coal delivered by truck."

Representatives of the Chicago, Lake Shore & South Bend Railway Co. had some "extremely tentative" talks with Notre Dame's utility services manager and business department representatives in the past two or three years, Affleck-Graves said. "I think it would be pushing the point to say we've been in discussions," he said.

South Bend Railway representatives are



A railroad line still leads into the coal storage area at the University of

considering buying the closed rail line from Norfolk Southern and reopening it to transport coal and other materials to businesses in South Bend. Passenger service might be added later, they said.

Notre Dame, although the university's coal shipments now arrive by truck.

Tribune Photo/SHAYNA BRESLIN

Rail company representatives told city officials that Notre Dame was one of the potential customers.

South Bend Mayor Stephen Luecke and council members are opposed to the idea, citing safety and quality-of-life concerns. The old rail line cuts through residential neighborhoods across the west side and would have 17 at-grade street crossings without flashing lights or automatic gates.

Affleck-Graves said he met with the mayor six or eight months ago to discuss the idea. As a steward of the university and its resources, Affleck-Graves said he is obligated to listen to any proposal that might increase the efficiency and economy of Notre Dame.

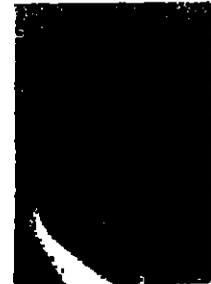
Luecke made it clear he views reopening the rail line as a bad idea, Affleck-Graves said.

"I assured the mayor at that stage that if the city and the county were strongly opposed to the railroad proposal, the university would not go forward," Affleck-Graves said.

Notre Dame officials have worked hard over the years to build a strong relationship with the city, the county and local residents. "We would not do anything to damage that relationship," Affleck-Graves said.

That doesn't mean that the university always will agree with local governmental officials on every matter, he said. But in the case of the railroad proposal, Notre Dame will yield to the wishes of the local community, he said.

Most of the energy used on the Notre Dame campus for heating, cooling and electricity is generated by coal burned in the campus power plant. The campus uses 80,000 tons of coal annually. The piles of coal are stored on university property along Douglas Road, near where the old rail line ends.



Affleck-Graves

Until about 10 years ago, when the rail line went out of service, coal shipments were delivered directly to campus by train. The coal now arrives in South Bend via railroad at a site on South Olive Street and is trucked to campus -- about 3,000 truckloads a year.

While the distribution varies from year to year, on average 85 percent of Notre Dame's energy comes from coal, 10 percent from natural gas and 5 percent from fuel oil.

If the rail line reopened, the city supported it, safety issues were addressed and neighborhood residents didn't mind it, Notre Dame would consider using rail service

again for coal deliveries, depending on the cost, Affleck-Graves said.

"Given the opposition to it, this is an easy decision for us to continue with track delivery," he said.

Affleck-Graves said South Bend Railway never presented a formal proposal or contract to Notre Dame.

The company also has said that reopening the rail line could raise the possibility of passenger trains delivering Chicago fans directly to campus for Notre Dame football games.

If the rail line were to reopen and city officials and the Chamber of Commerce thought passenger trains to campus on football Saturdays would be a good thing for the community, the university would be interested in exploring the idea. But Notre Dame doesn't plan to pursue such a proposal itself, Affleck-Graves said.

"Generally, we have a good, strong, working relationship with the city and the county," he said, "and it's our intention to maintain that."

Staff writer Margaret Fosmoe:

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EXHIBIT C

218498

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

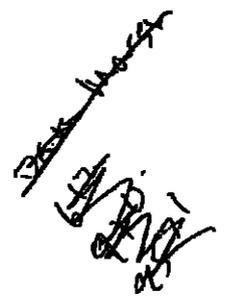
Docket No. AB 290 (Sub-No. 286)

NORFOLK SOUTHERN RAILWAY COMPANY--
ADVERSE ABANDONMENT--
ST. JOSEPH COUNTY, IN

REPLY COMMENTS AND ARGUMENT IN SUPPORT OF
ADVERSE ABANDONMENT APPLICATION OF THE
CITY OF SOUTH BEND, THE BROTHERS OF HOLY CROSS, INC AND THE SISTERS
OF THE HOLY CROSS, INC.

