

STATE ARBITRATION BOARD

1022 LOTHIAN DRIVE
TALLAHASSEE, FLORIDA 32312
PHONE: (904) 385-2852

*SEC'D'S/CO
12-
11/20/92*

20 November 1992

+++ NOTICE +++

In the case of Baxter's Asphalt & Concrete, Inc. versus the Florida Department of Transportation on Project No. 61001-3418 in Washington County, Florida, both parties are advised that State Arbitration Board Order No. 5-92 has been properly filed on November 20, 1992.

H. Eugene Cowger
H. Eugene Cowger, P.E.
Chairman & Clerk, S.A.B.

S.A.B. CLERK

NOV 20 1992

FILED

HEC/sfc

Copies of Order & Transcript to:

J.B. Lairscey, Jr., Director of Construction/FDOT

Kathy Sloan, Vice President/Baxter's Asphalt & Concrete, Inc.

STATE ARBITRATION BOARD

ORDER NO. 5-92

RE:

Request for Arbitration by
Baxter's Asphalt and Concrete, Inc on
Job No. 61001-3418 in
Washington County

The following members of the State Arbitration Board
participated in the disposition of this matter:

H. Eugene Cowger, P. E. Chairman
Kenneth N. Morefield, P. E. Member
John Roebuck, Member

Pursuant to a written notice, a hearing was held on a
request for arbitration commencing at 10:40 a.m., Thursday,
September 24, 1992.

Prior to beginning of testimony relating to the
Contractor's claim the Department of Transportation raised
the issue of whether or not the Board should hear this claim
because the Contractor was disqualified from bidding on DOT
work in accordance with Rule Chapter 14-23 during the period
of time covered by his claim. Disqualification was based on
delinquency of progress on this on the project from which
this claim arose. The Board decided to proceed with the
hearing and to take this evidence into consideration when it
deliberates on the claim. If deemed appropriate, the Board
will seek a legal opinion on this issue.

The Board Members, having fully considered the evidence
presented at the hearing, now enter their order No. 5-92 in
this cause.

ORDER

The Contractor presented a request for arbitration of a
three part claim for additional compensation in the total
amount of \$147,125.08 to cover additional costs he alleges to
have incurred due to delays to the work caused by the
Department of Transportation plus prejudgement interest based
on the delay costs.

The Contractor submitted the following information in
support of each part of his claim:

PART I Two Day Suspension of Paving Operations \$10,020.54

1. On September 6, 1988 we were instructed by the Department of Transportation (DOT) to suspend asphalt paving operations that were under way in lanes 1 and 2. There was a problem with slippage of the asphalt at this location and DOT wanted to determine the cause before any more material was placed.
2. As a result of this suspension, we could not conduct paving operations on September 7th and 8th. It was not reasonable to expect us to relocate our paving operation to lanes 3 and 4 because this would interfere with the logical sequence of work. Also, we anticipated that the DOT decision allowing us to resume work would be forthcoming immediately.
3. DOT recognized this delay and granted a two day extension of the allowable contract time.
4. We are claiming the ownership cost of our paving equipment which was idle during the two day suspension period and home office overhead for the suspension period.
5. The equipment rental rates are ownership rates taken from the Dataquest Blue Book, 1985 Edition.

PART II Design Changes That Extended Placing of Friction Course and Thermoplastic Markings into Cold Weather

50 CD Overhead @ \$1,394 =	\$69,700
Release 50 CD Liq. Damages @ \$ 500/ Day =	\$25,000
	\$94,700

1. During the course of the project, DOT initiated design changes that resulted in extending of the allowable contract time by 58 calendar days (Supplemental Agreement-Removal of Petromat 18 CD, Time Extension-Additional Borrow 30CD, Time Extension-Removal of Subsoil 4 CD, Accrued on Final Estimate 6 CD)
2. Extension of the project time by 58 days pushed beginning of construction of the friction course, an item that can be constructed only when the air temperature is 60 degree and rising, from late October 1989 into late December 1989. This pushed placing of the thermoplastic markings into February and March when many days of foul weather were encountered.
3. Due to the weather conditions encountered in December and January, it took 39 days to construct the friction course, an item which could have been completed in 9 days under more

favorable weather conditions..

4. Due to the weather conditions encountered in March, it took 33 days to place the thermoplastic markings, items which could have be completed in 13 days under more favorable weather conditions.

5. We realize that we started work on the project and on the asphalt work late, but still could have finished the friction course and thermoplastic markings before winter weather set in if we had not been delayed by the time required to complete the design changes.

6. We completed the Type 3, Asphaltic Concrete Surface Course on November 1, 1988 but could not begin work on the friction course until we accomplished grading and grassing of the shoulders.

PART III Interest \$42,404.54

We are claiming prejudgement interest at the rate of 12% per annum beginning May 15, 1989, the date of final acceptance of the project, for a period of three years.

The Department of Transportation presented the following information in rebuttal of the Contractor's claim:

PART I

1. The Contractor could have moved his paving operation to lanes 3 and 4 and continued work.
2. We have calculated the amount due for equipment rental and found the amount due to be \$1,537.41. We used Blue Book monthly rental rates divided by 176 hours per month and adjusted by the regional factor and the 50% factor for idle equipment suggested by the Florida Transportation Builders Association. The Standard Specifications provide that equipment rental rates for Force Account work is to be the monthly Blue Book rate divided by 176.
3. The overhead rate should be calculated at 15 percent of the equipment total We do not recognize the Eichleay formula that the Contractor used to calculate the overhead.

PART II

1. The Contractor did not start work on the project until Contract Day 52 and did not begin placing asphalt until Contract Day 137, even though the edgedrain work was completed on one roadway well before that date. This indicates that the Contractor elected to not pursue the work during the allowable contract period. He could have completed the work during that period.
2. The Special Provision for this contract state that an extension of the allowable contract time cannot be granted for a period beyond the allowable contract period as may have been extended.
3. We added 30 Calendar Days to the contract time for the additional borrow material required to complete the work, but it took only 11 days to place this material. We added 18 Calendar Days to the contract to complete the work of removing the petromat, but it took only 4 days to complete this work.
4. The Contractor did not have to wait until all of the Type 3 Asphaltic Concrete was complete before beginning grading and grassing the shoulders and placing the friction course.
5. Grassing work did not begin until three weeks after the Type 3 Asphaltic Concrete was completed.

The Board in considering the testimony and exhibits presented found the following information to be of particular significance:

PART I

The Contractor used daily Blue Book rates in calculating equipment rental costs. DOT used monthly Blue Book Rates per the standard practice.

The Board determined that disqualification of the Contractor from bidding on DOT work in accordance with Rule Chapter 14-23 occurred before occurrence of any of the events on which additional compensation ordered by the Board are based. Therefore, failure of the Contractor to request an

administrative hearing in response to the Department notice of intent to disqualify the Contractor from bidding is irrelevant here. In view of the above, the Board deems it unnecessary to seek a legal opinion on this matter..

From the foregoing and in light of the testimony and exhibits presented the State Arbitration Board finds as follows.

The Department of Transportation is ordered to compensate the Contractor for his claim as follows:

- PART I \$ 3,500.00
- PART II Release 35 Calendar Days assessed Liquidated Damages at \$500.00 per day.
- PART III \$ 7,500.00

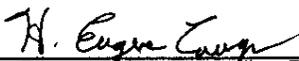
The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$216.00 for Court Reporting Costs.

S.A.B. CLERK
 NOV 20 1992
 FILED

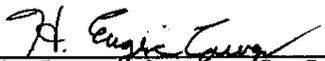
Tallahassee, Florida

Dated: 20 Nov 1992

Certified Copy:


 H. Eugene Cowger, P. E.
 Chairman & Clerk, S.A.B.

20 November 1992
Date


 H. Eugene Cowger, P. E.
 Chairman & Clerk


 K. N. Morefield, P. E.
 Member


 John P. Roebuck
 Member

STATE ARBITRATION BOARD
STATE OF FLORIDA

S.A.B. CLERK

NOV 20 1992

BAXTER'S ASPHALT & CONCRETE,)
INC.)

