

Service Date: October 15, 1990

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-9529
operations at Cut Bank, Montana)	ORDER NO. 6005a

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

Jon Metropoulos, Leo Berry, Browning, Kaleczyc, Berry & Hoven, 139 Last Chance Gulch,
P.O. Box 1697, Helena, Montana 59624

FOR THE INTERVENOR:

Selden S. Frisbee, Cut Bank City Attorney, P.O. Box 1998, Cut Bank, Montana 59427,
appearing on behalf of the City of Cut Bank

FOR THE COMMISSION:

Denise Peterson, Staff Attorney, 2701 Prospect Avenue, Helena, Montana 59620

BEFORE:

DANNY OBERG, Commissioner and Hearing Examiner

Pursuant to 2-4-621, MCA, a proposed order authorizing a grant of the authority requested was issued in this matter on August 30, 1990. No exceptions, briefs or requests for oral argument have been received. Therefore, the Commission adopts the proposed order as its final order in this matter.

BACKGROUND

Burlington Northern Railroad Company (BN or Applicant) applied to the Montana Public Service Commission (Commission) on March 16, 1990 for authority to discontinue its agency operations at Cut Bank, Montana.

The Commission noticed BN's application and held a public hearing on July 11, 1990 at the Glacier Electric Coop, 410 East Main, Cut Bank, Montana.

Cut Bank City Attorney Selden S. Frisbee appeared on behalf of the City of Cut Bank and moved to intervene. This motion was granted over the objections of BN.

At the onset of the hearing, BN objected to inclusion of safety as a factor of public convenience and necessity. The objection was overruled, requiring BN to present testimony and evidence on the issue of safety as it relates to application for closure and removal of the agent pursuant to the Notice of Public Hearing issued June 8, 1990.

SUMMARY OF TESTIMONYTestimony of Applicant

Testifying for BN at the hearing were James D. Whitmyer, James Engel and William T. Allbright.

James D. Whitmyer, Manager of Customer Service in Great Falls, testified that the Customer Service Center (CSC), previously referred to as the Centralized Billing Center (CBC), performs the agency functions formerly done by the local agent. The billing functions were transferred to Great Falls in late 1983 and the remaining agency functions in 1985, he testified. The CSC places car orders, spots cars, has switch lists for local trains, does waybilling and demurrage, arranges car weighing, takes inquiries from shippers, and does business by fax and telephone through the CSC's toll-free number, 24 hours a day, 7 days a week, he testified. According to his testimony, BN has visible customer contact through a personal representative in the area, who has or will have a mobile radio or telephone in the vehicle, and soon a lap top computer. This customer representative position is headquartered in Havre and comes to Cut Bank once a week or on an as needed basis. Under cross-examination Mr. Whitmyer testified that the customer representative position was established two to three months before the hearing.

Mr. Whitmyer testified that the representative contacted the local shippers. There was no objection to closing the agency, although there was some preference for the local agent because he assisted in talking with the train crew on spotting. Mr. Whitmyer testified that spotting could be handled as well from Shelby.

Under cross-examination Mr. Whitmyer testified that the shippers can contact the customer representative through the toll-free number at the CSC in Great Falls. This number is in

the telephone directory. The customer representative's number will be placed in the next local directory. The customer representative is responsible for the area from Cut Bank to Malta on the east end.

Mr. Whitmyer testified on cross-examination that the proposed Central Billing Center in Fort Worth, Texas (a transfer from St. Paul, Minnesota) will have nothing to do with service.

James Engel, Shelby, Montana, Trainmaster for the area, is responsible for everything that happens in the area, including track work, customer service and train operation. Mr. Engel has the ultimate responsibility for dealing with shippers in his area, i.e., handling complaints and service problems, setting up service, and maintaining contact with the CSC, according to testimony. The customer representative performs these needed services under Mr. Engel's authority. The present agent, John Almsbury, has no duties except to pick up mail and send the electric bill to Havre. Mr. Almsbury is ready to retire but has remained in hopes of being the last agent at Cut Bank, Mr. Engel testified.

Under cross-examination Mr. Engel testified that BN has a contract with Amtrak to provide a heated facility with a restroom for passenger convenience. BN has nothing to do with the leased premises except renovating. The leased premises are not used for BN's shipping or freight. Ticket sales do not occur at this facility.

Mr. Engel testified that train crews have primary responsibility for safety. The agent's hours are only eight hours per day, five days a week, seven a.m. to three p.m., while most trains pass in the night. Every BN employee does roll-by inspections, when next to a train regardless

of title. Roll-by inspection is not a specific duty of an agent. All agents make yard checks which are for the convenience of the crews and are not safety checks. BN has three carmen, one added, to provide seven day a week service to repair bad order cars as spotted by train crews. In the area, there are also hot box detectors nine miles west and four miles east of Cut Bank, as well as other detectors regularly placed along the line.

