Service Date: February 12, 1992

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

IN THE MATTER OF BURLINGTON NORTHERN RAILROAD COMPANY, Complaint by TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION, Concerning a Hardin, Montana, Agent Position.	)	TRANSPORTATION DIVISION DOCKET NO. T-9573 ORDER NO. 6072

FINAL ORDER

APPEARANCES

FOR THE COMPLAINANTS:

James T. Mular, Regional Legislative Director, 440 Roosevelt Drive, RR No. 1, Butte, Montana 59701, appearing for Transportation Communications International Union

Timothy J. Whalen, Whalen and Whalen, Attorneys at Law, 2825 3rd Avenue North #504, Billings, Montana 59101, appearing for Robert B. Perreten

FOR THE DEFENDANT:

Jon Metropoulos, Browning, Kaleczyc, Berry, and Hoven, Attorneys at Law, 139 North Last Chance Gulch, P.O. Box 1697, Helena, Montana 59624, appearing for Burlington Northern Railroad Company

FOR THE COMMISSION:

Martin Jacobson, Staff Attorney, public Service Commission, 1701 Prospect Avenue, Helena, Montana 59620

BEFORE:

HOWARD L. ELLIS, Chairman
BOB ANDERSON, Commissioner
WALLACE W. "WALLY" MERCER, Presiding Commissioner

FINDINGS OF FACT

INTRODUCTION

Procedure

1. On May 2, 1990 the Transportation Communications International Union (TCU) filed a Complaint before the Montana Public Service Commission (PSC) against Burlington Northern Railroad Company (BN). The Complaint by TCU alleges that, at some time in the preceding several years, BN unlawfully abolished an agent position at BN's Hardin, Montana, agency facility.

2. More specifically, TCU asserts that BN's past abolishment of its Hardin agency's 3 p.m. to 11 p.m. agent position was done in violation of BN assurances made during the 1982 Lodge Grass, Montana, agency closure hearing and the resulting 1986 Lodge Grass agency closure Order (identified and explained later). The PSC views the Complaint as also implying an assertion of a violation of Section 69-14-202, MCA, the primary statute governing closure or discontinuance of railroad agency services.

3. TCU requests that the PSC award employee job protection for the employee affected by the unlawful position abolishment. The request is based on Section 69-14-1001, MCA, which mandates a certain continued employment or wage protection to affected employees in

railroad agency closure actions.

4. On July 19, 1990 the PSC issued a Notice of Complaint to BN. On August 9, 1990 BN filed its Answer by letter, generally denying TCU's allegations with some further explanation and comment. In its Answer BN maintains that the abolished position was that of an operator, not an agent. BN also maintains that the operator retired on medical disability and was not involuntarily terminated. BN asserts that its assurances made at the Lodge Grass closure hearing and the resulting PSC Order do not compel BN to maintain agency staffing at Hardin beyond one shift on normal working days.

5. Between August 24, 1990 and September 6, 1990, TCU and Robert B. Perreten (Perreten) filed several letters or memorandums which, from all appearances, constitute a form of Reply to BN's Answer. One or more of these show no certificate of service. One or more were filed by Perreten prior to his formal intervention (explained later). Insofar as these deficiencies or any other procedural deficiency exists, the deficient replies cannot be considered for the purpose of establishing issues. However, in any event, it clearly appears that the material issues contained in these "pleadings" have been thoroughly pursued in the course of this matter.

6. BN later argues (in motions or briefing) that these filings by TCU and Perreten are not of a nature recognized by PSC procedural rules. The PSC disagrees. Although BN is correct that no PSC rule individually details the requirements for a Reply to an Answer, a

Reply is referenced in ARM 38.2.1208 (governing responsive pleadings) sufficient to make such pleading proper.

7. On September 4, 1990 Perreten simultaneously filed a Petition to Intervene and a Complaint for Declaratory Relief. In these, Perreten alleges that he is a BN employee affected by the unlawful station agent position abolishment which formed the basis of TCU's Complaint. He asserts that he was staffing a second position at Hardin when the transfer of the agent affected by the Lodge Grass closure moved him to a third position. The third position was later unlawfully abolished. He alleges that the consequences of this unlawful abolishment acted to deprive him of his opportunity to fill the second position when the former Lodge Grass agent retired and BN unlawfully abolished it.

8. Perreten supports TCU's legations and, additionally, expands the issues by alleging that BN has, in the preceding several years, unlawfully abolished more than one agent position and that, furthermore, in the same general time frame or somewhat earlier, BN has abolished all normal agency services. In regard to agency services, Perreten asserts a violation of additional statutes -- Section 69-14-215, MCA, on bills of lading, and Section 69-14-708, MCA, on livestock kill records. Perreten requests restaffing of all abandoned positions, reinstatement of all services, and reimbursement for wages and fringe benefits lost.