FILED

- and -)

) PROJECT NO. 61001-3418

) LOCATION: Washington County
) Florida

DEPARTMENT OF TRANSPORTATION)

ORIGINAL

RE: Arbitration In The Above Matter

DATE: Thursday, September 24, 1992

PLACE: Florida Transportation Center
1007 DeSoto Park Drive
Tallahassee, Florida

TIME: Commenced at 10:40 a.m.
Concluded at 12:05 p.m.

REPORTED BY: CATHERINE WILKINSON
CSR, CP, CCR
Notary Public in and for
the State of Florida at
Large

WILKINSON & ASSOCIATES
Certified Court Reporters
Post Office Box 13461
Tallahassee, Florida 32317

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

Mr. H. E. "Gene" Cowger, Chairman
Mr. Ken N. Morefield
Mr. John Roebuck

APPEARING ON BEHALF OF BAXTER'S ASPHALT & CONCRETE, INC.:

Ms. Kathy Sloan
Mr. J. S. Huggart

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Steve Benak
Mr. R. L. Shaw
Mr. James Rodgers

* * *

I N D E X

EXHIBITS	PAGE
Exhibit Nos. 1 through 5 in evidence	4

CERTIFICATE OF REPORTER	54
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P R O C E E D I N G S

1
2 CHAIRMAN COWGER: This is a hearing of the State
3 Arbitration Board established in accordance with
4 Section 337.185 of the Florida Statutes.

5 Mr. Ken Morefield was appointed as a member of
6 the Board by the Secretary of the Department of
7 Transportation. Mr. John Roebuck, Jack Roebuck, was
8 elected by the construction companies under contract to
9 the Department of Transportation.

10 These two members chose me, H. E. "Gene" Cowger,
11 to serve as the third member of the Board and as
12 chairman.

13 Our terms of office began July 1, 1991, and
14 expire June 30, 1993.

15 Will all persons who intend to make oral
16 presentations during this hearing please raise your
17 right hand and be sworn in.

18 (Whereupon, all witnesses were duly sworn by the
19 Chairman.)

20 CHAIRMAN COWGER: The documents which put this
21 arbitration hearing into being are hereby introduced as
22 Exhibit 1. That is the notice of arbitration and the
23 request for arbitration form and everything that was
24 attached to the request for arbitration when it was
25 submitted. All parties received copies of this some

1 time ago.

2 Do either of the parties have additional exhibits
3 to present at this time?

4 (Discussion off the record)

5 CHAIRMAN COWGER: We're back on the record.
6 During the time we were off the record, we were sorting
7 through exhibits. The contractor presented a blue
8 bound folder which we will identify as Exhibit 2.

9 The DOT presented a thin package of information
10 communication terminal message which we will identify
11 as Exhibit 3. DOT also presented a rather thick, black
12 bound booklet which we will identify as Exhibit 4. DOT
13 also presented a copy of a DOT rule which we will
14 identify as Exhibit 5.

15 (Whereupon, Exhibit Nos. 1 through 5 were received in
16 evidence.)

17 CHAIRMAN COWGER: Does either party have any
18 other information it wishes to put into the record at
19 this time? Does either party wish additional time to
20 examine the exhibits? Hearing nothing, we will proceed
21 on.

22 During this hearing the parties may offer such
23 testimony and evidence as is pertinent and material to
24 the controversy and shall produce such additional
25 evidence as the Board may deem necessary to an

1 understanding and determination of the matter before
2 it. The Board shall be the sole judge of the relevance
3 and materiality of the evidence offered.

4 The parties are requested to assure that they
5 receive properly identified copies of each exhibit
6 submitted during this hearing and to retain those
7 exhibits.

8 The Board will furnish the parties a copy of the
9 transcript of this hearing along with the final order,
10 but will not furnish copies of the exhibits.

11 The hearing will be conducted in an informal
12 manner. The contractor will elaborate on their claim
13 and then the DOT will offer rebuttal. Either party may
14 interrupt to bring out a point by coming through the
15 Chairman.

16 However, for the sake of order, I must instruct
17 that only one person speak at a time. Also, so that
18 our court reporter will be able to produce an accurate
19 record of the hearing, please introduce yourself the
20 first time you speak.

21 It is appropriate for us to begin. I understand
22 that the Department wishes to make an opening
23 statement, a little bit out of order from the normal,
24 but we will allow the Department to make an opening
25 statement at this point.

1 MR. BENAK: My name is Steve Benak, I'm district
2 construction engineer for District 3. The opening
3 statement I would like to make is concerning the -- on
4 this contract the contractor was declared delinquent.
5 At that time we received no time extension request from
6 them.

7 Some ten days later they were suspended from
8 further bidding on FDOT projects. What I'm after is
9 the Board to review Rule 1423 and make the
10 determination as to whether they should consider
11 hearing this case since the delinquency process has
12 already been invoked.

13 If they would look on the second page of
14 Exhibit 5, about halfway down the page, 14-23.014,
15 periods of suspension. In there it says if the
16 contractor does not file timely -- if the contractor
17 does not timely file request for hearing, the
18 suspension shall be conclusive and final agency action.

19 Then it goes on to read -- what I need the Board
20 to do is determine final agency action.

21 We have considered, or all of these time
22 extensions would have been considered at that time.
23 There was no submittal. The administrative process
24 continued.

25 CHAIRMAN COWGER: What was the ultimate

1 disposition of the suspension?

2 MR. BENAK: They were suspended from bidding --

3 MR. RODGERS: Suspended from bidding from July 28
4 through the time that it took to complete the job,
5 which was -- this job was finally accepted in May of
6 '89.

7 Then an extension of four months past that time
8 was added onto the -- to their suspension for the fact
9 that this was the third time that they had been
10 declared delinquent within the last 30 months.

11 MR. BENAK: This is all in Exhibit 3, in this
12 communication, terminal, blank. We have the letter
13 from, at the top, Kaye Henderson, but it was signed by
14 I guess Carl Huff. And then the following letter that
15 was -- when no submittal was received after the ten-day
16 period.

17 CHAIRMAN COWGER: Okay. Before we go any
18 further, let me ask one question, if I could. As
19 I understand it, the Department's position has to do
20 with the rule, Chapter 1423, which deals with
21 delinquency and progress of the work.

22 The portion of that rule that you're quoting
23 has to do with the suspension process, really. You
24 declared the contractor delinquent, the contractor has
25 ten days then to supply such additional information for

14 1 consideration by the Department before the Department
2 proceeds on with the process of declaring the
3 contractor delinquent.

4 How does that relate to liquidated damages?

5 MR. BENAK: I have --

6 MR. ROEBUCK: Have you consulted an attorney on
7 the implication of this rule versus the arbitration
8 claim?

9 MR. BENAK: No, I have not. We saw it on our own
10 and we just wanted to bring it out to make sure you all
11 were aware that this contract was declared delinquent.
12 It didn't ever come out in any of the contractor's
13 submittals.

14 CHAIRMAN COWGER: May I ask, before we get to
15 the contractor's rebuttal on this thing, may I ask the
16 members of this Board to consult a minute on this.

17 I think that we ought to accept this as an
18 exhibit but proceed on with the hearing to get all of
19 the facts out on the table here for consideration.
20 I don't think we should stop at this point and say no,
21 we can't hear this.

22 MR. MOREFIELD: I recommend we take it and decide
23 in our deliberations whether it's germane to our
24 decision or not.

25 CHAIRMAN COWGER: Do you agree, Jack?

1 MR. ROEBUCK: Absolutely because I think we would
2 need some legal determination as to the validity of
3 this as related to a claim in which the delinquency may
4 be mitigated to some degree.

5 MR. BENAK: Well, even if I would have gotten my
6 legal opinion, it's not necessarily -- you can still do
7 the same thing.

