Service Date: October 14, 1986

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 by BURLINGTON NORTHERN RAILROAD COMPANY to Consolidate Agency Operations at Lodge Grass, Montana.	)))))	TRANSPORTATION DIVISION DOCKET NO. T-6081 ORDER NO. 4674a

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PROPOSED ORDER

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APPEARANCES

FOR THE APPLICANT:

K. Kent Koolen, First Northwestern Bank Center, 175 North 27th Street, Suite 1003, Billings, Montana 59101, appearing for Burlington Northern Railroad Company

FOR THE PROTESTANTS:

James T. Mular, 440 Roosevelt Drive, R.R. #1, Butte, Montana 59701, appearing for the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC)

John C. Allen, 34 West Sixth Avenue, Helena, Montana 59620, appearing for the Montana Consumer Counsel

FOR THE COMMISSION:

Eileen E. Shore and Timothy R. Baker, Staff Attorneys, 2701 Prospect Avenue, Helena, Montana 59620-2601

BEFORE:

HOWARD L. ELLIS, Commissioner & Hearing Examiner
GORDON BOLLINGER, Chairman
THOMAS J. SCHNEIDER, Commissioner

BACKGROUND

On November 3, 1981, Burlington Northern Railroad Company (BN, Applicant) filed an application with this Commission requesting permission to discontinue the agency at Lodge Grass, Montana, with the service being provided through the Applicant's agency at Hardin, Montana. BN also requested permission to dispose of, or use for other purposes, the facilities currently housing the agency at Lodge Grass.

Following proper notice of the application, protests were received, and a hearing was scheduled and held on July 26, 1982, in the Conference Room of the Big Horn County Electric Coop in Lodge Grass.

On March 28, 1984, the Commission issued Order No. 4674 in this Docket, dismissing the Application for lack of jurisdiction. This order was appealed by BN to the District Court of the Thirteenth Judicial District, In and for the County of Yellowstone, which affirmed the Order.

The District Court judgment affirming the Commission's Order was appealed by BN to the Montana Supreme Court. The Supreme Court reversed the District Court, and concluded that the

Commission did have jurisdiction over the Application by BN to discontinue the agency at Lodge Grass, Montana, as proposed. The Court further directed the Commission to proceed to issue an order on the merits.

The Hearing Examiner, having taken evidence and being fully advised in the premises, issues the following Proposed Findings of Fact, Conclusions of Law, and Order pursuant to Section 2-4-621, MCA.

SUMMARY OF TESTIMONY

Testimony Presented By BN

Mr. Louis D. Lippert appeared and testified in support of the consolidation. Mr. Lippert is the Manager of Transportation Services for BN for the Billings Region, which includes the agency at Lodge Grass. Mr. Lippert provided general background and outlined BN's proposal for discontinuing service at Lodge Grass, and consolidate agency operations at Hardin.

Mr. Lippert stated that the distance between Lodge Grass and Hardin is approximately 30 miles. Agency service from Hardin for Lodge Grass would be conducted by telephone, with the agent at Hardin travelling to Lodge Grass, as needed.

Mr. Lippert described the duties of a station agent in rendering agency service in a community. The agent receives a bill of lading from the customer, and then prepares a weigh bill for

shipment of the car. This involves a minimal amount of typing. The agent takes account of inbound shipments by mailing the weigh bill for the inbound car to the customer accounting center. There are also a few clerical duties around the station involving miscellaneous reports.

In consolidating these activities at Hardin, three alternatives are available. First, the customer could be given a power of attorney, which would allow the customer to prepare his own bill of lading, sign on behalf of the railroad, retain the customer copy and forward copies to BN. This method is the most convenient for the customer, since they have their bill of lading in hand, which is often negotiable at the local bank. Otherwise, it may take several days to receive a verified copy. A second alternative is for the customer to complete the bill of lading, drop it off in a lock box in Lodge Grass, where it would be validated by the conductor, and a customer copy left in the box. The third alternative is for the customer to complete the bill of lading and mail it to the agent in Hardin. It would be completed, and the customer's copy would be returned. Mr. Lippert stated that all three methods would be available, and the customer could choose the most convenient.