9. On October 31, 1990 BN filed an Application to Discontinue

Agency Operations at Hardin, Montana. This agency closure petition was designated PSC Docket No. T-9595. The closure matter is not consolidated with this present complaint matter, but the matters have since been processed in parallel for the purpose of convenience to the PSC and the parties, as the parties are the same in both dockets.

10. On November 16, 1990 a Prehearing Conference was convened. TCU and BN were present. Perreten appeared through counsel via telephone. The parties discussed the issues and agreed to submit or exchange proposals for a Prehearing Order. For a number of reasons, through no particular fault of any party, this activity produced no signed Prehearing Memorandum and no Prehearing Order followed. Neither of these things are absolute procedural requirements in PSC administrative actions.

11. Hearing was held in Hardin, Montana, on Wednesday, January 23, 1991. Hearing on the paralleling docket involving the agency closure was held the following day. At hearing certain preliminary matters were disposed of, witnesses testified, exhibits were received, and a briefing schedule was established. Briefs from Perreten and BN have now been received. TCU filed no briefs.

Preliminary Matters

12. Several motions were made by Perreten, TCU, and BN prior to taking evidence at the hearing. These were ruled on by the PSC at hearing, but with an indication that any necessary elaboration on the

rulings would be contained in the Final Order.

13. In one of these, Perreten moved to consolidate the hearings or allow an interchange of testimony in the hearings on the complaint and the agency closure matter. Perreten's grounds were based on avoiding duplicate testimony. BN opposed the motion, arguing that undue confusion would result. The PSC denied the motion. There was a real possibility for immediate efficiencies in consolidating the hearings, but, in reality, unmanageable confusion would have ultimately resulted. The only real similarity between the dockets is that the parties are the same. Other than that the dockets are entirely different. TCU and Perreten have the burden on the complaint matter, BN has the burden on the agency matter. Given this alone (although other reasons might exist), it would be unlikely that the PSC could reasonably avoid some appealable error if the hearings were consolidated. The immediate efficiencies are clearly outweighed by ultimate inefficiencies.

14. Perreten, joined by TCU, also moved to dismiss the Hardin agency closure. Primarily this was on the basis that BN intended to move its agency services out of state. Perreten and TCU argued that this would be an improper delegation of authority and cause the PSC to lose jurisdiction over the agency services at Hardin. The PSC denied this motion without prejudice and invited Perreten and TCU to renew it at the-time of the agency closure hearing. The motion had no bearing on the complaint. The PSC also pointed out that it appeared to be an

argument better suited for briefing after the hearing on the agency closure.

15. Perreten also moved for judgment as a matter of law because the pretrial conference request for a Prehearing Memorandum was not complied with by BN. Perreten argued that he was not properly apprised of BN's contentions. The PSC denied the motion based on contentions being identifiable in the pleadings and failure of Perreten to avail himself of discovery or other means of identifying contentions. The relatively inconsequential nature of the preheating memorandum procedure overall was also considered. It appears that each party made a reasonable attempt to produce a preheating memorandum. It is apparent that a number of problems occurred through some fault of all of the parties. The PSC believes that the preheating conference did serve to focus the parties' attentions on crucial matters.

16. Prior to hearing BN moved to dismiss Perreten's Complaint for Declaratory Relief. BN argued that the PSC is not empowered to make a binding declaratory ruling on third parties and is not empowered to award the requested relief. BN also argued that Section 69-14-215, MCA, on certain agency activities, is a criminal statute, not subject to PSC jurisdiction, and Section 69-14-708, MCA, is a stock kill record keeping statute to which neither Perreten nor TCU have standing to assert violation BN also asserted that Perreten was not affected by the Lodge Grass closure and lacks standing on it. The

PSC denied this motion, although it noted that some positive merit existed in the motion as far as money damages or specific relief to Perreten could be awarded. Overall, the PSC views Perreten's intervention and Complaint for Declaratory Relief, although most probably inappropriately entitled, as nothing more that a special intervention. The matter is a complaint by special intervention, not a request for declaratory ruling. The nature of the PSC's jurisdiction and the standing of TCU and Perreten will be analyzed later, if necessary.

17. BN also moved to disallow evidence on legislative intent. The PSC denied this motion noting that, through the proper witness, legislative intent could properly be received by the PSC. However, no such evidence was submitted.