Under cross-examination and examination by the Commission, Mr. Engel testified that the building used by the agent is not the same as that used for Amtrak. Mr. Engel testified that a fire December 28, 1988 did costly damage to the agency facility. BN built a new building which is 200 feet from the old facility. Upon recall by the hearing examiner, Mr. Engel testified that there is a loading facility, a ramp near the depot at Cut Bank, which is available for anyone's use. The agent has nothing to do with the loading facility.

William T. Allbright, of St. Paul, Minnesota, Senior Cost Analyst for BN, testified on revenue and car load data. Mr. Allbright sponsored BN-1, Accounting Exhibits for proposal to transfer agency service from Cut Bank to Great Falls. Upon request of the Commission, Mr. Allbright also sponsored BN-2, an exhibit of a time study indicating the work load that would exist at Cut Bank if almost all the duties had not been transferred elsewhere. According to the accounting exhibits and Mr. Allbright's testimony, the Cut Bank agency has been profitable. The time-study exhibit shows the total time required for agency work would be 419 hours per year, including 251 hours for custodial work on the agency facility. Forty-eight (48) hours would apply to waybills forwarded, one hour to waybills received, and one hundred nineteen hours for total carloads per year, if these duties in fact were performed by the agent which they are not. Custodial work including U.S. mail, takes 12.5 percent of the agent's 2,008 annual employment hours.

Under cross-examination, Mr. Allbright testified that handling of hazardous material is the responsibility of the shipper and the train crew, not the local agent.

Testimony of Public Witnesses

For the convenience of the public, some public testimony was taken before Applicant presented its case.

State Representative Harriet Hayne from House District 10, residing in Dupuyer, Montana, testified in opposition to the closure of the Cut Bank agency. She has supported the closure of little used agencies. However, 30 to 60 trains pass through Cut Bank daily, she testified. Representative Hayne testified that Cut Bank would be well-served to have a local agent for emergencies, with that much traffic. Like a policeman or fireman, perhaps an agent would not always be needed but it is good to have one just in case. She believed the agent should be given some duties. Keeping the agency is in the public interest, she testified.

Roger Samms, Cut Bank, Montana, operates the Pardue Grain Elevator west of Cut Bank. Mr. Samms testified in support of closing the Cut Bank agency. In past years he dealt with the local agent, but he does not do so now. The CSC is more convenient than the local agent; service is available 24 hours a day. Mr. Samms testified that he has often used the CSC in off hours. Mr. Samms is happy with the service out of Great Falls and does not believe that BN should have to keep an unnecessary job open, according to his testimony.

George Studdart, Cut Bank, testified on behalf of older people who have to wait for passenger service. He emphasized the importance that passenger facilities remain open.

James T. Mular, representing the Transportation and Communications Union, testified in opposition to the closure of the Cut Bank agency. He testified that the agent was required for safety reasons. Mr. Mular stated that safety is a factor in public convenience and necessity. Mr. Mular also questioned whether there would be adequate accommodations for passengers and whether the depot meets the safety requirements of the Commission. He criticized BN for already closing the agency by its actions in 1983 and 1985 as part of its centralization.

Francis Marceau, authorized representative of the United Transportation Union, testified in opposition to the closure of the Cut Bank agency. On behalf of train operation and train crews, Mr. Marceau stated that the presence of an agent to perform roll-by inspections is an additional safety factor. Before, the Federal Railroad Administration (FRA) required inspections every 500 miles, but now it is only required every 1,000 miles. Detectors cannot observe everything, according to his testimony, and an agent can provide additional safety protection for the public.

DISCUSSION, FURTHER FINDINGS AND ANALYSIS

Under § 69-14-202(1), MCA, a railroad under operation in the state of Montana shall maintain such agency facilities for shipping, freight delivery and accommodation of passengers as were maintained and staffed on January 1, 1987. If the railroad demonstrates to the Commission, following an opportunity for public hearing, that the facility is not required for the public convenience and necessity, then the Commission shall authorize the closure of the facility. § 69-14-202(2), MCA.

To determine public convenience and necessity, the Commission must weigh and balance facts and testimony presented at the hearing by the general public, shipping public and railroad, pursuant to § 69-14-202(2), MCA. The Commission shall also weigh and balance any other factors it considers significant to provide adequate rail service. The 1989 legislature amended § 69-14-202(2), MCA, to expand Commission analysis to include impacts of the proposed closure upon the general public other than shippers or passengers. The amendment also allows the Commission to consider factors other than shipping and passenger requirements. These factors, however, must be significantly related to the agency's function in providing adequate rail service.

