

Service Date: October 30, 1989

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

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IN THE MATTER of the Application)	TRANSPORTATION DIVISION
of Burlington Northern Railroad)	
Company to discontinue its agency)	DOCKET NO. T-9247
operations at Terry, Montana and)	
to dispose of the depot facility.)	ORDER NO. 5961

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

Charles C. Dearden, Murphy, Robinson, Heckathorn & Phillips, P.O. Box 759, Kalispell,
Montana 59903-0759

FOR THE COMMISSION:

Timothy R. Baker, Staff Attorney, 2701 Prospect Avenue, Helena, Montana 59620

BEFORE:

DANNY OBERG, Commissioner & Hearing Examiner

BACKGROUND

Burlington Northern Railroad Company (BN) applied to the Montana Public Service Commission (Commission) on April 27, 1988 for authority to discontinue its agency operations at Terry and dispose of the depot facilities at Terry, Montana.

The Commission noticed BN's application and a public hearing was held on November 17, 1988 at the Senior Center, Terry, Montana.

At the conclusion of the hearing the parties stipulated to a final order.

SUMMARY OF TESTIMONY

Testimony of Applicant

Testifying for BN were Charles Scheibe, John Miskulin and William Albright.

Charles Scheibe. Mr. Scheibe is the Manager of Data Quality located in St. Paul, Minnesota. He explained that under BN's proposal, a shipper wanting service out of Terry would contact the Centralized Billing Center (CBC) in Glendive to order a railroad car. The customer would provide the CBC with the necessary relevant information, such as commodity, destination and shipping date. The CBC places an order with a BN car distributor, who sends a car to the customer's loading facility. BN will pick up the car when it is loaded.

The CBC operates 24 hours a day, 7 days a week. It is a computerized operation that ties into the entire BN system. The customer prepares the bill of lading, and can call the CBC toll-free. There are three options for processing the bill of lading. The customer can mail the bill of lading to Glendive for processing, may use a power of attorney for BN to sign the bill of lading, or may put the bill of lading into a locked box at the point of pickup. The CBC is equipped to handle both the bill of ladings and way bills (a way bill is an internal document that describes the destination of the car).

John Miskulin. Mr. Miskulin is the trainmaster/agent stationed in Glendive. He is responsible for supervising train crews and operating the centralized agency at Glendive. Terry is located on the mainline, and is served by two local trains, seven days per week. In addition, approximately 20 trains per day pass through Terry on the mainline. The removal of the agent at Terry would have no impact upon this service.

Mr. Miskulin also offered a further description of the centralized agency functions at Glendive. The Glendive agency is capable of both handling all customer functions and addressing all customer problems. The clerks at Glendive each handle certain territories, and are familiar with the needs of particular shippers, such as car placement. The Glendive agency periodically sends out questionnaires to its shippers, in order to keep abreast of any service problems, and to keep informed of shipper needs. The centralized agency in Glendive has been in operation since June, 1985.

According to Mr. Miskulin, no objections have been raised by area shippers to BN's application, other than the loss of the job to the community. The agent is a protected employee, and will be able to bump a junior employee on the BN system. Mr. Miskulin stated that the local agent currently travels to the outlying areas to check on blind sidings and the location of cars on those sidings. These activities may also be adequately performed by passing train crews. Mr. Miskulin also stated that the internal needs of BN call for the continued use of the depot facility, and if BN considers disposing of the facility, he will first give preference to local community needs.

BN's application notes that agency service at Terry is also provided to the blind sidings of Baker, Plevna, Ismay, Mildred and Fallon, Montana. According to Mr. Miskulin, the rail traffic at Baker, Plevna, Ismay and Fallon consists largely of grain, and an occasional carload of fertilizer.

William Allbright. Mr. Allbright, a senior cost analyst for BN, sponsored Exhibit A -- Accounting Exhibits for Proposal to Discontinue Agency Service at Terry, Montana. Exhibit A shows the following cars received and forwarded at Terry in 1985, 1986, 1987 and the first nine months of 1988.