8 MR. ROEBUCK: That's right.

9 CHAIRMAN COWGER: Ms. Sloan, I would like for you
10 to have the opportunity to comment on this issue and
11 then we are going to leave it.

12 MS. SLOAN: On page 71 of the Standard
13 Specifications for Road and Bridge Construction, 1986
14 version, it tells you that you have 45 days from the
15 time that the contract is complete to submit a time
16 extension request.

17 CHAIRMAN COWGER: What was that again, the
18 section?

19 MS. SLOAN: And that was done. It's Section
20 8-7.3.2.

21 CHAIRMAN COWGER: Again, let's have a little
22 discussion here between the members of the Board. Do
23 you think that it would be appropriate that we ask both
24 parties to give us a legal opinion on this? Do you
25 think we need it?

1 MR. MOREFIELD: I would say you ought to wait
2 until we can discuss this in deliberations and then
3 decide. And that's something we can put on the record,
4 then if we want to ask them to provide additional
5 information on this, we will ask them for it.

6 CHAIRMAN COWGER: We will wait until we
7 deliberate, and there may be a delay in the ruling, if
8 we decide we do need a legal opinion, but we will let
9 this drop for now. It's in the record, but we will
10 consider that proposal. We will proceed on with the
11 hearing at this point.

12 Okay. Appropriate now for the contractor to
13 proceed. As usual we would like for you to state at
14 the beginning the total amount of your claim.

15 MS. SLOAN: The total amount of the claim is
16 \$147,124.81.

17 CHAIRMAN COWGER: Thank you. Then I think it
18 would be also appropriate if we proceed through the
19 claim one step at a time, Part 1, Part 2. I guess
20 that's it, isn't it? And Part 3. All right.

21 MS. SLOAN: Part 1, or claim number 1 is really
22 pretty simple. The Department of Transportation held
23 us up on a job for two days, of which they agree, and
24 they granted us liquidated damages. We have asked for
25 some compensation on equipment and general overhead.

1 They have made us an offer. We presented a claim
2 to them in the amount of \$10,020.54. They made us an
3 offer of \$1,537.41, of which we don't feel the offer is
4 fair.

5 We had to shut down our asphalt operation for two
6 days during very good weather conditions, and we just
7 don't feel their offer is fair.

8 We utilized the data request Blue Book rates.
9 I used 1985 rates because it would have cost me so much
10 to get 1988, and that's all I had available to me.

11 We did use ownership rates, not operated costs.
12 Please note that we did not charge DOT with our asphalt
13 plant, we just charged them with the equipment that was
14 listed in their diary. We also did not request any
15 loss of profits for those two days.

16 So what the Board needs to decide is how much we
17 should be awarded.

18 I do have some information here pertaining to use
19 of the data request, Blue Book for construction
20 equipment.

21 And under Exhibit 1, it's a memorandum, it's 1-B.
22 I sought a little legal advice on what the validity of
23 using the Blue Book is, and they cited some cases that
24 seemed to back it up that made me feel like we were
25 doing the appropriate thing.

1 Unless you all want me to get into more detail of
2 what equipment, which I have it listed here, that's
3 really all I have on that.

4 CHAIRMAN COWGER: DOT, what is your position on
5 this? And did you, in fact, make an offer to settle
6 this for a thousand and some-odd dollars?

7 MR. BENAK: Yes, I made an offer to Baxter's
8 Asphalt of -- this is in Exhibit 4, pages 6 and 7.
9 I made an offer of \$1,537.41. The way we calculated
10 that is by the Blue Book rates which was suggested by
11 the Florida Transportation Builders Association. We
12 used those rates to establish our offer on the
13 equipment.

14 We have utilized this in numerous equipment
15 claims throughout our district. It's just that the
16 rates that we have had established, I guess it's kind
17 of like a gentlemen's agreement between the building
18 association and the contractors and ourselves.

19 CHAIRMAN COWGER: Tell us briefly what the
20 difference between the \$1500 that you offered and the
21 \$10,000 that the contractor is claiming, where are they
22 different?

23 MR. BENAK: It's broken down back here on pages 8
24 and 9. We went through and utilized the rates for the
25 equipment.

1 CHAIRMAN COWGER: The contractor used the
2 operated rate?

3 MR. BENAK: Contractor used, I think the hourly
4 rate I believe is what they used.

5 MS. SLOAN: Daily rate.

6 MR. BENAK: I didn't know which one you used, but
7 we used the monthly rate divided by 176 times the
8 regional factors times point 50 and and the regional
9 adjustment factors and age factors.

10 MR. MOREFIELD: Point 5, that's 50 percent,
11 that's the idle equipment, the agreement that you're
12 talking about?

13 CHAIRMAN COWGER: I'm familiar with that.
14 Ms. Sloan you said you used the daily rate?

15 MS. SLOAN: Yes, sir.

16 CHAIRMAN COWGER: There must be more to it than
17 just the rates.

18 MS. SLOAN: Our claim also consists of two days
19 of overhead. If you look under Exhibit 1, our blue
20 folder, which is Exhibit 2, the first page, under the
21 list of equipment, you will see plus general overhead,
22 a total for each day.

23 CHAIRMAN COWGER: I understand.

24 MS. SLOAN: The overhead is \$1,394 per day.
25 That's home office and job site overhead. And if you

1 will look under number 3 of our exhibit, you will see a
2 calculation for the general overhead.

3 MR. MOREFIELD: Where was that?

4 MS. SLOAN: Tab number 3.

5 There's overhead in both parts of our claim.
6 That's why I put it as of the third exhibit. It shows
7 the legal use of the Eichleay formula for method of
8 calculation of home office overhead damages, and I do
9 have financial information in this exhibit to back up
10 my calculations.

11 CHAIRMAN COWGER: We can understand that. Let me
12 back up a minute, though, because we want to talk about
13 the overhead a minute. It appears to me like the total
14 amount that the contractor is asking for for equipment
15 only, before you add the overhead in, is \$3794 one day
16 and 3437 another, which totals out to about \$8100,
17 \$8200 -- 7100 or 7200.

18 MS. SLOAN: That's correct.

19 CHAIRMAN COWGER: The Department is saying that's
20 only like \$1500, plus or minus. Where are the
21 differences there? Are they strictly in the rate?

22 MS. SLOAN: Yes, sir.

23 MR. BENAK: Equipment rate.

24 CHAIRMAN COWGER: There's that much difference
25 between the rates that you all used? The contractor

1 used the daily rate, you all used the monthly rate
2 divided by 176 and applied a 50 percent factor to it?

3 MR. BENAK: Right.

4 MR. RODGERS: One difference is the daily versus
5 the monthly. That's a factor. Then the other
6 difference, like you said, is the daily versus -- or
7 the other one, what was it, the 50 percent that we
8 used.

9 CHAIRMAN COWGER: We understand that. I don't
10 think we need to talk about that any more unless
11 somebody wants to talk about the equipment costs.

12 MR. BENAK: I need to bring out some more issues
13 in this claim. On our exhibit, on the same exhibit,
14 Exhibit 4, page 11, there's a letter from Mr. Huggart
15 that preceded this activity. It's a response to a
16 letter from Mr. George Bruner talking about how he was
17 going to get back into progress percentage.

18 In that, if you will look at the bottom of the
19 page 11, he says, "As to further accelerate progress,
20 it is planned to produce the Type II asphalt for the
21 eastbound roadway from our Marianna plant."

22 You turn the page on page 12, "This will enable
23 us to be placing asphalt on the eastbound and westbound
24 roadways simultaneously."

25 What the project engineer, Mr. Bob Shaw did, when

1 this event happened he suggested that they should go to
2 the other roadway and lay asphalt. At that time
3 they -- and this preceded this event.

4 They thought this up, we didn't, is the point I'm
5 trying to get across.

6 MR. RODGERS: The claim is for a total shutdown
7 of their asphalt operations which was not necessary.
8 Every night they parked their equipment somewhere in
9 the middle of the job -- well, the same location every
10 night.