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Date: January 22, 2007

VS at 6-7. Certain very vocal city officials persuaded those favoring rail service to keep quiet. They intimidated UND officials, specifically Paul Kempf and John Affleck-Graves, and persuaded them to change their position over use of rail. CLSSB believes that these officials persuaded NS to renege on its agreement to sell the line to CLLSB³⁹

While referencing Harris' statement that "it is my understanding that the Mayor's Office sent representatives to the community centers to tell them to be in opposition," CLS&SB ignores Harris' concession that "I have not tried to verify this." V.S. Harris at p 7 (emphasis added) The Board cannot rely on the testimony of a witness who admits that he has not tried to verify the supposed facts about which he purports to testify. Nor can the Board rely on the arguments made in CLS&SB's Protest that are based on Harris' unfounded speculation

There is no evidence to support CLS&B's unfounded claims that Paul Kempf, the Director of Utilities at Notre Dame, and John Affleck-Graves, Notre Dame's Executive Vice President, were intimidated by City officials into changing their position over use of rail.⁴⁰ If CLS&SB had any credible evidence to support its speculative comments, it should have introduced it.

Nor can CLS&SB substantiate its claim that City officials "persuaded NS to renege on its agreement to sell the line to CLSSB."⁴¹ CLS&SB has not identified any City official who would have been able to persuade NSR to back out of the tentative deal. Nor has it identified the NSR officials who were the City officials' supposed targets. In response, Applicants state that they

³⁹ CLS&SB Protest at pp 16-17

* ⁴⁰ In fact, CLS&SB cannot demonstrate that Notre Dame ever "changed" its position at all. In the June 22, 2006 newspaper article that announced that Notre Dame "has no intention of entering into an agreement" with CLS&SB, Affleck-Graves categorized CLS&SB's talks with Notre Dame's utility services manager and business department representatives as being "extremely tentative." Applicants' Attachment I, Margaret Fosmoe, *Notre Dame drops coal-by-rail option*, South Bend Tribune, June 22, 2006. Affleck-Graves is also quoted as saying that "I think it would be pushing the point to say we've been in discussions" with CLS&SB.

⁴¹ CLS&SB Protest at p. 17; see also, *id.* at p 3 ("local officials pressured NS to abrogate that agreement and withdraw its support for the sale. Verified Statement of Robert Harris (Harris VS) at 3.")

EXHIBIT D



City of South Bend Common Council

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L. White
Person, Committee
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in Puzzello
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avid Varner
District
vin Kuspa
District
"Buddy" Kirsits
Large
morthy A. Rouse
Large
aren L. White
Large
athleen Cekanski-Farrand
Council Attorney

Carol Colby Kaesebier
Vice-President and General Counsel
University of Notre Dame

June 13, 2006

John Affleck-Graves
Executive Vice President
University of Notre Dame

James J. Lyphout
Vice President for Business Operations
University of Notre Dame
317 Main Building
Notre Dame, Indiana 46556

Paul Kempf, Director of Utilities
102 Facilities Building
University of Notre Dame
Notre Dame, Indiana 46556

Facsimile: (574) 631-8212

Re: **Proposed South Bend Short Line Railroad Services to the
University of Notre Dame**

Dear Vice-Presidents Kaesebier, Affleck-Graves and Lyphout and Mr. Kempf:

The South Bend Common Council is calling a Committee of the Whole meeting on Thursday, June 15, 2006, 5:00 p.m., in the Council Informal Meeting Room, 4th Floor County-City Building, 227 West Jefferson Boulevard, South Bend, Indiana 46601. We respectfully request each of you to be present for this meeting or if you are unable to attend to send a representative from your office.