Cars Received and Forwarded at Terry

Jan-Sept

	1985	1986	1987	1988
Received	58	28	52	70
Forwarded	71	31	25	259
Total	129	59	77	329

Exhibit A also contained net revenues or losses for the Terry agency calculated using the Belt/Carter and the BN formulas.

		Belt/Carter Formula	BN Formula
1985	\$ 68,466	\$(35,028)	
1986	16,380	(39,918)	
1987	23,521	(42,245)	
1988 (Jan-Sept)		92,779	(28,275)

Page 3 of Exhibit A shows the number of units handled and the estimated amount of time consumed performing agency work at the station at Terry during 1987. This schedule shows a total time worked of 2,000 hours and a total time required for agency work of 264 hours. Based on BN's estimation of the time required to do a unit of agency work, and the actual number of units of work handled, the agent at Terry spent 13 percent of his time on agency work and travel, and 87 percent of his time was available for other work.

In addition to Exhibit A described above, Mr. Allbright also sponsored the following exhibits:

Exhibit B: A summary of agencies by state which shows that of 190 total agencies on the BN system, 37 are located in Montana. The BN system encompasses 26 states and 2 Canadian provinces.

Exhibit C: A summary of the average miles per agency by state. The exhibit shows that Montana has, on average, an agency for every 63 miles of track. The system average is one agency for every 124 miles of track.

Testimony of Public Witnesses

Mr. James Mular, legislative director of the Transportation Communications Union (TCU) testified in opposition to the closure of the Terry agency. He testified that he believes that public convenience and necessity require the Terry agency to remain open. Using the Belt/Carter formula, the agency is profitable. The railroad has introduced no evidence to show that the Glendive agency is capable of handling the increased work from Terry, and has produced no evidence that the Glendive CBC can adequately meet shipper needs. Mr. Mular added that he believed that the concept of "implied public convenience and necessity" should keep a profitable agency open. He also stated that there were other factors of agency service which should be considered.

Mr. Mular requested the Commission to give employee wage protection under § 69-14-1001, MCA. He also testified as to his discussions with BN personnel during the 1987 legislature regarding the amendment of § 69-14-202, MCA, and its subsequent application. Mr. Mular testified that BN indicated it would not seek the closure of any station where the agent was within two years of retirement. This policy would avoid both the bumping of junior employees and the upheaval of the agent's life. Mr. Mular testified that in return for this promise the TCU and other unions did not oppose the amendment of § 69-14-202, MCA.

Mr. Ron Kiosse, Terry, Montana, appeared and testified. Mr. Kiosse is the general manager for Farmers Union Trading Co., Terry, Montana. He described several instances where he felt the local agent played an important role in providing rail service.

In September, 1986, Mr. Kiosse ordered a carload of fertilizer. The car was spotted, but approximately one-third of the fertilizer was missing because a door on the rail car had been

severely damaged. This occurred during the middle of the fertilizing season, and timing was critical. The local agent assisted with verification and the processing of the necessary shortage claim.

According to Mr. Kiosse, there have been three or four instances when fertilizer cars were delivered, but were incorrectly spotted for unloading. The local agent assisted in having the cars respotted, as necessary.

Mr. Kiosse stated that on one occasion, a car arrived for unloading on a Friday evening. He did not know the car had arrived, as there was no notification provided. The local agent provided Mr. Kiosse with notification that the car had arrived.

Mr. Kiosse stated that it was his belief that the centralized agency at Glendive does not perform the agency functions as well as the local agent. Mr. Kiosse stated that with the incident concerning the shortage of fertilizer, the assistance provided by the local agent was significant, as it quickened the subsequent receipt of additional fertilizer. At this time, there were farming customers waiting for the additional fertilizer. Mr. Kiosse also stated that the local agent contacted Mr. Miskulin, who also provided assistance. Mr. Kiosse did not try to contact the Glendive agency.

On cross, Mr. Kiosse stated that he did not fill out any of the questionnaires submitted to him by BN regarding agency service. He also testified that he has tried the toll-free number to the central agency in Glendive, and has found that service to be unsatisfactory, as it takes too long. The local agent is immediately available.