18. After hearing BN also made one motion to dismiss for failure of Perreten and TCU to file a document in support of their complaint, as they failed, for approximately two months, to meet the briefing schedule. BN alternatively moved for a resetting of the briefing schedule. Perreten responded that the PSC had not advised him of the filing of the transcript for the case and it was therefore impossible for him to brief the matter making required references to the transcript. The PSC denied the motion to dismiss. The briefing schedule has been amended (on more than one occasion) and has now been complied with. BN was not prejudiced. However, the PSC disagrees with Perreten's analysis of the proper application of rules governing

briefing -- a discussion of the transcript matters and briefing schedules was had with all parties at the close of the hearing and established how the same were to be done. Perreten agreed to the procedure established at that time without any expressed concern or other objection.

19. BN also later argued, in briefing, that TCU's failure to brief the matter at all is grounds for dismissal of its Complaint. Perreten responded that it would be error to dismiss issues raised by TCU and Perreten. The PSC agrees with Perreten. TCU has actively participated until the briefing stage. Perreten's special intervention (which adopts all issues) and active participation in briefing on all issues prevents a dismissal of the complaint itself. Dismissal of TCU would serve no purpose.

Evidence Submitted

Lodge Grass Proceeding

20. On request of TCU and Perreten, and on its own motion, the PSC takes official or administrative notice that on December 3, 1986, the PSC issued a Final Order, Order No. 4674b, PSC Docket No. T-6081. This Order authorized BN to close its agency facility at Lodge Grass, Montana. No judicial review was sought for this Order. It was preceded by an October 14, 1986, Proposed Order to which no exceptions were made.

21. The hearing on the Lodge Grass closure was actually

conducted in 1982. Between 1982 and 1986, the matter was in court on jurisdictional questions, until being returned to the PSC for a decision. No subsequent fact-finding hearing was held and it necessarily follows that the evidence bearing on the closure is "1982 evidence." As indicated above, no party challenged this through exceptions, reconsideration, or judicial review. Furthermore, no party apprised the PSC that any circumstance had so changed that a decision on the "1982 evidence" would be improper in any aspect.

22. TCU, then the Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), appeared and protested the Lodge Grass closure. Perreten participated in the Lodge Grass closure as a public witness, at that time also being a BN telegrapher at BN's Hardin agency.

23. Lodge Grass is located about 30 miles south of Hardin, Montana, on one of BN's railroad lines. The Lodge Grass closure had some bearing on the Hardin agency as the Order required 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." See, PSC Docket No. T-6081, Order No. 4674b, para. 41, p. 16, and para. 4, p. 17 (1986).

24. This "proposal presented by BN" is most appropriately that found in the Order's "summary of testimony," which, essentially, amounts to findings of fact. The transcript of the hearing is possibly a source for the "proposal," so long as any subject testimony

reasonably relates to the expressed findings of fact. It would be inappropriate to extract virtually any testimony from the transcript as such is merely testimony, not a PSC determined Finding of Fact.

25. In any event, it is clear that the "proposal" was that which was presented by BN's Manager of Transportation Services, Louis D. Lippert, and BN's Manager of Station and Line Statistics, Patrick F. Cosgrove. Between the testimony of these two witnesses, BN's proposal amounted to a consolidation of the Lodge Grass agency services into the Hardin agency services. More specifically, business would be conducted by phone with toll-free long distance service available, there would be travel to Lodge Grass as necessary, and three options for the handling of bills of lading would be available. It was noted that increased hours would be available at Hardin as the Hardin agency operated from 7 a.m. to 3 p.m. Mondays and Tuesdays and 7 a.m. to 11 p.m. Wednesdays through Sundays. It was also noted that the existing Lodge Grass agent would "bump" into another position.

26. There is no finding or supporting testimony for any proposition that the consolidation "proposal" of BN contemplated an expansion of services at Hardin. The proposal was merely a consolidation of existing Lodge Grass services into the Hardin agency services. In this regard, all references to "increased hours" being available as part of BN assurances to provide services, for Lodge Grass from Hardin clearly meant that Hardin had more hours already in

place. It did not mean that there would be an expansion of hours.

TCU and Perreten Witnesses

27. At hearing on the present Complaint matter TCU and Perreten both called the same witnesses. The first witness was Jay C. Parsons (Parsons), a 20-year BN employee at Sheridan, Wyoming, and the Local Chairman for TCU Local 401 in Billings, Montana, since January, 1990. The second was Perreten himself. Perreten is a 17-year BN employee who had worked at the Hardin agency facility for the preceding 10 years.

28. Parsons testified that on April 1, 1985 the BN work force at the Hardin agency consisted of four. One was the agent, two were operators, and one was a relief. Parsons referenced the work shifts as "tricks" -- first being 7 a.m. to 3 p.m., second being 3 p.m. to 11 p.m., and third being 11 p.m. to 7 a.m. All were daily, seven days a week. The relief worked the "rest days" of the other three positions.