11 In the morning they can go east or west either
12 direction and set up an asphalt-laying operation on a
13 six and a half mile stretch of interstate. It doesn't
14 have to be in this one location where this small few
15 hundred foot of extra work, so to speak, is going on.
16 They can lay -- and they proposed it.

17 The scenario was that Mr. George Bruner wrote
18 them a letter on page 10. He was the resident engineer
19 in charge of this job, warning them that they were 11
20 percent behind their progress schedule.

21 Page 11 of our submittal is Mr. Huggart's letter
22 back to Mr. Bruner telling him how he's going to get
23 back on schedule. How he explained it was I'm going to
24 start laying asphalt out of two asphalt plants. I can
25 be laying asphalt on two roadways at the same time.

1 CHAIRMAN COWGER: The point you're making is that
2 it was under that scenario feasible to be laying on
3 either roadway? That's basically the point.

4 MR. RODGERS: Two separate types of asphalt,
5 also.

6 CHAIRMAN COWGER: At the time the suspension came
7 into place on whichever roadway it was, was he, in
8 fact, laying on the other roadway?

9 MR. SHAW: No.

10 CHAIRMAN COWGER: Was he operating out of only
11 one plant or two plants?

12 MR. RODGERS: I think we can go to this schedule
13 and show you that he was actually --

14 CHAIRMAN COWGER: I'm only interested in those
15 two days, during that two-day period. Was he operating
16 out of one plant or two plants?

17 MR. SHAW: I'm Bob Shaw. What he had done was he
18 proposed to operate on both roadways. I don't know
19 whether he laid previously or not.

20 CHAIRMAN COWGER: Let's leave looking at the
21 chart until we get to Part 2 because that's really the
22 purpose of the chart, isn't it?

23 MR. RODGERS: Yes, sir.

24 CHAIRMAN COWGER: Give me a little more detail
25 why it was necessary to suspend the paving operations.

1 MR. SHAW: We was paving and had some areas that
2 started slipping, some isolated areas. What we asked
3 them to do was stop their operation for that day and
4 let us check it out, get district personnel to come in
5 and do some coring.

6 We asked them about 3:30 not to lay asphalt in
7 these areas. At that time -- the next day is when
8 I asked them not to lay and then told them they could
9 lay on the other roadway. We had been discussing
10 laying on both roadways.

11 CHAIRMAN COWGER: I think we know enough about
12 that business about going to the other roadway to deal
13 with that.

14 You told them at three o'clock on one afternoon
15 to suspend operations. When did you authorize them to
16 go back again then? Was it the morning of the second
17 day?

18 MR. RODGERS: Three o'clock on the 6th of
19 September is when we suspended.

20 MR. SHAW: Page 20 gives you the note there.

21 MR. RODGERS: Page 20 is the engineer's summary
22 of that daily diary. Three o'clock on the 6th is the
23 suspension and eight o'clock on the 8th, 8:00 a.m. on
24 the 8th is the -- give the word to go back to work.

25 Ms. Sloan mentioned that those were very good

1 days for work. The 8th was a rain day, which is the
2 second day. We gave them the word to go back to work
3 on the morning of the 8th. They couldn't go back to
4 work on that day because of rain. That was the second
5 day that they couldn't work due to rain.

6 MR. BENAK: If you would, also, on -- we have a
7 summary of this entire event on page 5 in our Exhibit
8 No. 4. Essentially everything we just said is there.
9 We have the backup data right in behind it.

10 CHAIRMAN COWGER: What did you determine the
11 cause of the slippage was, or did you?

12 MR. SHAW: It was just small isolated areas. We
13 cored it and never did determine just what caused it.

14 CHAIRMAN COWGER: It was mentioned somewhere in
15 there about some gil fabric being removed on part of
16 the job.

17 MR. BENAK: That's not this.

18 CHAIRMAN COWGER: That's not pertinent to this?

19 MR. SHAW: We had those problems with the
20 petromat material and then we got into this and
21 wanted to stop and check into that before we went any
22 further.

23 CHAIRMAN COWGER: Does DOT have anything more to
24 say about Part 1 right now? Let's let the contractor
25 rerebut.

1 MS. SLOAN: They're saying on September 8th that
2 we were rained out. They've got a note in here that it
3 was cloudy and overcast with some light rain. I don't
4 think they would have given us that day if it had been
5 so bad that we couldn't have worked.

6 Our operation was stopped due to the slippage
7 problems. They did tell us we could remobilize, but
8 I would like to say a few things about why we didn't
9 remobilize.

10 We went out -- for one thing we would have to
11 move all of our paving equipment four and a quarter
12 miles from the eastbound lane to the westbound lane on
13 I-10.

14 You have got to know we were not allowed to post
15 any speed reduction signs for this project. It's not
16 an easy thing to pick up all your equipment and move it
17 four and a quarter miles down the road.

18 It would have, to remobilize at that point
19 would have interfered tremendously with the logical
20 construction sequence of the project. We would have
21 had needed to remobilize back to the eastbound lane
22 once we were given the okay to proceed. This would
23 have left exposed joints open to traffic, which
24 certainly wouldn't be a good idea.

25 Another reason we didn't remobilize is that we

1 felt an almost immediate decision would be forthcoming.
2 There were 13 people from the Department of
3 Transportation, including knowledgeable Department
4 heads from Crestview, Bonifay and Chipley that came to
5 look at this problem. We felt that it should have not
6 taken much time for these people to make a decision.

7 Early on the day of September 7th one DOT
8 personnel drilled a core and noted it appeared the
9 slippage problem was due to moisture coming up from the
10 subgrade. From this point we knew it should not take
11 long for them to make a decision.

12 We also did not want to do anything to cause
13 possibly contribute to this problem. No one knew
14 what the problem was. There was even talk of the
15 possibility of it being our asphalt, even though it had
16 passed DOT inspection. We certainly didn't want to
17 take a risk placing asphalt that might not work.

18 We especially had concerns at this point in time
19 about having to redo work even at DOT's expense. This
20 is evident by our supplemental agreement dated
21 September 30. That's the situation where we had to do
22 additional work. The DOT had to pay us for it.

23 We were in the process of working on the terms of
24 the supplemental agreement at the time the slippage
25 problem was going on and we just didn't want any more

18 1 problems for us or for them. The supplemental
2 agreement called for removal of previously laid asphalt
3 and filter fabric, and we just didn't want to get into
4 another situation like that.

5 So for those reasons it didn't make any sense to
6 pick up and move all of our equipment four and a
7 quarter miles down the road.

8 CHAIRMAN COWGER: I think we need to move on to
9 Part 2 of the claim unless either party has any
10 additional information that they want to present. Does
11 either one of the Board members have any questions?

12 MR. BENAK: I want to address this overhead rate
13 in the calculation by the Eichleay formula. We don't
14 recognize the Eichleay formula in the third district.
15 We haven't used it.

16 I added overhead at the rate of 15 percent on my
17 offer. The information given by the contractor is
18 really incomplete. We would have to get really
19 involved in their overhead rate to determine that. And
20 that would mean trying to determine all their other
21 private work and their DOT work ongoing at the same
22 time that they could charge off to.

23 CHAIRMAN COWGER: We understand that. We are not
24 going to get into that depth over such a small amount
25 of money.

1 MR. ROEBUCK: What is the Department's rental
2 rate policy on using monthly rates divided by 176 for
3 short-term shutdowns?

4 MR. MOREFIELD: We do have an agreement with FTBA
5 to do exactly what they did, but that agreement has
6 occurred after this potential time frame of this
7 particular incident. But the 75 percent -- isn't that
8 it, for the Blue Book rate for --

9 MR. RODGERS: In the spec book it gives you the
10 same thing, Mr. Roebuck. I think you were right on.
11 It's under --

12 MR. MOREFIELD: While he's looking that up,
13 Steve, did your \$1500 include that 15 percent or not?

14 MR. BENAK: Yes. You can look at my exhibit on
15 page 6 where I wrote the letter to Ms. Sloan and then
16 I figured the rates then added 15 percent on it. It's
17 on page 6.