For inbound cars being received at Lodge Grass, the bill to the account would be taken to Hardin, where it would be mailed with a remittance slip to Customer Accounting. Similarly, ordering

and tracing cars could be handled through the agency at Hardin. With the consolidation, there would be increased hours during which the agent would be available. The business hours at Lodge Grass were 7 a.m. to 4 p.m., five days a week. The Hardin agent is available seven days a week, from 7 a.m. to 3 p.m. on Monday and Tuesday, and 7 a.m. to 11 p.m. on Wednesday through Sunday. Toll free long distance telephone service would be available, and the agent in Hardin would accept collect calls as well.

According to Mr. Lippert, the only personal service that could possibly be required of an agent in Lodge Grass would be to make an inspection of damage to a car. This could still be accomplished by the agent at Hardin, who would be able to travel to Lodge Grass, as needed. Demurrage records would be retained at Hardin, although there has not been any demurrage at Lodge Grass for the last two years.

Mr. Lippert also described the administrative duties performed by a local agent. These include mailing occasional circulars and tariffs, maintaining the appearance of the depot, completing switch lists for cars to be spotted or picked up, handling car orders, and distributing seals to customers. Aside from maintaining the appearance of the depot, the agent at Lodge Grass had not had to perform any of these duties for the past two years.

On cross-examination, Mr. Lippert stated that BN would have no objection to informing the public of the available services by placing a listing in the phone directory. Mr. Lippert also testified that BN had contacted the former shippers that used the Lodge Grass agency in 1979, and they expressed no interest in using the services. Mr. Lippert also stated that between six and twelve trains a day pass through Lodge Grass. The present agent at Lodge Grass is occasionally called out on over time to perform train order duties at the agency, although the time actually spent is marginal. Mr. Lippert added that this function can be performed at Parkman, Wyoming, approximately 40 miles from Lodge Grass. Mr. Lippert testified that the Lodge Grass depot is the last remaining agency on the Crow Reservation, with blind siding duties at Wyola, Benteen, and Spear. In the past two years there has been no revenue from the sidings at Spear and Benteen. There were a couple of cars received at the blind siding at Wyola in early 1981, although this function could have been performed from Hardin.

Mr. Lippert also described the duties of the local agent in relation to securing cars that are stored on the sidings. If the Lodge Grass agency is closed, the agent at Hardin, or Parkman, Wyoming, would be able to perform this function, if needed. However, the current agent at Lodge Grass does not perform this function. Typically, this function is performed by train crews.

On redirect examination, Mr. Lippert testified that there would be no change in train operations with regard to traffic through Lodge Grass. Mr. Lippert also stated that there was not an agent at either Colstrip or Sarpy Creek, Montana, although there is significant coal mining activity in each of these places. Both of these areas are covered by the agent at Forsyth, Montana.

Mr. Lippert classified the traffic through Hardin as light. Although traffic is light, Mr. Lippert described Hardin as necessary for the provision of train order service on the main line, as the point between Huntley, Montana and Parkman, Wyoming.

Mr. Patrick F. Cosgrove, appeared and testified in support of the consolidation. Mr. Cosgrove is the Manager of Station and Lines Statistics in the Cost and Statistics Division of BN's Accounting Department. Mr. Cosgrove is in charge of compiling the revenues and expenses associated with the Lodge Grass agency which are contained in certain exhibits to be presented to the Commission:

> Exhibit No. 1 - showing the revenues, expenses and statistics for the Lodge Grass agency.
>
> Exhibit No. 2 - showing the estimated annual savings that BN would receive if the consolidation is granted.

These exhibits were admitted over the objection of the Consumer Counsel, who objected to the operating ratios and formulas underlying the exhibits.

Referring to Exhibit No. 1, page 1, Mr. Cosgrove described the operation of the agency at Lodge Grass from 1979 through March, 1982. Using the BN operating ratio, in 1979 the agency experienced a net loss of $26,738. In 1980, there was a net loss of $29,300. In 1981, there was no traffic at the agency, and therefore no revenue. The expenses of operation were $32,987, which was also the net loss during that year. Similarly, there was no revenue during the first quarter of 1982, and expenses and losses were in the amount of $59,050. Mr. Cosgrove stated that even without the BN operating ratio, a net loss would result.