29. Parsons testified that the third trick was abolished by BN on September 9, 1988, and the second trick was abolished by BN on May 1, 1990. Parsons provided no testimony on the status of the relief position.

30. Perreten's testimony differed somewhat. Perreten testified that, at sometime in 1986, BN abolished the two operator and one relief positions first referenced by Parsons. This left only the agent position. The exact date for this is not clear. However,

according to Perreten, BN reinstated all positions later in 1986 and by January 1, 1987, there were, again, at least three formally "bulletined" positions at the Hardin agency.

31. Perreten testified that, of these three positions, two were actually filled on January 1, 1987. One was filled by the agent. The other was filled by Perreten himself, in utility status. Perreten did not know if, exactly on January 1, 1987, he was performing any freight shipment or delivery or other agent functions.

32. Perreten testified that all three positions were formally awarded and filled in early 1987. Perreten then agrees with Parsons as to the details of BN's abolishment of the positions -- the third trick was abolished September 9, 1988, and the second trick was abolished May 1, 1990. Perreten testified that he was the BN employee affected by the abolishment of the third trick.

33. Perreten testified that after the abolishment of his position in September, 1988, he was governed by a BN and union bargaining agreement which, in six-month increments, permitted him the option of (a) accepting a job offer, (b) accepting a severance agreement, or forfeiting the election for another six months while on "standby" status. He eventually took a job (January, 1991) with BN in Everett, Washington. Perreten testified that during the time between September, 1988, and January, 1991, he elected the forfeiture in six month increments and was called by BN to work about two months total.

34. Perreten testified that the Hardin agency facility had, at times since the abolishment of the second trick position, been closed and padlocked during the absence of the agent. No certainty in time was established for these closures.

35. Parsons testified that "operators" handle train orders and communications on train movements and other station service work that needs to be done when the agent is not present. Perreten essentially agreed.

36. Parsons testified that the Hardin station accounting, demurrage records, waybill maintenance, and other typical agent functions were transferred (by BN) to Sheridan, Wyoming, in May of 1986, with several months of implementation following. Parsons testified that he was not aware of a stock kill record book at the Hardin agency. Perreten essentially agreed and added that all typical agent functions
-- car ordering, waybilling, demurrage record keeping -- had been transferred by January 1, 1987.

37. Perreten testified that the remaining agent duties performed at Hardin included communications, roll-by inspections, and public inquiries. He testified that he performed these duties in his employment performance at the Hardin agency.

BN Witnesses

38. BN also called two witnesses -- Dennis G. Garner (Garner)

and Stephen N. Sims (Sims). Garner is BN's Manager of Customer Service at Minneapolis, Minnesota. He had been the same previously, from 1985 to 1990, at Sheridan, Wyoming, which supervised the Hardin agency. Sims is BN's Manager of Administration for the Denver Division.

39. Garner testified that the transfer of agency functions was a result of centralization of computer systems permitting better service to customers. Garner testified that the system was working well, with no customer complaints. Garner concurred that the Hardin agency functions were transferred to Sheridan in 1986. Garner testified that there were positions abolished at Hardin because of lack of work, but acknowledged that this might have been by design or anticipated as an incident of technology.

40. Garner testified that, to his knowledge, there were no functions being performed at Lodge Grass at the time that the PSC issued its order closing the Lodge Grass agency. He explained that, if there were any, they went to Hardin. Garner testified that whatever positions were in Hardin on January 1, 1987, agents or operators or both, they handled BN matters concerning shipping and delivery of freight as a primary responsibility.

41. Garner testified that he was not aware of Montana statutes governing agency matters. Garner acknowledged that there might have been days for sick leave or vacation that the agency at Hardin was closed, but this practice did not occur before BN had fully

implemented Sheridan agency services systems for customers at Hardin. Garner could not answer specific questions on the times and natures of the staffing at the Hardin agency.

42. BN's second witness, Sims, first testified that there was one authorized position at the Hardin agency on January 1, 1987, and that was the position of "agent." Sims could not recall there being another position at that time. Sims testified that the second and third trick general clerk positions that were ultimately abolished in 1988 and 1990 were awarded on February 26, 1987, and would have been "bulletined" approximately 25 days prior to that. Sims had no documentation evidencing any of this.

43. Later, Sims testified that on January 1, 1987 there were three individuals at the Hardin agency. One was a bulletined position of agent. Two were utility status or extra list status, performing functions as needed. In Sims words, this amounted to one position and three people. Sims had no specific knowledge of the duties of these people, but testified that the utility status were assigned to a 30-mile area, not necessarily the Hardin agency. Sims also agreed that, hypothetically, an employee could be working a position even though not formally assigned to that position.