18 CHAIRMAN COWGER: Are we ready to quit on this?
19 I am except for one little question.

20 MR. RODGERS: In that question, it's on page 87
21 of the spec book there.

22 CHAIRMAN COWGER: Okay, excuse me. This is the
23 section dealing with force account work and how you're
24 going to calculate the equipment rates?

25 MR. RODGERS: Right. That's force account. Like

1 I say, we were in a delay situation there.

2 CHAIRMAN COWGER: We understand. Nowhere in
3 all of this can I find the equipment rates that the
4 contractor used to establish these amounts.

5 MR. ROEBUCK: It's in the '85 Blue Book, is that
6 right?

7 MS. SLOAN: I have a copy of the Blue Book.

8 CHAIRMAN COWGER: I'm just trying to establish
9 how much difference there was between the rate that you
10 asked for and the rate that DOT is willing to allow.
11 Seems to be kind of substantial.

12 MR. ROEBUCK: Looks like it's more like the
13 short-term day rate as compared to the 175 per month.

14 CHAIRMAN COWGER: Could you furnish us a copy of
15 that, just two or three pages showing how you
16 established your rates?

17 MS. SLOAN: Okay. Then we will move on. DOT, so
18 you understand, all I want to know for instance, the
19 contractor on September 7th charged one asphalt paver
20 \$1,078.25. What I want to see is how they arrived at
21 that 1,078.25, how many hours, what rates they used and
22 so forth. If you would supply us with a little
23 information on that. It doesn't have to be a lot of
24 detail. We would appreciate it.

25 MS. SLOAN: Okay.

1 CHAIRMAN COWGER: Does DOT have any objection to
2 us seeing that?

3 MR. BENAK: No.

4 CHAIRMAN COWGER: You have been very precise in
5 how you did yours.

6 MR. BENAK: We pulled ours right out of the Blue
7 Book, also.

8 CHAIRMAN COWGER: Let's move on to Part 2, if we
9 can, gentlemen and lady. This has to do with the
10 liquidated damages issue, is that correct?

11 MS. SLOAN: Yes, sir, and home office overhead.
12 This portion of the claim comes to \$94,700, which
13 includes \$25,000 of liquidated damages and \$69,700 in
14 home office overhead.

15 If you will look under tab number 2, it gives an
16 explanation of our claim. First of all, I want it to
17 be noted that Baxter's Asphalt did not start work on
18 this project until day number 52. We went into the
19 project knowing we had to absorb that amount in
20 liquidated damages.

21 We have no problem in doing so. However, DOT
22 directed several changes to the scope of the work.
23 They resulted in 58 days in additional contract time.
24 None of this had anything to do with weather problems.

25 By putting the 58 days on our contract, it put us

1 into having to attempt to place friction course that
2 had a 60 degree and rising requirement during the
3 winter.

4 We had done a job on State Road 277 in Washington
5 County that had a very close to the same amount of
6 friction course on it, and we had placed that asphalt
7 in nine calendar days, which is what we anticipated to
8 do on this job and would have been able to do had we
9 not been put into a situation where we were attempting
10 to do it when weather did become a problem.

11 We had the same problem with the thermoplastic.
12 After we placed the friction course, we had a 30-day
13 requirement to wait, and then we were attempting to put
14 down the thermoplastic, which we had anticipated for it
15 to take also seven working days.

16 When you put it on our calendar it comes out to
17 be 13 calendar days because there happens to be a
18 couple of weather days and some weekends in there.
19 We were not allowed to work on this project during
20 weekends. It actually took us 39 days to place the
21 thermoplastic, and it took -- how many for the friction
22 course, Jim?

23 MR. MOREFIELD: Thirty-three for the
24 thermoplastic, thirty-nine for the friction course.

25 MS. SLOAN: Okay. There's a calendar, the last

1 page, behind tab number 2. Had we not had the delays
2 that we had on the project, we should have been placing
3 friction course at the end of October in the yellow
4 area there. And then the thermoplastic, the first part
5 of December.

6 And as you can see by this calendar, weather was
7 not a problem during that time. Now there were two
8 days of rain when we were placing thermoplastic, but
9 that's not unusual there. But you can see what it put
10 us into doing was placing the friction course on into
11 January and the thermoplastic into March. We had so
12 many days of temperature and weather problems during
13 that time frame that it took us a lot longer than it
14 should have.

15 Now when we went into this job we did know we
16 were starting the job late. There's no problem with
17 that. We knew that we were starting the job late. We
18 had time to get this job over before temperature became
19 a factor.

20 However, due to the changes that were made in the
21 contract, we were put into a different time frame, and
22 they would not grant us any liquidated damages even
23 though they agreed that we had weather problems during
24 that time because the contract time had expired.

25 So we're looking at a difference of 30 days for

1 the friction course and 20 days for the thermoplastic,
2 which is an additional 50 days that it took us to do
3 this job than it would have had we done it during a
4 better time frame.

5 We had other jobs that we could have been working
6 on a lot of the time where there was temperature
7 problems on this job. We had other jobs that did not
8 have a temperature requirement, but our equipment was
9 sitting on I-10 waiting for the temperature to rise.

10 CHAIRMAN COWGER: Are you saying you kept the
11 equipment committed to this job during that time?

12 MS. SLOAN: Yes, sir. And I have not charged
13 them anything for any idle equipment on this. We
14 considered it, but it would have put the claim way
15 above what it would have taken to bring it to
16 arbitrations and I didn't want to spend three years
17 going to court.

18 CHAIRMAN COWGER: DOT, before you rebut, I would
19 like to ask a couple of questions about this little
20 calendar that was just referred to. As I understand
21 it, this depicts what you anticipated that you could
22 have done on the project if you hadn't had these 58
23 days delay due to various reasons.

24 MS. SLOAN: Yes, sir.

25 CHAIRMAN COWGER: For instance, you could have

20 1 started placing the friction course on October 24?

2 MS. SLOAN: That is correct.

3 CHAIRMAN COWGER: The chart does not depict
4 anything at all about the dates that you actually did
5 place the friction course or did the thermoplastic, is
6 that correct? I don't see it.

7 MS. SLOAN: That is correct. However, if you
8 look under the tab, Exhibit 2, down at the bottom of
9 the first page it says, beginning placing friction
10 course on October 24, not December 20.

11 CHAIRMAN COWGER: Okay.

12 MS. SLOAN: Then, complete November 1, not
13 January 27. Then thermoplastic December 2, not
14 February 27.

15 CHAIRMAN COWGER: Those latter dates are the ones
16 you actually did start?

17 MS. SLOAN: Right.

18 CHAIRMAN COWGER: I want to let DOT rebut, but
19 while we're on this, let me get a little information
20 from DOT. Looking at this calendar, dealing strictly
21 with the situation here as depicted in this calendar,
22 is this a reasonable set of dates that could have been
23 accomplished, do you think?

24 MR. BENAK: What dates are you asking about?

25 CHAIRMAN COWGER: The main thing, was it feasible

1 without the 58-day delay the contractor could have
2 begun placing the friction course on the 24th of
3 October?

4 MR. BENAK: I would much rather refer to my
5 chart. It tells the story a lot better.

6 CHAIRMAN COWGER: Then I will drop my question.

7 MR. BENAK: That's what I was going to get into
8 right off the bat. Is it my turn?

9 CHAIRMAN COWGER: Yes.

10 MR. BENAK: First, what I want to start talking
11 about is, as Ms. Sloan was saying, exactly when work
12 started on this job. She was saying on day 52. That
13 was when her subcontractor came in and started putting
14 in the edge drains.

15 In actuality I believe they started, Baxter came
16 to work on day 137. That's on this chart here. It's
17 way over here. And this activity, as you will see,
18 goes from head to tail, head to tail, in the
19 controlling items. What we know that could have
20 happened is there's two roadways out there. You can be
21 working on one and doing something on the other one at
22 the same time. This didn't occur here or here.