Referring to Exhibit No. 1, page 2, Mr. Cosgrove stated that in 1979, only three carloads were received and three were forwarded at the Lodge Grass agency. In 1980, no traffic was received, and eight cars were forwarded. In 1981 and the first quarter of 1982, no traffic was received or forwarded. Although it was not contained in the exhibits, Mr. Cosgrove stated that he was aware of no traffic at Lodge Grass through June 30, 1982.

Referring to Exhibit No. 1, page 3, Mr. Cosgrove described the carload shipments at Lodge Grass, separated by forwarded and received traffic, and commodity. In 1979, there was traffic at Lodge Grass only during four months of the year. In 1980, there was traffic at Lodge Grass only during the first three months of 1980. There has been no traffic since.

Referring to Exhibit No. 2, Mr. Cosgrove stated that if the petition to consolidate agency operations were granted, BN would save approximately $35,249 on an annual basis. Mr. Cosgrove added that a time study was not prepared for this case because there was no traffic at Lodge Grass during the last two years. There were a total of 191 cars forwarded and received in Hardin during 1981.

On cross-examination, Mr. Cosgrove admitted that the prepared exhibits did not contain the revenues generated from the blind sidings. However, he added that during the three and a half years covered by the exhibits, the Benteen and Spear sidings had no traffic. The Wyola siding received two carloads of fertilizer in March and April of 1981, which generated $1,877 of revenue. Fifty percent of this revenue would be allocated to Lodge Grass, and after application of the BN operating ratio, the loss to the station would be reduced by approximately $90 (in 1981). Mr. Cosgrove also stated that the employee displaced at Lodge Grass would continue to be paid by BN, as he would bump into another position. This would still save BN money, since it would eliminate the need of hiring additional employees on the system. Finally, Mr. Cosgrove added that after consolidation, the depot would be removed, resulting in a tax savings to BN.

Testimony of Public Witnesses

Mr. Robert Yellowtail, of Lodge Grass, appeared and testified in opposition to the consolidation. Mr. Yellowtail is 93 years old, and lived on the Crow Reservation when the first railroad was permitted by the government to cross the reservation. Mr. Yellowtail stated that he was confused by the railroad's claim that the agency services were no longer needed. Mr. Yellowtail emphasized that the railroad's presence on the reservation was pursuant to a grant from the government. Mr. Yellowtail testified that he believed that the railroad should not be allowed to leave the reservation without tribal permission. Mr. Yellowtail stated that the Crow Reservation contains an estimated 18 billion tons of coal, the vast majority of which is undeveloped. The Crow Tribe is planning to develop this re source, and he believes that they will need the railroad to maintain agency service for future use.

Ms. Eloise Pease, a member of the Crow Tribe, appeared and testified in opposition to the consolidation. Ms. Pease is employed by the Tribe as a Director of Economic Planning and Resource Development. Ms. Pease described the Tribe's ongoing program to study and promote a synfuel project on the reservation. Tentatively, the Tribe has agreed to look for a site for the synfuel project, as well as a power plant. Both of these prospects will use a fairly large quantity of coal. The Westmoreland Corporation is currently involved in developing the coal deposits

on the northern part of the reservation. In addition, the Tribe is conducting negotiations with Shell Coal.

Ms. Pease stated that she appeared before this Commission 10 or 12 years ago, asking that BN not be permitted to close their stations. She admitted that, at that time, she spoke of the same potential opportunities for the Tribe. Ms. Pease testified that the Lodge Grass agency is critical to the development by Shell, since they will have an access road from their construction site to Lodge Grass.

Ms. Pease also referred to the various treaties between the Tribe and Congress and the railroads. The Big Horn Southern Railroad was the first company to negotiate with the Tribe. It was a subsidiary of the Chicago/Burlington Northern Railroad. Officials of the Big Horn Southern promised to remain in good faith with the Tribe. Ms. Pease described an agreement which existed between the Tribe and Big Horn Southern. The railroad promised that the Tribe would be paid for their land, would have free transportation, and would get their land back if the railroad ever abandoned their line. Ms. Pease requested that the railroad act in good faith and give the Tribe more time to provide economic development on the reservation.