44. After an <u>in camera</u> inspection of certain BN employment records, the PSC determined that, on January 1, 1987, Perreten was designated as a utility clerk at the Hardin agency. Counsel for TCU

and Perreten stipulated this determination as evidence.

45. Sims testified that he was the person that dealt with Perreten in job offers after Perreten's position was abolished in 1988. Sims testified that Perreten would have received his guaranteed level of compensation for hours worked had he taken the offers. Sims testified that the positions offered were of a different nature and demanded a 24-hour on call status, but with time off, frequent work, and opportunity to bid into other positions.

Perreten's Rebuttal Witnesses

46. After BN's witnesses testified, Perreten called Ronald D. Matheny, BN Director of Operation Services, and Garner and Parsons again, as rebuttal witnesses. The only material rebuttal testimony came from Parsons, who testified that there had been shipper complaints and problems at the Hardin agency and the matters would be compounded by the absence of an agent.

Late Filed Exhibits

47. After hearing, BN was asked to file position bulletins demonstrating, in chronological order, the positions at the Hardin agency from April 1, 1985, to January 1, 1987. BN later contacted the PSC and stated that it was unable to find these documents. No other party has submitted the same.

Analysis

48. In 1982, for all purposes relevant and material to the Lodge Grass closure, BN's Hardin agency was staffed by two positions. One was an agent working a 7 a.m. to 3 p.m. shift Monday through Friday, the other was a telegrapher, clerk, or operator working a 3 p.m. to 11 p.m. shift Wednesday through Sunday. At the Lodge Grass hearing, BN witness Lippert was, after a bit of stumbling, unequivocal on this point. No conflicting evidence existed.

49. Commencing at some time after the hearing in the Lodge Grass agency matter and at least until April 1, 1985, BN's Hardin agency was staffed by four positions. one was an agent, two were operators, and one was a relief. During this time the Hardin agency was operated "around the clock." The exact details of the genesis of staffing at Hardin between 1982 and 1985 are not contained in the record and remain unknown to the PSC.

50. The two operator positions and the one relief position existing on April 1, 1985 were abolished at some time in 1986. Perreten himself provides testimony on this. The exact date and nature of this reduction in staffing is also not contained in the record and remains unknown to the PSC.

51. However, by and on January 1, 1987 two or three "Positions" again existed at BN's Hardin agency. One position was that of an agent. All parties agree that it was a formal and "filled" position. If and how the other two positions were formally described or recorded or

"bulletined" (advertised or offered but not necessarily filled) by BN is unknown.

52. Perreten testified that on January 1, 1987 the three positions were "bulletined" and two were filled -- one by the agent and one by Perreten himself in utility status. BN witness Sims testified that the positions were not formally bulletined at that time, but were bulletined, awarded, and filled by the end of February, 1987.

53. However, the nature of how one of these other "positions" actually operated (informally filled) is of little contention. Perreten's testimony on this is the same as above -- he was in utility status. BN witness Sims testified that on January 1, 1987 there were three individuals at the Hardin agency -- the agent and two utility status performing functions as needed. Furthermore, after PSC inspection of BN employment records, all parties essentially agreed that, on January 1, 1987, Perreten was designated as a utility clerk at the Hardin agency.

54. As is apparent, the evidence on what actually existed as far as staffing at the Hardin agency on January 1, 1987, is conflicting. However, the weight of the evidence, with all factors considered, favors Perreten's general contention on this point -- there was more than one agency staff at the Hardin agency at that time. Given (a) the PSC's requirement that the Hardin agency be staffed as proposed by BN at the Lodge Grass closure hearing, (b) the absence of any indication by BN that circumstances had so changed that such requirement would not, or could not, be met at the time of the order approving closure of the Lodge Grass

agency, the PSC's anticipation that, in the absence of some form of review of the Lodge Grass Order, BN intended to comply, (d) BN witness Garner's testimony that whatever positions were in Hardin on January 1, 1987, they handled matters concerning shipping and delivery of freight as a primary responsibility, and (e) the facts contained in the paragraphs above, the PSC determines that substantial credible evidence supports the finding that at least one agent and one utility clerk were actually staffing the Hardin agency and performing agent services on January 1, 1987.

55. In regard to a third position at the Hardin agency, the evidence is much more in conflict. Perreten himself testifies that only two were filled on January 1, 1987. BN witness Sims testified that there were two utility status at that time. For purposes of this matter the PSC determines that there was no third position at the Hardin agency on January 1, 1987. Additionally, there is no substantial evidence in the record supporting a finding that any third position, if existing, was performing agency services.