In the Notice of Public Hearing the Commission informed BN and the public that it would consider rail safety as it relates to the closure of the agency and removal of the local agent. In considering safety as a factor, the Commission examines whether the local agent by defined duties or a course of conduct provides an essential safety function which is significant to provide adequate rail service.

Public convenience and necessity is not an absolute standard that can be determined by a formula. It must be determined by the facts and circumstances of each case. Before the 1989 amendment, the Commission weighed the needs of the shippers served by the railroad against the railroad's burden of maintaining agency service, when the agency facility was provided for shipping and freight service. Now, the Commission also considers burdens on the general public in the communities served by the railroad.

The general public testimony included that of a state representative who had concerns about the need for an agent in case of an emergency, much like the local policemen and firemen. What an agent could do under emergency circumstances is speculative and not significantly related

to the railroad's use of an agent to provide adequate rail service. The Commission finds that the railroad has taken other presumably adequate safety measures and that on-call emergency duties are not part of the agent's function in providing service. Other employees have safety duties, and the railroad uses safety equipment and procedures to safeguard the general public and minimize its own liability. The agent would not be in a position to handle most emergencies, while trained emergency personnel for the city, county and BN can be reached by any person through a telephone call. Furthermore, no facts or testimony indicate that this agent or agency has performed essential emergency or safety functions sufficient to keep the agency open.

In response to the general concerns about keeping the passenger facilities open, BN testified that it had a lease agreement with Amtrak. Amtrak is responsible for maintaining and keeping passenger accommodations, and it is not this facility that BN proposes to close. Amtrak is required to keep the passenger facility for passenger service.

The only member of the public to testify as a shipper supported BN's request to close the agency. BN had provided the grain elevator good service at all hours from its Central Service Center in Great Falls, the number was always accessible and there was no problem getting through to the central agency. The grain elevator did not use any services of the local agent. BN appears to meet the needs of the shipping public with its central agency. It is not warranted to require BN to maintain the agency when the only duties remaining at Cut Bank are custodial and for the convenience of BN, not for the general or shipping public.

Considering the foregoing, the Commission determines that the convenience and necessity of the shipping and general public does not require BN to keep the local agency open and a resident agent available at Cut Bank.

Pursuant to § 69-14-1001, MCA, when a railroad is granted permission to close an agency facility, the Commission shall require employee protection. Any employee affected by this closure shall have all rights as provided by this statute, federal law or agreement.

In its Petition and application to discontinue agency operations at Cut Bank, BN did not request permission to dispose of the agency facility. From BN testimony at this public hearing, the Commission learned that the original agency at Cut Bank was virtually destroyed by fire in December, 1988. Consequently, BN moved its agency operation approximately 200 feet to an other building. BN did not notify the Commission of the destruction of this facility or receive permission to abandon the structure and move to another agency facility as is required by rule under ARM 38.4.301. Because BN has stated that it intends to use the existing facility for other than agency functions, the Commission will not address the issue at this time. However, the Commission expects BN to notify the Commission if and when BN intends to abandon this facility and obtain permission to dispose of the facility.

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 specific 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 does not require the continuance of agency service at Cut Bank, Montana.

4. Section 69-14-1001, MCA, applies to protect employees affected by the closure of the agency at Cut Bank.

5. The Commission concludes that BN may remove and/or dispose of the agency facility only after notifying the Commission and requesting permission. Prior to the request and disposal, BN should determine whether the building is of historical significance and preserve it if historically significant or allow local governments in the area the opportunity to utilize the building. If BN questions this requirement, it shall raise the issue with the Commission before disposing of the facility. When or if the issue is raised, the Commission will determine appropriate procedures for resolving the issue.

ORDER

NOW THEREFORE IT IS ORDERED that Burlington Northern Railroad Company's application in Docket No. T-9529 to close the agency at Cut Bank, Montana and dispose of the depot facilities is Granted, subject to the conditions provided herein.

IT IS FURTHER ORDERED that Burlington Northern Railroad Company shall apply § 69-14-1001, MCA, as required.

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 the Applicant must, within thirty (30) days of the mailing of the notice of the rights herein granted comply with all rules and regulations of the Montana Public Service Commission.

Done and Dated this 15th day of October, 1990 by a vote of 4-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DANNY OBERG, Vice Chairman

JOHN B. DRISCOLL, Commissioner

REX MANUEL, Commissioner

WALLACE W. "WALLY" MERCER, Commissioner

ATTEST:

Ann Peck
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.