23 It could have -- they could have pursued the work
24 in a more timely fashion cutting this in half, cutting
25 that in half. They would have lessened the amount of

1 time on this job.

2 CHAIRMAN COWGER: So we can get it into the
3 record a little bit better, we can't get what you
4 pointed to in the record. When you talk about cutting
5 in half, what activities were you talking about?

6 MR. BENAK: I'm talking about putting the edge
7 drain in. I believe Coggin and Deermont put that edge
8 drain down for you. They started at one end of the
9 job, went on one side of the roadway, turned around,
10 went all the way to the end before Baxter's Asphalt
11 ever showed up on the job.

12 And what I'm saying is there was only -- by the
13 special provisions they were only allowed one lane
14 closure per roadway, so therefore I would understand
15 they would have to get through with one roadway before
16 they can start on it, but they completed both before
17 they even showed up.

18 MR. ROEBUCK: Did Coggin show up during your
19 first 52 days or not?

20 MS. SLOAN: No, sir.

21 MR. BENAK: The time started on October 31. Then
22 we had a vacation time from --

23 MR. SHAW: If you look on page 75 of the claim it
24 will give you the details.

25 MR. BENAK: They had a vacation for Thanksgiving

1 and Christmas in here. They had two vacations in
2 there. There was no work. There were suspended
3 periods, they had no work periods here. Then they
4 started the edge drain right here.

5 If you will look right here, each one of these
6 units is a week here. So we're talking about one, two,
7 three, four, five months of time that Baxter's Asphalt
8 didn't show up on the job. And so now this is -- the
9 original last day was 13 September '88. This is our
10 extended period right here of -- we have it calculated
11 56 days and not 58.

12 This 56-day period when looked at it from the
13 diaries, considering whether there were two days in
14 this period that were -- would be considered for
15 weather, and keeping in mind this is an old style of
16 how we calculated contract time in that there were 305
17 days set up originally. It was multiplied to get that
18 305 days, was multiplied by 1.825. That entails a
19 weather day per week and no work on weekends.

20 MR. RODGERS: So we started out with 167 workdays
21 that was calculated to do this work, and then they
22 added 44 days for one day a week weather, 44 days for
23 one Saturday per week of no work, and 44 days of one
24 Sunday per week of no work, then seven days of
25 holidays. We recognized nine days a year for holidays,

1 which came out in round figures to the 305 is how the
2 calendar days were arrived at.

3 MR. BENAK: If you will open Exhibit 4 to page
4 75, we have a little summary here, in words of what
5 this chart is depicting.

6 MR. RODGERS: What that means is that the 44
7 weather days were already added into this contract. In
8 those days we anticipated that there would be one bad
9 weather day per week on the average. And for this
10 whole time frame, we did not exceed that 44 days of
11 anticipated bad weather. That wasn't documented during
12 the normal contract time.

13 MR. BENAK: And also the special provisions do
14 not allow us to give contract time extensions beyond
15 the end of the contract. That's on page 145 and 146 of
16 Exhibit 4 is the special provisions that indicates that
17 such extensions of time may be allowed only for delays
18 occurring during the contract time period or authorized
19 extensions of the contract time period.

20 When we ran out of time, we couldn't consider
21 weather past that date.

22 MR. RODGERS: Those bars are shown as solid bars
23 on the chart, but there's lots of gaps in those bars
24 where no work was accomplished and nothing was
25 preventing the contractor from working.

1 For example, the Type S item, Type S asphalt,
2 structural course, we calculated, I believe, didn't we,
3 Bob, of 629 tons per day productivity rate. That's not
4 over the whole time that they attempted Type S, that's
5 just for the days that they showed up to accomplish
6 Type S.

7 We didn't consider the days that they didn't
8 come to work. So you can see from your questioning,
9 Mr. Cowger, that 629 tons a day would not get them
10 finished like they wanted to finish on friction course.
11 You can't do 629 tons a day on a straight-away stretch
12 of interstate and make any kind of job production.

13 CHAIRMAN COWGER: That's on the Type S that we're
14 talking about?

15 MR. RODGERS: That was on the Type S to give you
16 an example of the productivity. Again, that was
17 calculated of the days they were laying Type S. That
18 didn't count -- we didn't include the days they didn't
19 show up to do anything.

20 MR. BENAK: What I was trying to indicate earlier
21 is that these controlling items, the edge drain, crack
22 and reseal the Type S, there are some other
23 noncontrolling items in there that were overlapping.
24 Just wanted to point that out to you. These -- the
25 Type S crack and reseal, edge drain, the controlling

1 items along the project.

2 CHAIRMAN COWGER: I think we are able to
3 understand that. What else did you specifically want
4 to talk about now in rebuttal before I start asking a
5 few questions?

6 MR. SHAW: If you would look on page 82 of the
7 chart. It's a copy of the chart.

8 CHAIRMAN COWGER: Would you tell me what that is
9 again.

10 MR. SHAW: Page 82, the chart. What we need to
11 look at here the original last day was September 13.
12 They're contending the 58 days there. If you take the
13 58 days and look at the weather for October and
14 November, those are the days they're talking about, not
15 in December, January and February of the next year.
16 We're talking about the original 305 days that ended on
17 September 13, plus an extension of 56 or 58 days, which
18 ended on --

19 MR. RODGERS: November 8th.

20 MR. SHAW: Or the 10th, if you go the 58 days.
21 And according to Mr. Huggart's chart, there was only
22 two days of rain during that period of time. That's
23 the 58-day extension.

24 MR. RODGERS: What we are saying is we gave them
25 that extension and that was plenty of time to do the

1 items that they needed to be done.

2 They delayed themselves. They elected to go
3 outside this 58 days into December and January and
4 February and March. It had nothing to do with our 58
5 days. There was excellent weather throughout that 58
6 days. The time that they are trying to lay friction
7 course is outside of this 58 days, outside of the
8 contract time.

9 And by the contract we're not allowed to give
10 time extensions. We have that documented in here. The
11 contract says that we are not allowed to give time
12 extensions outside the original or extended contract
13 time.

14 We can sympathize with them for the bad weather
15 during that time, but we are bound by contract.

16 CHAIRMAN COWGER: We will deal with that issue
17 when we're deliberating as to the validity of that
18 contract clause. We don't need to pursue that further,
19 unless the contractor wants to. I think the contractor
20 ought to be allowed at this point to testify on that
21 one issue.

22 The Department has taken the position that
23 there's a clause in the contract that says that they
24 can't grant any time after the original contract time
25 expires. What is your position on that?

1 MS. SLOAN: Well, we worked with them when we had
2 to tear out the filter fabric and asphalt we had laid.
3 We let our asphalt operation be stopped. We worked
4 with them, but when we got to where we were having
5 problems they didn't work with us.

6 That's why we feel that we should have been given
7 consideration for being in a time frame where we were
8 trying to do something that wasn't even feasible to
9 attempt to do during cold weather. I think Mr. Huggart
10 has something here.

11 MR. HUGGART: I'm Jim Huggart, with Baxter's
12 Asphalt. Look back on the chart on page 82 in your
13 Exhibit 4. Of course, I made the notes on that myself,
14 which is a copy of it.

15 Showing on September '88, day 13, it shows
16 original last day, 305 I think is what is scribbled in
17 there. That does not take into consideration
18 calendar-wise the 30-day curing period, does it?

19 MR. RODGERS: Thirty-day curing period is time
20 suspended.

21 MR. HUGGART: It's time suspended. Whether we're
22 out of time or we were in the time frame, it still
23 moves us 30 days down the calendar which throws us into
24 the bad weather pattern.

25 MR. RODGERS: I think your performance was well

1 and beyond any 30 days. I think your problem was
2 somewhere on the magnitude of 90 days. I don't think
3 30 days would have made any difference to you. Thirty
4 days would have still kept you inside of a good weather
5 pattern.

