

Service Date: August 16, 1988

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER of the Application)	TRANSPORTATION DIVISION
OF Burlington Northern Railroad)	
Company to discontinue its agency)	DOCKET NO. T-9236
operations at Fort Benton, Montana.)	ORDER NO. 5859

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

Charles Dearden, Murphy, Robinson, Heckathorn & Phillips, P.O. Box 759, Kalispell, Montana 59901

FOR THE INTERVENOR:

Al Cheethan, P.O. Box 112, Fort Benton, Montana 59442, appearing on behalf of City of Fort Benton and Chouteau County

FOR THE COMMISSION:

Geralyn Driscoll, Staff Attorney, 2701 Prospect Avenue, Helena, Montana 59620-2601

Wayne Budt, Administrator, Transportation Division, 2701 Prospect Avenue, Helena, Montana 59620-2601

BEFORE:

DANNY OBERG, Commissioner and Hearing Examiner

BACKGROUND

Burlington Northern Railroad Company (BN) petitioned the Montana Public Service Commission (Commission) on April 11, 1988, for authority to discontinue its agency operations and dispose of the depot facility at Fort Benton, Montana.

Following proper notice of the petition, a public hearing was held on June 23, 1988, in the EOC Building at Fort Benton, Montana. At the conclusion of the hearing the parties stipulated to a final order in this docket.

At the hearing the City of Fort Benton and the County of Chouteau through Al Cheethan, the city attorney for Fort Benton and the deputy county attorney for Chouteau County, sought to intervene. There were no objections to the late intervention and the Commission granted Chouteau County and the City of Fort Benton late intervention.

APPLICANT'S TESTIMONY

Testifying on behalf of Burlington Northern were Izzy Conaway, Chuck Keeler and William Allbright.

Izzy Conaway. Mr. Conaway is the regional manager of station services for the Seattle region. Fort Benton is part of the Seattle region. He testified that BN has established a Centralized Billing Center (CBC) in Great Falls that provides billing services to all the Great Falls service area agencies including Fort Benton.

The CBC operates 24 hours a day 7 days a week. It is a computerized office that links with BN's entire computer system. The customer may call the CBC toll free. The BN employee at the CBC orders cars through the Seattle Transportation Division. The customer prepares a bill of lading, which is a document that will move the car from shipper to receiver. The customer can telefax or mail the bill of lading or BN has given shippers limited power of attorney so that the shipper may sign the bill of lading for BN. The shipper may also put the bill of lading into a locked box at the point of pickup.

Way bills are the document that BN uses to calculate its bills. The way bill moves with the car. Way billing is also handled at the CBC.

If a problem occurs along the route (a lost car, a shipment that has not arrived, etc.) the CBC has the ability to access the entire BN system. According to Mr. Conaway, BN's computer system is setup without access for local agents in the community. The Fort Benton agent must contact the Great Falls CBC to access the net work.

Mr. Conaway contacted all shippers in the Fort Benton region. No shipper raised an objection from a business point of view. On cross-examination from Commission counsel Mr. Conaway clarified that at least half the shippers prefer to see the agent remain in Fort Benton, but they believe that from a business perspective they could receive adequate service from the CBC.

Mr. Conaway testified that he contacted the agent who is Leonard Knudsen. Mr. Knudsen is a protected employee.

Mr. Conaway also testified concerning the disposal of the depot. Consistent with its standard policy BN is willing to donate the depot to a charitable or civic group. If there is no charitable or civic group it will put the depot up for bid. On cross-examination Mr. Conaway testified that to his knowledge BN has no intention of abandoning the Fort Benton line.

Mr. Conaway was cross-examined by the City of Fort Benton and Chouteau County. He stated it is possible that a local agent provide the services offered at the CBC but BN did not set up its computer network that way. He also testified that he agrees that the protected employee can displace another employee and this has a ripple affect through the system. It is likely that someone somewhere will lose a job.