Mr. David Covert, Terry, Montana, appeared and testified. Mr. Covert is a local businessman and a member of the Terry Chamber of Commerce. He testified that the rail service

provided by BN to its shippers has deteriorated to the point where virtually no service was provided. The result is hardest on small communities, such as Terry.

Ms. Sue Tibbetts, Terry, Montana, appeared and testified. Ms. Tibbetts is employed by the Prairie Elevator Co. She testified that small town elevators cannot compete with the larger elevators because of the rate disparity. She noted that her employer has forwarded 19 grain cars during 1988, and had ordered 14 more. The presence of the local agent helps to insure that the delivery of cars and loading process runs smoothly. She stated that the local agent provides notification of car arrival, and takes care of spotting problems. She did not want to experience any further decline in service. Ms. Tibbetts also testified that some shippers still order cars through the local agent.

On cross, Ms. Tibbetts stated that she had not noted any complaints with service on the questionnaires provided by BN. The local agent provides a quicker resolution of problems since he is in the immediate area. She stated that she is satisfied with the service from the Glendive agency, but added that this does not represent all of the service that is provided.

Mr. Gary Larson, Terry, Montana, appeared and testified. Mr. Larson is the Prairie County Sheriff. He stated that the local agent is an important contact point for information concerning livestock kills, right-of-way fires, or other emergencies. He added that he has never been provided with the toll-free number for Glendive, and believes that the Glendive agency would not be of much assistance, because of the distance from the area.

Mr. Dale Hubber, Terry, Montana, appeared and testified. Mr. Hubber is the Terry City Attorney and the Prairie County Attorney. He testified that the blocking of railroad crossings by trains is a serious problem in this area. For many residents, a particular crossing may be the only

access to town. A blocked crossing may be a hazardous situation during an emergency. At one time or another, all of the crossings in the area have been blocked. The local agent is valuable in these instances as a contact to the train crews. He also serves as a visual contact during the cutting of the train to clear the crossing. Mr. Hubber asked the Commission to keep the Terry agency open so that the local agent could provide this important assistance. Mr. Hubber also stated that, as an example, on the days of July 1, 18, 22, 29, 30 and August 1, 1988, he noted that local crossings had been blocked for more than 20 minutes.

Senator-elect Jerry Devlin, representing District No. 25, appeared and testified. He stated that he believes that after Terry, the agency at Miles City will also be closed, depriving the area of services. He testified that BN is trying to discourage local shippers because they do not produce enough business.

Mr. V.E. Altermatt, Terry, Montana, appeared and testified. Mr. Altermatt is the local agent at Terry. He testified that he does provide information to local residents regarding right-of-way fires, train schedules, or the presence of stock in the right of way. He believes that the timing of this information is often important, and that use of the toll-free number is not always a timely option. Referring to Ms. Tibbetts' testimony, Mr. Altermatt testified that the Prairie Elevator often needs on-site spotting assistance, because the cars often arrive either out of order or with numerous other cars. He provides this assistance. Often the Glendive agency shows the cars as being spotted properly and subject to demurrage, even though this is not the case. Mr. Altermatt also stated that he performs roll-by inspections, and added that within the last year, he stopped a train with shifted loads of rail.

On cross, Mr. Altermatt stated that the spotting of cars is generally the responsibility of the train crew. However, he also testified that he believes the way billing function, now performed in Glendive, is a minor part of the agent's responsibilities. He added that during a recent derailment, he played an important role in getting the spilled grain reloaded into other cars. He also stated that he has on several occasions responded to calls from computerized agencies about cars that are nonexistent. According to Mr. Altermatt, the computerized agency leads to problems that cannot be easily corrected and cannot serve as a substitute for a local agent.

Applicant's Rebuttal Testimony

Mr. Miskulin testified on rebuttal for Applicant. He stated that the local agent is largely unable to serve local customers without contacting the trainmaster or the Glendive agency. For example, with shortage claims or damaged merchandise, the local agent must generally go through the trainmaster first. Similarly, to seek assistance for respotting cars, the local agent does not have this authority and must contact the trainmaster. He also sponsored the following exhibit:

Exhibit E: A copy of the questionnaire that he sends to local shippers.