56. By the end of February, 1987, BN had formally filled three positions at the Hardin agency. On September 9, 1988 BN abolished the third trick, apparently the 11 p.m. to 7 a.m. operator position. The affected employee was Perreten. On May 1, 1990, BN abolished the second trick, apparently a 3 p.m. to 11 p.m. operator position. Given this, Perreten necessarily had been "bumped" from his January 1, 1987, second trick position to a third trick position at sometime after January 1,

1987, and before September 9, 1988.

57. Perreten's employment with BN at the Hardin agency was governed by a collective bargaining agreement. It is evident from the records of the PSC that BN made no application to the PSC for approval, and obtained no approval, to abolish either the second or third positions at the Hardin agency.

CONCLUSIONS OF LAW

General

58. All Findings of Fact are incorporated herein as Conclusions of Law. The PSC has jurisdiction over this matter. This matter has been processed in accordance with the laws of Montana.

59. The principal PSC-administered statute governing BN's Lodge Grass agency closure was Section 69-14-202, MCA (1979 to 1985 versions were the same and applied to all closure matters until amended in 1987). During that time the statute provided that railroads must maintain and staff facilities for the shipment and delivery of freight in at least one location in each county through which its line passed and at any point on the line where there was a city or town of population not less than 1,000. It also provided that the PSC must first approve any closure of any existing facility at points not meeting the above criteria. See, Section 69-14-202, MCA (1985).

60. This statute also governed BN's actions at the Hardin agency from the date of the Order closing the Lodge Grass agency until-the

statute was amended. The statute was amended in 1987 and again in 1989.

61. The 1987 amendment, effective October 1, 1987, provided that railroads maintain and staff all facilities for shipment and delivery of freight, as were maintained and staffed on January 1, 1987, unless the PSC first found that the public convenience and necessity did not require such maintenance and staffing. See, Chapter 495, L. 1987; and Section 69-14-202, MCA (1987). The 1989 amendment, effective May 5, 1989, retained this, but added that the PSC, in determining public convenience and necessity, must consider the testimony of the general public and the burdens on the railroad and shipping and general public. See, Chapter 645, L. 1989; and Section 69-14-202, MCA (1989). The statute as amended governed BN's actions at the Hardin agency during the relevant times to date.

Arguments

62. In briefing this matter, Perreten argues that the testimony at the Lodge Grass agency closure hearing represents that BN proposed an increase in agency hours at Hardin. He argues that the testimony establishes that BN was required to maintain three positions operating the time slots identified in the testimony. He argues that, because the PSC compelled BN to implement its proposal, BN was required to maintain three positions after the December, 1986, Order and on January 1, 1987. Perreten discounts the relevance of that testimony at the present hearing regarding the actual staffing level at the Hardin agency on

January 1, 1987, arguing that what is relevant is what the Lodge Grass order required.

63. Perreten argues that the September, 1988, position abolishment (third trick position held by Perreten) represents a de facto closure of the agency for that time slot and that it was done without the required PSC approval of such abolishment. He argues that, therefore, it was in violation of Section 69-14202, MCA, and entitles Perreten to wage protection pursuant to Section 69-14-1001, MCA.

64. Perreten also argues that BN elimination of the second and third trick positions were willful and in violation of Section 69-14-137, MCA. Perreten requests that the PSC impose a penalty, or penalties, for such violations.

65. In briefing this matter, BN argues that the hearing on the Lodge Grass agency closure demonstrates that the agent duties at Lodge Grass in 1982 were minimal, if any truly existed. BN argues that both the second and third trick positions were those of operators not agents. BN argues that Perreten was treated in accordance with his union contract at the time of his position abolishment and that Section 69-14-1001, MCA, does not apply in the presence of such agreement.

66. BN argues that, as a legal matter, the PSC has never attempted to dictate the precise manner in which railroads provide agency services, the PSC has no authority to "micro-manage" railroad operations, and the PSC cannot require a certain level of staffing at Hardin. BN also argues that Section 69-14-202, MCA, requires only the continuance of agencies,

not the continued operation of agencies at a set level of staffing -- again referencing no power in the PSC to dictate management decisions.

67. BN references a number of prior PSC Orders and court opinions in support for its arguments that the PSC has no authority to dictate things like the level of staffing at agencies or the services performed by agents or to compel similar management decisions. These will be specifically referenced in the PSC analysis following, if warranted.

68. In his reply brief, Perreten argues that BN has violated the Lodge Grass order because it has served Lodge Grass out of Sheridan, Wyoming, not the Hardin agency. Perreten also continues to maintain that the Lodge Grass order imposes obligations on BN and compels continued performance of these obligations at Hardin.