Charles Keeler. Mr. Keeler is the train master/road foreman out of the Great Falls region. He is responsible for supervising the clerical services in the Great Falls region and is responsible for general train service in the area. He testified that Fort Benton currently receives train service on an as needed basis. There is no regularly scheduled train through Fort Benton but it is BN's corporate policy to send car loads on within a 24 hour period. Mr. Keeler testified that closing the Fort Benton agency will result in no change in train schedules or train service in the Fort Benton area.

On cross-examination Mr. Keeler stated that he is responsible for approximately 400

miles of main line track and 200 miles of branch line track in the Great Falls region. In the Fort Benton area there are five shippers with 52 car capability and four shippers with smaller shipping needs. "Fifty-two car capability" refers to unit trains -- a train with 52 cars of the same commodity.

On cross-examination Mr. Keeler also testified that while it is true a local agent can solve local problems because he is easily accessible to people in the community, most errors or problems in the train would be discovered at the Great Falls CBC and they will be adequately able to find the car.

Also on cross-examination Mr. Keeler stated that to his knowledge BN has no intention of abandoning the Fort Benton line. He stated that the line is quite profitable to BN and it would seem very unlikely to him that they would cease to offer service in that area.

William Allbright. Mr. Allbright, a senior cost analyst for BN sponsored Exhibit A titled, "Accounting Exhibits for Proposal to Discontinue Agency Service at Fort Benton, Montana." Exhibit A shows the following cars received and forwarded at Fort Benton in 1985, 1986, 1987 and January through March of 1988.

Cars Received and Forwarded

Fort Benton

	1985	1986	1987	1988	Jan.-Mar.
Received	84	21	45	4	
Forwarded	906	812	1,500	422	

Kershaw Blind Siding

Received	71	5		-	-
Forwarded	<u>1,065</u>	<u>544</u>		<u>1,129</u>	<u>260</u>
Total	2,126	1,382	2,674		686

Exhibit A also contained net revenues for the Fort Benton agency calculated using both the Belt/Carter and the BN formulas.

	Belt/Carter Formula of Net Revenue From Railway Operations for Fort Benton, MT and the Blind Siding at Kershaw, MT	BN Formula of Net Results of Operation for Fort Benton, MT and the Blind Siding at Kershaw, MT
1985	\$947,752	\$198,884
1986	337,903	71,126
1987	804,983	208,587
J-M 1988	193,749	52,898

Page 6 of Exhibit A showed the number of units handled and time consumed for the Fort Benton agency during 1987. This schedule showed 2,000 hours of time worked and 559 hours required for agency work. Based on BN's estimation of the unit time factor required to do agency work and the actual number of units of work handled, the agent at Fort Benton spent 28 percent of his time on agency work and had 72 percent of his time available for other work. Mr. Allbright testified that these numbers assume the agent is performing agency functions, but as Mr. Conaway testified, these functions have been transferred to the Great Falls CBC.

On cross-examination Mr. Allbright testified that to his knowledge BN has no intention of abandoning the Fort Benton agency.

PROTESTANT'S TESTIMONY

The City of Fort Benton and Chouteau County called Mike Donner, of Fort Benton, to testify in opposition to the closing of the agency. Mr. Donner is an employee of Farmers Union Oil, which is a shipper using the BN line. Mr. Donner stated that he was appearing at the hearing at the request of his supervisor, Calvin Hanks, who could not attend. He stated that Farmers Union

Oil wants a local agent for the following reasons:

- 1) It believes that a local agent is more successful in releasing cars;
- 2) With a local agent cars are spotted correctly;
- 3) It is easier to explain and resolve a service problem because local agents understand what is happening in the area;
- 4) He believes there is better communication with a local agent;
- 5) The local agent's time, not the shipper's, is spent solving a shipping problem; and
- 6) Farmers Union Oil believes that having both a toll free number and the local agent provides adequate service.

On cross-examination Mr. Donner stated that he did not know how often Farmers Union Oil needed to have cars spotted but he believed that it was several times a year.

The following individuals made public statements in opposition to the closing of the agency: James Mular, Leonard Knudsen, Henry Grossman, George Fultz, Ronald Jovanovich, Loren Jenkins, Gerry Dalton, Gordon McGown, A.E. Anderson, Winny Appelby, Carol Richard and Gar Wood.