6 MR. HUGGART: I think the 30 days plus the 58
7 days or 56 days --

8 MR. RODGERS: Would have still been --

9 MR. HUGGART: Would have pushed us down the
10 November, December, January time period.

11 MR. RODGERS: Our contention is you're still in a
12 good weather --

13 MR. BENAK: Still in good weather pattern.

14 MR. RODGERS: You haven't gotten into the bad
15 weather that you're contending as of yet, within the 30
16 days.

17 MR. SHAW: If you look at that chart,
18 November 8th was day 361. If you had a 30-day period
19 in there, it would take you on over into September 8th,
20 9th, along in there, which is still good weather all in
21 there.

22 MR. BENAK: December.

23 CHAIRMAN COWGER: I think we're down to arguing.
24 Let me ask you a couple of questions that come to mind.
25 In actuality now, during the period of time between the

1 time they completed the friction course and the time
2 they began the thermoplastic, does the contract provide
3 for 30-day suspension of time?

4 MR. SHAW: Yes.

5 MR. BENAK: Yes.

6 CHAIRMAN COWGER: Did you, in fact, suspend the
7 time or are those 30 days included in the liquidated
8 damages?

9 MR. SHAW: No.

10 MR. BENAK: Time was suspended.

11 CHAIRMAN COWGER: Okay.

12 MR. BENAK: It's even depicted on the chart here.

13 CHAIRMAN COWGER: Okay. What page are you on?

14 MR. BENAK: This is on my Exhibit 4, page 83.

15 You can see the blank month there.

16 CHAIRMAN COWGER: All I have to do is look at
17 the --

18 MR. BENAK: That's February 8, 1989.

19 CHAIRMAN COWGER: We're looking at January 28
20 I think, time suspended?

21 MR. BENAK: Yes.

22 CHAIRMAN COWGER: Then time resumed, February?

23 MR. BENAK: Yes, sir.

24 CHAIRMAN COWGER: There's really no dispute in
25 this thing about the weather days that occurred as

1 shown on these charts, right? Everybody is pretty much
2 in agreement with the weather days?

3 The question I have is, DOT, let's set aside
4 everything else for the moment and look at what
5 actually happened so we can get a picture of this.
6 Once the Type S was finished, and in looking at your
7 chart I notice that the type -- the placing of the Type
8 S was completed --

9 MR. BENAK: 1 November '88.

10 CHAIRMAN COWGER: And the friction course began
11 being placed --

12 MR. BENAK: 20 December '88.

13 CHAIRMAN COWGER: During that period of time was
14 it feasible to place the friction course or not? In
15 other words, was cold weather actually delaying the
16 placing of the friction course all that time or rain or
17 whatever?

18 MR. SHAW: LCT you can't lay below 60 or 65
19 degrees. If you go below that you have a problem.

20 CHAIRMAN COWGER: Between November 1 when the
21 Type S was completed and the time they began placing
22 the friction course on December 20, were the weather
23 conditions such that they couldn't place the friction
24 course?

25 MR. RODGERS: That would have to be just

1 assumption on our part. We could go back and research
2 the diaries and see what each day reveals. We all know
3 what the weather patterns are in this area during those
4 months. Generally you have days that are above 60
5 degrees until you get into January.

6 And also the friction course did not have to wait
7 until the Type S was completed. Again, our contention
8 is that the only requirement was that you complete one
9 roadway before you start another operation on that same
10 roadway.

11 CHAIRMAN COWGER: I understand. Ms. Sloan, isn't
12 it your contention, though, that cold weather, rain,
13 whatever, delayed the placing of the friction course
14 between November 1 and December 20? Is that your
15 contention that the reason you did not begin placing
16 the friction course on November 2, let's say, was
17 because you couldn't because of the weather conditions?

18 MS. SLOAN: Give me just a minute.

19 MR. RODGERS: While they're looking, if you will
20 look at their chart, their chart does not depict any
21 weather problems during those periods that you
22 mentioned. They show good weather during those dates,
23 those two dates.

24 MR. HUGGART: On the chart that you're referring
25 to, since that was a projected 30 day curing period,

1 the only rain day I recorded was the 22nd and that was
2 left over from another analysis.

3 It's possible there may be some rain days between
4 the 2nd of November and the 21st. I didn't put them
5 down because I didn't think it would add anything to
6 the process that we have been going through.

7 CHAIRMAN COWGER: I guess what I'm trying to get
8 at is why couldn't you have begun placing the friction
9 course? Again we're looking strictly at the events
10 that occurred on the job now. Why couldn't you have
11 begun placing the friction course on November 1, plus
12 or minus, instead of December 20? What prevented that?

13 MR. BENAK: I don't know.

14 CHAIRMAN COWGER: I'm not asking you the
15 question.

16 MR. BENAK: You were looking at me.

17 CHAIRMAN COWGER: I was just looking at your
18 reaction.

19 MR. HUGGART: In answer to your question, sir,
20 I think we were in the process of doing our shoulder
21 work and our sodding and our grassing, which had to be
22 completed prior to placing of any friction course.

23 And DOT's chart, I don't think it has an exhibit
24 number, it depicts the sodding and grassing operation
25 coming in very close behind completion of the

1 structural S asphalt. And then the friction course
2 beginning after the sodding and grassing was complete.

3 MR. RODGERS: A quick scan through the diaries
4 shows above sixties, seventies, eighties weather
5 throughout that entire time frame through the end of
6 December.

7 MR. BENAK: Also, if you will note that at the
8 end of the S, there was a three-week period of no work
9 until the sodding and grassing started, which we have
10 contended the whole time it could have been overlapped
11 a lot more on -- into the Type S time frame that it was
12 put down.

13 MS. SLOAN: Mr. Cowger, would you like for me to
14 submit copies of the diaries during that time frame so
15 that everyone can see what was -- what work was being
16 done?

17 CHAIRMAN COWGER: That's not in DOT's exhibit
18 here, is it? These daily records that are in DOT's
19 exhibit are for a different period of time dealing with
20 another issue.

21 MR. RODGERS: We have brought an extra set of the
22 entire contract package and diaries that is for your
23 use if you care to have them afterwards.

24 CHAIRMAN COWGER: We would like to have a copy of
25 the diary. We will return them to you.

1 MR. RODGERS: We brought you a set.

2 CHAIRMAN COWGER: Would those reflect the
3 temperatures on the days --

4 MR. RODGERS: Yes, they do reflect the
5 temperatures. In behalf of Baxter's, I did the chart.
6 I was showing just critical items. There was work
7 going on at the end of Type S to the beginning of the
8 friction course, hauling borrow, those type things,
9 incidental items. You will find that there was work
10 being accomplished.

11 CHAIRMAN COWGER: What other testimony do we need
12 to bring out on either side? We have quite extensive
13 exhibits to look at I can see.

14 MR. RODGERS: Our submittal addresses each of the
15 issues that makes up the 58 days time extension. Our
16 submittal labeled Claim 2, and then it's Tab B, C, D,
17 E, F, each of those are individual issues that resulted
18 in a time extension and in some of those cases they
19 were represented by a supplemental agreement signed by
20 the contractor, and in some cases they were represented
21 by a letter.

22 In all cases they were represented by an
23 agreement between the contractor and the DOT on the
24 amount of time that was granted, and usually the amount
25 of time that was granted for the item was well above

1 what actually it took in terms of accomplishing the
2 work after 20-20 hindsight looking back.

3 For example, we granted 30 days for the borrow,
4 extra borrow on the job and the actual workdays that it
5 took was 11 days.

6 In every case we granted more time than what the
7 work actually required when it came time to accomplish
8 it.

9 Each of those issues are addressed under these
10 tabs as a summary of how they came about, so that
11 addresses why the 58 days.

12 MR. BENAK: Are you all through presenting? We
13 need to get into making up of the time extension. We
14 need to get into that.

15 CHAIRMAN COWGER: Let me ask something that might
16 speed things up a little, Steve, based on what Jimmy
17 just said. Beginning in DOT's Exhibit 4 here,
18 beginning at Tab C, I think -- maybe it's B -- is it C?
19 It's B.