Ms. Pease stated that she was certain that there were agreements in place between BN and Westmoreland for the construc-

tion of spur lines to provide rail service. There are also letters of intent between BN and Shell, but no agreements.

On cross-examination, Ms. Pease admitted that she has never seen any of the agreements that she described. She also stated that the agreements she mentioned were not applicable to the prospects being promoted by the Tribe, but were examples of what could potentially be accomplished.

Ms. Pease stated that she would provide the Commission with a copy of the treaty between the Tribe, the United States, and Big Horn Southern Railroad. The potential Shell Coal Development would be approximately 25-28 miles from Lodge Grass, although further progress is currently delayed because of differing interpretations of the underlying contract. Two potential sites for the proposed synfuel plant include between Hardin and Billings, and near Lodge Grass. The proposed power plant would most likely be located adjacent to the synfuel plant.

Mr. Frederick Lefthand, a Crow tribal member from Lodge Grass, appeared and testified in opposition to the consolidation. Mr. Lefthand has lived near Lodge Grass for 39 years, and operates a ranch nine miles south of town. Mr. Lefthand read a prepared statement into the record. It was his position that certain congressional acts were being ignored and needed to be applied to this consolidation. Mr. Lefthand stated that the proper forum to resolve this question was the Crow Tribal Council, not the

Commission. Mr. Lefthand stated that the consolidation and closure of the Lodge Grass agency would be a breach of contract, to be ultimately resolved by the Tribal Council.

On cross-examination, Mr. Lefthand stated that the population of Lodge Grass, according to Tribal census, was over 1,200.

Mr. Dick Gregory, a member of the Big Horn County Commissioners, appeared and testified in opposition to the consolidation. Mr. Gregory stated that the County resisted any erosion of its tax base, big or small. Accordingly, the County wanted the depot at Lodge Grass to be maintained. Mr. Gregory also stated that the agent at Lodge Grass was a good member of the community, and it would be a loss to the county for him to leave. On cross, Mr. Gregory admitted that the annual taxes on the depot totalled $167.

Mr. Robert B. Perreten of Hardin, appeared and testified in opposition to the consolidation. Mr. Perreten is a telegrapher for BN at Hardin. He stated, however, that he was not appearing in his capacity as a BN employee. Rather, he was appearing as a representative of several residents of the community of Hardin and County of Big Horn. The main concerns to be expressed focused upon the efforts of the proposed consolidation on tax revenues and employment. Mr. Perreten stated that many people were concerned

about the railroad's proposal, since Lodge Grass is the last agency on the reservation.

On cross-examination, Mr. Perreten testified that the Hardin agency is much busier than ever before, although the actual business conducted through the agency has declined. According to Mr. Perreten, much of the work performed at Hardin could be conducted at Lodge Grass. Mr. Perreten also described the duties of an agent in relation to securing railroad cars along the sidings in the event of inclement weather. Although Mr. Perreten stated that he believed that it was technically an agent's duty to perform this function, he admitted that he had never done so.

An objection was raised by BN to the hearsay nature of Mr. Perreten's testimony. Mr. Perreten explained his appearance before the Commission. He stated that he was simply appearing before the Commission so that he could find out what was going on, although the objections to the consolidation were for the most part those of the persons who asked him to attend.

Mr. James T. Mular, Butte, appeared and testified in opposition to the consolidation. Mr. Mular is the State Legislative Director for BRAC. Mr. Mular requested that the Commission apply §69-14-1001, MCA, if they approve the consolidation. Further, Mr. Mular pointed out that §69-14-202, MCA, applies, since the Tribal census indicates that the population of Lodge Grass is over 1,200 persons. Mr. Mular testified that the proposed

consolidation and closure of Lodge Grass should be denied, since there are significant effects on public safety. On cross, Mr. Mular stated that he was not a member of the Crow Tribe, although he added that Melvin Lefthand, a Crow Tribal Member, recently tried to make him a blood brother.