James Mular. Mr. Mular is the state legislative director of the Transportation and Communications Union (TCU), formerly the Brotherhood of Railway and Airline Clerks (BRAC). He testified in opposition to the closure of the Fort Benton agency stating that the expenses assigned to Fort Benton are not always expenses applicable to Fort Benton and that the time studies performed by BN do not accurately reflect an agent's duties.

Mr. Mular requested that the exhibits included in the Rudyard hearing Docket No.

T-9237 marked as TCU Exhibits 1 through 6 be included this docket. No objections being received the Commission admitted those exhibits into this record also.

Mr. Mular also requested that if the Commission closes the agency it apply employee labor protection pursuant to 69-14-1001, MCA, and look to orders from the Maryland and Idaho Commissions.

Leonard Knudsen. Mr. Knudsen appeared pursuant to a subpoena issued by the Commission. The Commission asked Mr. Knudsen to explain the duties of an agent in Fort Benton. Mr. Knudsen testified that he transferred into Fort Benton approximately three years ago. Since that time the official duties of an agent have been reassigned from the agency back to Great Falls. It is Mr. Knudsen's opinion that this results in a decline in service to the shipper, particularly the smaller local shipper. He testified that on several occasions he has requested forms needed to serve shippers in the local area and that BN has been reluctant to provide those forms to him, preferring that he refer the shippers to the CBC rather than serving them in the local area.

On cross-examination from Fort Benton and the Choteau County, Mr. Knudsen stated that the railroad does not provide him with information on handling hazardous materials. All questions concerning hazardous materials and placarding of hazardous materials are referred to the Great Falls CBC.

The City of Fort Benton also cross-examined Mr. Knudsen on 69-14-708, MCA, which requires the railroad to keep a record of livestock killed or injured on the railroad tracks. Mr. Knudsen testified that he believes it is the agent's responsibility to keep such a record but BN does not require him to do so.

Mr. Knudsen sponsored as Exhibit C a 1919 order from the Commission requiring agents to keep records of livestock killed by the railroad. On cross-examination from BN Mr. Knudsen stated that he was not aware of the federal regulations on hazardous waste. BN requested permission to submit as a late filed exhibit the federal regulations concerning the placarding of hazardous waste. Hearing no objections, the Commission allowed this to be filed as part of the record.

The City of Fort Benton and Choteau County moved that this petition be dismissed based on 69-14-708, MCA. The hearings examiner reserved his ruling on this motion which is discussed at page 15 of this order.

Henry Grossman. Mr. Grossman is a farmer at Shaukin, Montana, and a Chouteau County Commissioner. He stated that he believes that state law requires BN to maintain an agent at Fort Benton because an agent is necessary for public convenience and necessity. He also testified that he fears the railroad will discontinue the Fort Benton line in the near future. He believes that removing the local agent is the first step in doing that. Mr. Grossman also testified that loss of the agent's wages in the community would be detrimental to Fort Benton.

George Fultz. Mr. Fultz, a local businessman, testified in opposition to losing the local agent. He works on a program to encourage tourism in the area. He believes that a local agent will be beneficial for developing tourism and for generally developing the business community.

Ronald Jovanovich. Mr. Jovanovich, mayor of Fort Benton, testified in opposition to closing the agency. He stated he agreed with much of the earlier testimony given in opposition to closing the agency and would not repeat it here. It is his opinion that public convenience and necessity require BN to maintain an agency at Fort Benton. It is his belief that the public

convenience and necessity referred to is that of Fort Benton not BN.

Loren Jenkins. Mr. Jenkins is a representative from Big Sandy. He testified in opposition to the closure of the agency at Fort Benton and stated that he was also representing the opinions of Representatives Alan Kolstad. Representative Jenkins stated that he did not oppose the closure of the agency at Big Sandy because he agrees that it may not be necessary any longer. He does, however, oppose the closing of the agency at Fort Benton. It is his belief that the agent provides valuable service to the shippers and to the community. He also testified that losing another job in the Fort Benton community would be detrimental to the area. It is his opinion that a salary circulates two and a half times in the community and the loss of another job would hurt Fort Benton.