We are faxing to you a copy of Mayor Stephen J. Luecke's June 1st letter which he sent to Mr. Affleck-Graves, which summarizes some of the many concerns which the city has regarding the proposed South Bend Short Line Railroad services to the university.

Yesterday, the South Bend Common Council received an update from our Public Works Director, Gary Gilot, who highlighted the following issues and concerns

regarding the proposed railroad spur line operations which would severely negatively impact South Bend. In light of the serious gravity of the situation with the purchase from Norfolk Southern by Mr. Landrio set for Wednesday, June 21st, we believe that a public meeting on this issue is imperative. In light of the many concerns raised we are also inviting U.S. Senator Evan Bayh, U.S. Senator Richard Lugar and U.S. House of Representatives Chris Chocola to this meeting.

- Multiple safety concerns
- Quality of life concerns
- Impact on neighborhoods/commercial corridors
- Lack of private investment by Gary Landrio
- Lack of commitment from Mr. Landrio to seven (7) identified "minimum requirements" for such operations to be operable ?

Several additional concerns were raised by the Council, which included:

- Proposed South Bend Short Line Railroad Services being totally incompatible with the South Bend City Plan ?
- Financial impact to the City of South Bend regarding multiple public safety concerns of the proposed seventeen (17) crossings of public streets; four (4) crossing on private properties and a minimum of five (5) public alleys which are blocked or dead-ended by rails
- Potential violations of the Manual of Uniform Traffic Control Devices ?
- Potential safety violations of applicable federal laws ?

The City of South Bend values the many contributions made by the University to our community. However, it appears that the minimal economic benefit of transporting coal by rail instead of by truck which the university may realize will undoubtedly cause detrimental effects on the South Bend community.

The multi-faceted adverse effects of the proposed railroad spur line to the University of Notre Dame has the potential of harming the relationship between South Bend and Notre Dame. In light of the University's many positive outreach efforts, such as establishing a downtown office and revitalizing the neighborhoods around campus, we believe that this new business proposal on coal acquisition may cause irreparable harm to our future relationship.

Proposed Railroad Spur Line to the University of Notre Dame
June 13, 2006
Page 3

The City is prepared to take all legal actions necessary to protect the public health, safety and welfare of our citizens, our neighborhoods, our businesses and the many cultural and entertainment venues located in South Bend.

We are also inviting Mr. Landrio to this meeting so that he may publicly address all of our concerns.

We look forward to open dialogue on this issue with each of you on Thursday at 5 p.m.

Thank you.

Sincerely,


Timothy A. Rouse
Council President

Enclosure

cc: The South Bend Common Council	Hand-Delivered
Mayor Stephen J. Luecke	Hand-Delivered
Rev. John Jenkins, University President	Fax: (574) 631-8212
U.S. Senator Evan Bayh	Fax: (574) 236-8319
U.S. Senator Richard Lugar	Fax: (317) 226-5508
U.S. House of Representatives Chris Chocola	Fax: (574) 251-1066
John Voorde, City Attorney	Hand-Delivered
Charles S. Leone, City Attorney	Hand-Delivered
Kathleen Cekanski-Farrand, Council Attorney	Hand-Delivered
Gary Gilot, Public Works Director	Hand-Delivered
Jeffrey M. Janskowski, Deputy City Attorney	Hand-Delivered
The Board of County Commissioners	Hand-Delivered
Rafael Morton, President of County Council	Hand-Delivered
Mr. Mark Eagan, Chamber of Commerce	Fax: (574) 289-0358
Sandra Seanor, MACOG	Hand-Delivered
Mr. Gary Landrio, South Bend Short Line Railroad	Fax: (814) 726-9855
Federal Railroad Administration	webmaster@fra.dot.gov
News Media	