DISCUSSION, ANALYSIS AND FINDINGS

Under § 69-14-202(2), MCA, the Commission shall authorize the closure, consolidation, or centralization of a facility if a railroad demonstrates to the Commission that the facility is not required for public convenience and necessity. At the time of this application and the hearing on the application, the Commission's test for determining public convenience and

necessity involved weighing the needs of shippers for rail service against the railroad's burden of maintaining agency service.

The 1989 Legislature modified § 69-14-202(2), MCA, by adding the following language:

In determining public convenience and necessity, the commission shall, prior to making its decision, weigh and balance the facts and testimony presented at the hearing, including the facts and testimony presented by the general public, the existing burdens on the railroad, the burdens placed upon the shipping and general public if the application is granted, and any other factors the commission considers significant to provide adequate rail service.

Since the legislature does not engage in idle acts, the Commission reads this amendment to § 69-14-202, MCA, to reflect the desire of the legislature that the Commission expand its analysis to include impacts of the proposed closure upon persons other than shippers. A review of the legislative history of this amendment supports such an interpretation.

However, the Commission need not determine in this proceeding which test should be applicable. Application of the narrower test (pre-1989 legislature) demonstrates that public convenience and necessity require the agency at Terry to remain open.

Using the Belt/Carter formula, approved by this Commission as a fair measure of agency profitability, the agency at Terry is profitable. In approving applications to close profitable stations in the past, the Commission has noted that shipper testimony in such cases will be accorded great weight.

Two shippers testified in opposition to the closure. The Commission concludes from their testimony that shipper convenience would be affected by BN's proposal in this proceeding, and

that service important to these shippers would be curtailed. Both shippers testified that notification of car arrival and spotting assistance were important services to them, and that the on-site presence of a local agent enhanced these services. Further, Mr. Kiosse testified that the assistance provided by the local agent with a car shortage problem was critical, as he had customers who were waiting for the commodity. Mr. Kiosse also testified that he did not find use of the toll-free number to Glendive satisfactory, since it was too time-consuming. Ms. Tibbetts concurred in this testimony, noting that the local agent provided a quicker resolution to problems. The testimony of the local agent, Mr. Altermatt, reinforces this conclusion. He specifically described the spotting problems experienced by Ms. Tibbetts, and described instances wherein the computerized agency concept suffered failure.

Mr. Miskulin testified that many of the functions performed by the local agent were, according to railroad policy, not his responsibility. The Commission has always declined to define the role of the local agent, and will not do so here. However, the testimony in this docket makes it clear that this function encompasses more than just a waybilling function. The railroad views this question from its perspective. The Commission believes that the railroad's perspective, while entitled to consideration, is not the only perspective the Commission is required to examine. Regardless of railroad policy concerning the duties of an agent, the testimony in this docket demonstrates that the area shippers need the assistance of the local agent, and consider this assistance vital.

When weighed against BN's interest in closing a profitable station, the Commission concludes that the balance tips in favor of keeping the Terry agency open. The need for a local

presence is so clear from the evidence in this proceeding that the Commission would be compelled to reach the same conclusion even if Terry were not profitable.

Application of the broader (post-1989 legislature) test for public convenience and necessity merely reinforces this conclusion. Several area residents described the importance of the local presence of the agent in such matters as right-of-way fires, and crossing blockages. This testimony was supported by that of the agent.

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.

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. No rule can be used to determine whether public convenience and necessity requires 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 Commission concludes that the public convenience and necessity do not permit the elimination of agency service at Terry, Montana.

ORDER

NOW THEREFORE IT IS ORDERED that Burlington Northern Railroad Company's application in Docket No. T-9247 to close the agency at Terry, Montana and dispose of the depot facilities is Denied.

IT IS FURTHER ORDERED that pursuant to stipulation that 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 30th day of October, 1989 by a vote of

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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

HOWARD L. ELLIS, Vice Chairman

JOHN B. DRISCOLL, Commissioner

WALLACE W. "WALLY" MERCER, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Ann Purcell
Acting 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.