Gerry Dalton. Mr. Dalton moved to Fort Benton two months ago from Los Angeles. He testified that he believes it is particularly important to have an agent at Fort Benton because of the hazardous nature of the fertilizer being shipped in and out of the agency. It is his opinion that an agent would be useful in dealing with hazardous material.

Gordon McGown. Mr. McGown, Highwood, Montana, is a grain farmer in the Highwood area. He testified that up until a few years ago Highwood had a track. The loss of the railroad track was very inconvenient for the local grain farmers and very detrimental to the community. He believes that the farmer should be considered a shipper rather than the grain elevator. It is his opinion that if the farmer is considered the shipper BN would realize that its customers do desire local agents serving the area.

A.E. Anderson. Mr. Anderson, Fort Benton, testified in opposition to the closing of

the agency. He stated that he shares the same building as the agent and believes that BN's figures on the agent's productivity are inaccurate. His observation is that the agent does much more than what appears in Exhibit A and he thinks that public convenience and necessity require that the agency remain in Fort Benton. As an example, he stated that the golf course was having trouble with a railroad crossing to the golf course. He testified that the agent was able to refer him to the correct people to talk to at Burlington Northern. On cross-examination BN clarified that this crossing is owned by General Mills, not by BN. Mr. Anderson stated that his brother rents the agent's office space to BN.

Winnie Appelby. Ms. Appelby, Fort Benton business woman, testified in opposition to the closing of the agency. She stated that she would prefer that the agency remain in Fort Benton but that if it is removed, she believes BN should provide funds for purchasing the rock collection at Loma.

Carol Richards. Ms. Richards, Loma, Montana, testified in opposition to the closing of the agency. She is a grain farmer near Loma. She stated that they currently haul their grain to the General Mills Elevator and General Mills Elevator hauls it from Loma to a railroad siding. Pulling the tracks out of Loma has caused her a great deal of inconvenience and loss of money. She fears that pulling the agent out of Fort Benton is the first step toward removing the Fort Benton tracks. She testified that she believes that the farmer should be considered the shipper and customer of Burlington Northern and that the farmer's convenience and necessity requires that the agency remain at Fort Benton.

Gar Wood. Mr. Gar Wood also farms near Loma. He stated that although Burlington Northern may be correct that removing the local agent will result in greater time

efficiency, Burlington Northern should have concerns about other things in addition to time efficiency and savings. For example, he believes that the computer could be located at Fort Benton and the agent could provide all the computerized services that are currently available through the Great Falls CBC. He believes that this would provide better service in the area and provide a local contact.

FINDINGS OF FACT

The Commission finds that the Fort Benton and Kershaw Siding received 155 cars in 1985, 26 cars in 1986, 45 cars in 1987 and 4 cars from January through March in 1988. It forwarded 1971 cars in 1985, 1,356 cars in 1986, 2,629 cars in 1987 and 682 cars from January through March in 1988. The agency is profitable using either the BN or Belt/Carter formula.

Farmers Union Oil, a shipper, as well as four grain farmers, Henry Grossman, Gordon McGown, Carol Richards and Gar Wood testified in opposition to closing the agency. There was also considerable testimony from interested citizens stating that public convenience and necessity require the continuation of the agency.

Based on the testimony supporting the continuation of the agency services, the amount of traffic at this agency and the fact that it is profitable using either the BN or Belt/Carter formula, the Commission finds that public convenience and necessity require the continuation of agency services at Fort Benton.

No rule can be used to determine whether public convenience and necessity require a given service to be performed. The facts in each case must be separately considered. See Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. Board of Railroad Commissioners, 225 P.2d 346

(Mont. 1953) cert. den. 346 U.S. 823. The facts in this case establish that shippers and grain farmers want agency service at Fort Benton. Individuals actually served by an agency are in the best position to assess their needs and the requirement of public convenience.