DISCUSSION, ANALYSIS AND FINDINGS

It has always been the position of this Commission that railroads should be allowed to practice economies when the benefits therefrom outweigh inconvenience and loss of service to the public. In the past, this has resulted in Commission authorization to abandon or curtail station agency service. Accordingly, BN's application must be examined in terms of "public convenience and necessity." The application of this standard rests upon the facts of each case.

According to the testimony presented by BN, there has been no traffic received at the Lodge Grass agency since 1980. At the time of the hearing in this matter, this represented a period of over two years. In 1981, and through June of 1982, no traffic was either received or forwarded at Lodge Grass. At the time of the hearing, this represented a period of over one year. During the three and one-half years preceding the hearing, the blind sidings at Spear and Benteen had no traffic. In early 1981, the

Wyola siding received two carloads of fertilizer, but this function could have been performed through the Hardin agency.

Using the BN operating ratio, the Lodge Grass agency experienced net operating losses for 1979 and 1980 of $26,738 and $29,000, respectively. There was no revenue generated during 1981 and the first quarter of 1982. The operating expenses represented the net losses during these years, in the amounts of $32,987 and $59,050, respectively. Regardless of the operating ratio or formula used, the Lodge Grass agency experienced a substantial net operating loss during the years 1979 through the first quarter of 1982. Revenue of $1,877 was generated at the Wyola siding in 1981. These facts were not contradicted at hearing.

Several tribal members referred to the need for agency operations to meet a potential need for services arising out of the possible future development of coal reserves on the reservation. However, all of this testimony was speculative and uncertain at best. This is evidenced by the admission of Ms. Pease that similar testimony had been presented to the Commission during a hearing held on the same subject 10-12 years prior.

Mr. Perreten and Mr. Mular raised certain safety concerns regarding functions to be performed by station agents at blind sidings. This testimony also appeared to be speculative in nature. Further, it was admitted that regardless of actual responsibility,

these certain duties were not being performed by station agents, but were performed regularly by train crews.

On the basis of the testimony and exhibits in the record, the Examiner concludes that public convenience and necessity do not require the presence of an agent at the Lodge Grass station and that the Hardin station is the logical place for those duties to be performed. The service shall be provided at the Hardin agency consistent with the proposal presented at the hearing by BN through the testimony of its witnesses.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Montana Code Annotated, Title 69, Chapter 14.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter pursuant to Montana Code Annotated, Title 2, Chapter 4.

3. No set rule can be used to determine whether or not the public convenience and necessity require a given service to be performed. The facts in each case must be separately considered and from those facts the question is to be determined. See Chicago, M. St.P. and P.R.C. v. Board of Railroad Commissioners, 126 Mont. 568, 225 P.2d 346 (1953), cert. denied 346 U.S. 823.

4. Public convenience and necessity do not require the maintenance of the station agency at Lodge Grass, Montana. However, they do require that the remaining duties performed at Lodge Grass be performed at the station agency at Hardin, Montana, consistent with the proposal presented by BN at the hearing on this matter.

ORDER

IT IS ORDERED by Hearing Examiner, Howard Ellis, that the application of Burlington Northern, Inc. for authority to discontinue agency service at the station of Lodge Grass, Montana, IS GRANTED, consistent with the terms of this order.

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

IT IS FURTHER ORDERED that the Commission encourages Burlington Northern, prior to the disposal of the Lodge Grass depot building, to first determine whether the building is of historical significance and take appropriate action to preserve such buildings, and secondly, to allow local governments in the affected area the first opportunity to utilize the building.

IT IS FURTHER ORDERED, pursuant to Section 2-4-621, MCA, that this is a proposed order only. Any party has the opportunity to file exceptions to this initial decision, present briefs, and make oral arguments before the full Commission. Exceptions and

supporting briefs must be filed with the Commission within twenty (20) days from the date of service of this proposed order.

IT IS FURTHER ORDERED that a full, true and correct copy of this order be sent forthwith by certified mail to the Applicant herein, and by first class United States mail to all other appearances herein.

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

DONE AND DATED this 14th day of October, 1986.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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HOWARD L. ELLIS, Commissioner
& Hearing Examiner

ATTEST:

Ann Purcell
Acting Secretary

(SEAL)