69. Perreten argues that Section 69-14-202, MCA, is not subject to such narrow interpretation as that argued by BN. He argues that the specific language pertaining to "staffing" in Section 69-14-202, MCA, provides the requisite authority to the PSC to compel staffing. Perreten also seems to argue that the statute pertains to agency "functions" as well. Perreten argues that it is implied by the PSCs authority pertaining to public convenience and necessity that the PSC has power to require standards and qualifications for staff and hours for service by staff of agencies. Perreten argues that the 1987 amendment to Section 69-14-202, MCA, renders BN's case references inapplicable.

70. On the applicability of Section 69-14-1001, MCA, Perreten argues that Perreten was denied protection under his union contract

because BN placed him in a position requiring him to exercise rights by its unlawful abolishment of his position -- there being a right to benefits for violation of the union contract, but no right to benefits for violation of Montana law.

Analysis

Violations

71. Perreten's arguments are premised on there having been three staffed positions performing agent functions at BN's Hardin agency on January 1, 1987. If it were true that BN did have three such staffed positions, Perreten's arguments appear to be substantially correct insofar as BN's abolishment of his eventual third trick position without PSC approval would have been in violation of Montana law and certain consequences flowing from such violation most probably would place him in a position to obtain some form of relief.

72. However, the facts show that there were not three such positions at the Hardin agency on January 1, 1987. There were two. Perreten's argument under this circumstance do not apply. He makes no arguments for such alternative.

73. The facts show that on January 1, 1987 there was an agent at Hardin and there was a utility clerk. Perreten was the utility clerk. The facts show that Perreten, as a utility clerk, performed agent functions. Therefore, BN had two "staff" at the Hardin agency at the relevant time, performing relevant functions, to bring the situation of

staffing within the meaning and application of Section 69-14-202, MCA.

74. Perreten, however, was "bumped" from this second position at some time in February, 1987, and became an operator in a third position. BN then had one agent and two operators at its Hardin agency.

75. Insofar as Perreten's third position is involved, neither Section 69-14-202, MCA, nor any other statute or rule administered by the PSC governs. From the PSC□s perspective, BN could have done virtually anything with the third position without approval. Given this, when BN abolished the position held by Perreten in September, 1988, BN had no obligation under PSC administered statutes or rules to obtain PSC approval or afford wage protection or anything else. The matter appears to be governed solely by Perreten's employment agreement.

76. BN argues that the second and third positions abolished were those of operators, not agents. BN appears to assert that the governing statute, Section 69-14-20-2, MCA, applies to □agents" only. The PSC disagrees. It is true that Section 69-14-202, MCA, applies to a railroad's furnishing of freight (and passenger) services and it must be construed with this in mind. However, this statute, in no other fashion, restricts application only to an individual designated by the railroad as □agent." Section 69-14-202, MCA, speaks in terms of "staffing" not in terms of "agents." So long as the railroad "staff" is performing freight shipment and delivery type services or is available to perform the same, such "staff" is within the application of Section 69-14-202, MCA.

77. BN also argues that Section 69-14-202, MCA, requires only the

continuation of operation of agencies that were maintained and staffed on January 1, 1987, not the continuation of such agencies exactly as maintained and with the same level of staffing as on January 1, 1987. The PSC also disagrees with this argument. Section 69-14-202, MCA, clearly and unambiguously reads and requires that railroads "shall maintain and staff facilities ... [for the shipment and delivery of freight, etc.] ...as were maintained and staffed on January 1, 1987."

78. As explained above, Section 69-14-202, MCA, had no application to BN's abolishment of the third trick position in September, 1988. As explained above, this is so because such position was not in existence (or required to be in existence) on January 1, 1987. However, the contrary is true for the second trick position abolished by BN in May, 1990. The second trick position was in existence on January 1, 1987. BN was required by Section 69-14-202, MCA, to obtain approval from the PSC prior to abolishing it.

79. BN also argues that the PSC has never attempted to dictate the precise manner in which railroads provide agency services and, furthermore, does not have the authority to do so in regard to level of staffing. BN argues that these types of things are "management decisions." The PSC disagrees with this, in part, and agrees with it, in part. However, the entire theory of when, where, and what the PSC will and can lawfully do in regard to dictating the precise manner in which agency services are to be provided, need not be discussed here. In the face of Section 69-14-202, MCA, and its requirement that railroads

maintain a certain staffing level (that maintained on January 1, 1987), BN's arguments are unsound in this instance. Section 69-14-202, MCA, does not raise implied authority questions, it does not impart a discretion to be exercised by the PSC, it is not subject to an analysis of what the PSC can and cannot dictate it absolutely requires continued staffing at the level existing on January 1, 1987.