The facts in this case also establish a strong community interest in maintaining the agency at Fort Benton. This interest enters into the Commission assessment of public convenience and necessity.

At the hearing the City of Fort Benton and Chouteau County moved to dismiss the petition on the grounds that the Commission was prohibited from granting it based on 69-14-708, MCA. Although it is denying the petition to close the agency on other grounds, the Commission wishes to make it clear that the motion to dismiss is denied.

If the Commission were to grant the Motion the issue of public convenience and necessity would be made moot. The City of Fort Benton and Chouteau County argue that Section 69-14-708(1), MCA, precludes the Commission from authorizing BN to close the Fort Benton agency.

Section 69-14-708(1), MCA, reads as follows:

Records of accidents involving animals. (1) It shall be the duty of any corporation, association, company, or person owning, controlling, or operating any railroad or branch thereof in this state to designate some station on the line of the same, in each county through which it passes, at which it shall keep a suitable book and within 30 days after the killing or injuring of any animal, to cause to be entered therein the date when and the place where the same was killed or injured, as near as may be, together with a description thereof, including the age, color, and sex of the same and marks and brands upon the same as near as the same can be done. When such railroad or branch thereof shall run to or through any town or station at which is located the county seat of any county, then such book shall be kept at such town or station at which said county seat is located, and the affidavit

hereinafter provided for may be served on the agent of such station.

The City of Fort Benton and Chouteau County argue that this constitutes a mandate from the legislature to keep an agent and agency in each county seat for the purpose of maintaining records as provided in this section. It further argues that Commission authorization to close the agency in the face of this mandate would be void. The Commission disagrees with this interpretation of 69-14-708(1), MCA, and finds that, for purposes of interpreting 69-14-202, MCA, the Commission is not bound by 69-14-708(1), MCA.

The Commission agrees with BN that Section 69-14-708(1), MCA, requires a railroad to maintain records of stock losses at a designated place in each county through which it passes. Further, if a railroad line runs through a county seat, then a place at the county seat must be designated for the maintenance of records on stock losses. The Commission does not interpret the language "designate some station" in the first sentence of 69-14-708(1), MCA, as requiring the maintenance of a "facility" as contemplated in 69-14-202(1), MCA. The second sentence of 69-14-708(1), MCA, refers to "town or station," indicating that the drafters of that statute intended that some location in a county or county seat be designated for the maintenance of a record book, but that the location need not be limited to a particular railroad facility. Further, the Commission does not interpret 69-14-708(1), MCA, as requiring that the railroad agent designated for keeping stock loss records be the same agent contemplated in 69-14-202, MCA. It is sufficient that BN designate some person in each county in which it has a line, or in the county seat if a railroad line runs through the county seat, who can perform all functions required by 69-14-708, MCA. The Commission maintains that this interpretation fully complies with the intent of 69-14-708, MCA. Therefore, the

City of Fort Benton's and Chouteau County's Motion to Dismiss is denied.

CONCLUSIONS OF LAW

1. The Public Service Commission has jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 14, MCA. The petition to close the Fort Benton agency is made pursuant to 69-14-202, MCA (1987).
2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter as required by Title 2, Chapter 4, MCA.
3. Public convenience and necessity require the continuance of an agency at Fort Benton, Montana.

ORDER

NOW THEREFORE IT IS ORDERED that Burlington Northern Railroad Company's application in Docket No. T-9236 to close the agency at Fort Benton, Montana and dispose of the depot facility is Denied.

IT IS FURTHER ORDERED that pursuant to stipulation this is a final order.

IT IS FURTHER ORDERED that all objections and motions made during the hearing in this docket that were not ruled on are denied.

IT IS FURTHER ORDERED that this order be effective immediately and that a full, true and correct copy be mailed to the Applicant and all parties of record.

Done and Dated this 16th day of August, 1988 by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

JOHN B. DRISCOLL, Commissioner

HOWARD L. ELLIS, Commissioner

TOM MONAHAN, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Carol Frasier
Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.