80. Perreten argues that BN has violated the terms of the Lodge Grass Order because BN is serving Lodge Grass from Sheridan, Wyoming, not Hardin. Perreten appears to argue that the Lodge Grass Order imposes obligations and compels continued performance of these at Hardin. Perreten also argues that Section 69-14-202, MCA, applies to agency "functions." This is not the case and this is where BN's arguments in regard to the PSC not dictating the precise way in which agency services are to be performed apply. The Lodge Grass Order, like all other agency orders, was an expression made in an environment of ongoing and changing railroad operations and government regulations. It did not impose obligations to such degree that the railroad's development and implementation of new and better ways of adequately doing business was contingent upon PSC approval. The Lodge Grass Order was issued with every expectation that it could be, and was to be, subject to certain changes in railroad operations. There was no prohibition expressed or implied in the Lodge Grass Order that, if services at the Hardin agency were changed by technological advances or other factors, the Lodge Grass services could not follow the same course. So long as a railroad

continues to maintain and staff agencies as they were maintained and staffed on January 1, 1987, having its staff performing agency functions pertaining to the shipment and delivery of freight (and accommodation of passengers, when applicable) or available to perform the same as needed, and so long as these agency services are adequately performed by the railroad, whether through the agency or by some other means, the railroad is in compliance with Section 69-14-202, MCA. But for BN's unlawful abolishment of the second trick position in May, 1990, BN is in compliance with Section 69-14-202, MCA, and the Lodge Grass Order.

Remedies

81. Analysis is now necessary on the law providing remedies to the complaining parties. TCU requested that the PSC award wage protection to the affected employee. The effected employee was that employee filling the second trick position in May, 1990. However, it is undisputed that this employee retired on medical disability. Protection pursuant to Section 69-14-1001, MCA, would not apply.

82. Nevertheless, the position itself was then abolished without PSC approval. It was, at that time, incumbent upon BN, pursuant to Section 69-14-202, MCA, to fill the position or seek approval from the PSC to abandon it. It did neither and is, therefore, in violation of the law.

83. There is also a problem with the Hardin agency being closed (padlocked), at times and for periods uncertain, but nevertheless closed,

during normal agency hours. This, too, is a violation of Section 69-14-202, MCA.

84. Perreten suggests that BN be fined pursuant to Section 69-14-137, MCA. This section provides that a railroad must (not more than)$500 for every act in willful violation of Title 69, chapter 14, MCA, or any act prohibited by the same. The PSC determines that a fine would be inappropriate in this proceeding. In his initial pleadings, Perreten did not mention or request that a fine be imposed pursuant to Section 69-14-137, MCA. If the PSC determines that a fine is appropriate for BN's violations determined herein, it will notice BN of its intent to fine and afford BN an opportunity to be fully heard on the matter.

85. However, in the future, for violations of Section 69-14-202, MCA, and related provisions (such as those found here -abolished positions or padlocked agencies), and similar violations, the PSC intends to pursue the remedy of fines. This warning also applies to failure to correct past violations.

86. More importantly to Perreten, however, has got to be the remedy, if any, that the PSC can grant to him as a result of BN's unlawful activities. In this regard Perreten has requested that the PSC reinstate the unlawfully abolished position and award wales and fringe benefits lost. The PSC can order BN to reinstate the unlawfully abolished position, however, the PSC cannot dictate to BN who must fill that position. It might have been the case that Perreten "stood next in line" to fill such position in May, 1990, absent the unlawful

abolishment. Given the record it appears that he was, but the PSC has no jurisdiction to make such determination.

87. As indicated above, Perreten's third position was lawfully abolished. Perreten's rights are governed by his employment agreement, not PSC administered statutes or rules. This same reasoning applies to the request that the PSC award wages and fringe benefits lost. Perreten's relief for these things, if due, cannot be awarded by the PSC.

ORDER

1. All Conclusions of Law are incorporated herein.

2. TCU's request that the wage protection of Section 69-14-1001, MCA, be awarded to the employee affected by BN's May, 1990, abolishment of the then-existing "second trick" position is denied.

3. Perreten's request, if any, that the wage protection of Section 69-14-1001, MCA, be awarded to the employee affected by BN's May, 1990, abolishment of the then-existing "second trick" position is denied.

4. Perreten's request that the "third trick" position abolished by BN in September, 1988, be reinstated is denied.

5. Perreten's request that the "second trick" position abolished by BN in May, 1990, be reinstated is granted. On this basis and on the PSC's own motion, BN is ordered to reinstate and fill and operate the "second trick" position at the Hardin agency.

6. Perreten's request that BN be fined $500 per day for the violations determined herein is denied.

7. Perreten's request that he be awarded wages and fringe benefits lost is denied.

Done and Dated this 23rd day of January, 1992 by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

HOWARD L. ELLIS, Chairman

BOB ANDERSON, Commissioner

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.