20 You go in and you explain to us in great detail
21 how you arrived at the 58 days that the contract time
22 was extended. I assume that goes from Tab B through
23 tab --

24 MR. BENAK: It's E I believe.

25 CHAIRMAN COWGER: All of that is explained in

1 here as to how you arrived at those things. Is there
2 any reason for -- because we can read that. Is there
3 any reason for you all to testify on that?

4 MR. BENAK: It essentially just will show, like
5 Jimmy was saying, on each instance that time was
6 considered, we believe we were fair in the time that we
7 granted Baxter's Asphalt.

8 Another instance was the slippage of the pavement
9 in which we had a supplemental agreement documenting
10 that. We gave, 18 days is all accrued and granted were
11 given, and it took four days to accomplish that work.
12 And I think it was \$56,000.

13 MR. RODGERS: Plus the bid items.

14 MR. BENAK: Plus the bid items to replace that
15 asphalt.

16 CHAIRMAN COWGER: Now that slippage had nothing
17 to do with the two days that we were talking about in
18 Part 1?

19 MR. BENAK: This is entirely different.

20 CHAIRMAN COWGER: This is Tab C we're looking at.

21 MR. RODGERS: Had to do with the waterproofing.

22 MR. BENAK: We have the supplemental agreement
23 sitting there explaining the, you know, everything that
24 was agreed to and signed off on. You get into Tab D,
25 and that was the 10,000 yards of borrow that we agreed

1 to place, place at contract amount plus 30 days. Like
2 Jimmy said, it took 11 days to place that material.

3 CHAIRMAN COWGER: Excuse me just a second.

4 Doesn't Tab C and D explain the whole 58 days?

5 MR. BENAK: No. That's 30 plus 18 and then the
6 other --

7 CHAIRMAN COWGER: Oh, I can't add.

8 MR. BENAK: The base --

9 CHAIRMAN COWGER: That's B. So, if I look at B
10 through D now I've got the 58 days?

11 MR. RODGERS: Right.

12 CHAIRMAN COWGER: When I get to Tab E we're
13 talking about something there I think that is not
14 germane today because the contractor didn't make any
15 claim on that flashing arrow board, did he?

16 MR. BENAK: It was in a previous claim.

17 CHAIRMAN COWGER: But it's not in this claim.

18 MS. SLOAN: That's correct.

19 MR. BENAK: We didn't know it wasn't going to be.

20 CHAIRMAN COWGER: I'm just trying to go through
21 here and sort out.

22 Let's look at Tab F for a minute. What does that
23 in essence cover?

24 MR. BENAK: That in my opinion covers everything
25 else we have in this book.

1 CHAIRMAN COWGER: Kind of a summary?

2 MR. BENAK: It's a summary, claiming all of this,
3 and then this is what I call for lack of words "what
4 if." Conjecture is what it boils down to.

5 MR. SHAW: It's really a weather analysis from
6 Mr. Huggart's chart. It shows one day per week and
7 then the actual days that it was bad weather, then the
8 second one comes from the diaries.

9 CHAIRMAN COWGER: I think we have probably got
10 enough testimony on this. I don't think we need to get
11 into a lot more verbal testimony because we can
12 certainly read what DOT has put into this. I'm sure
13 that based on my experience with District 3 it will be
14 thorough.

15 Does either one of the members of the Board have
16 any further questions on Part 2 or any reason why we
17 shouldn't leave Part 2 and go to Part 3?

18 MR. MOREFIELD: No.

19 MR. ROEBUCK: No.

20 CHAIRMAN COWGER: We will move on to Part 3 then
21 which is entitled prejudgment interest. I think we can
22 move through that pretty quickly. It's pretty
23 clear-cut in my mind. The contractor is asking for
24 prejudgment interest at 12 percent per annum on Part 1
25 and Part 2 of the claim. You sum those two up and

1 figure the interest at 12 percent per annum.

2 The question to the contractor, what time period
3 does that cover?

4 MS. SLOAN: From final acceptance of the project
5 for three years. That's simple interest.

6 CHAIRMAN COWGER: What is the cut-off date then
7 for the three years?

8 MS. SLOAN: That would make it May 15 of '92.

9 CHAIRMAN COWGER: Okay. So basically what it
10 amounts to is it's for three years. Okay. I think
11 that is straightforward.

12 At this point I would like to ask DOT for any
13 testimony they might have on the validity of paying
14 that interest.

15 MR. BENAK: Other than we don't want to, you
16 know, we feel that we have addressed each of the claims
17 and have made them a fair offer, and that, you know,
18 this -- I don't know exactly when the claim was
19 submitted. I think it was in arrears of when the job
20 was over. I don't know when your time extension
21 request was in.

22 A lot of these things -- we didn't even cite 512
23 from previous knowledge of -- we didn't have previous
24 knowledge of the claim to where we could keep records.
25 We didn't even cite that in any of our, I guess,

1 rebuttal.

2 MR. RODGERS: I think the issue that Steve
3 brought up at the very beginning has a part in this in
4 that why should we be willing to pay interest on
5 something that was withheld from us all this time.

6 The time to have brought it up would have been at
7 the administrative hearing process, and we could have
8 addressed it then, and then the interest would have
9 been mitigated at that point in time.

10 CHAIRMAN COWGER: Let me ask you a couple of
11 questions. The Board can effectively deal with
12 whatever we think would be appropriate as to the
13 interval of time, I believe, that would be appropriate.

14 Let's talk a minute, though, again I want to
15 throw a hypothetical situation out. That the Board did
16 determine that some money was due to the contractor on
17 this claim, whatever that number might be.

18 And now we want to talk strictly about the
19 interest itself and what your position is on whether
20 the interest is calculated properly and again when
21 should that interest start and stop. Have you got any
22 thoughts on that?

23 MR. BENAK: I know in the past we have paid
24 interest on claims that were justifiable. We have done
25 that in the past. Now starting and stopping it, you

1 know, is -- depends on the guesswork of, I guess the
2 Board.

3 CHAIRMAN COWGER: We are not going to guess, now.
4 We will make an analysis.

5 MR. BENAK: I guess I should have reworded that
6 to hypothesis? That would sound a little better.

7 CHAIRMAN COWGER: All of this was submitted as a
8 claim at one time or another. There was a time period
9 that elapsed in there between the time that DOT
10 rejected the claim and the time that there was a
11 request for arbitration I think.

12 Can somebody give me a feel for when the last
13 issue in dispute was denied by DOT? Can I find that in
14 these records if we look?

15 MR. BENAK: It's in my records and I refer to
16 it --

17 MR. RODGERS: Page 6.

18 MR. BENAK: Page 6, that was in May of '92.

19 CHAIRMAN COWGER: At this point in time you were
20 still dealing with the claim up to that point. That's
21 all I needed to know.

22 MR. RODGERS: That's when you could title it as a
23 speculative settlement of the claim.

24 CHAIRMAN COWGER: That was the final time the
25 Department dealt with the claim.

1 MS. SLOAN: Mr. Cowger, on May 11, 1989, we
2 submitted a request for time extensions that would
3 cover the days that we are requesting. It was rejected
4 back then, and then we just tried again before our time
5 ran out.

6 CHAIRMAN COWGER: It looked to me like -- okay.

7 MS. SLOAN: The claim on the equipment was not
8 submitted to them until the date that they're speaking
9 of.

10 CHAIRMAN COWGER: I think I can pick out what we
11 need there. Does either party have anything further
12 they want to say about the interest then? If not,
13 I think I will ask the Board members one more time if
14 there are any questions you have on any part of the
15 claim.

16 MR. MOREFIELD: No.

17 MR. ROEBUCK: No.

18 CHAIRMAN COWGER: This hearing is hereby closed.
19 The Board will meet in approximately 45 days to
20 deliberate on this claim, and you will have our order
21 shortly thereafter.

22 MR. ROEBUCK: The only thing we would ask for is
23 the Blue Book rates Ms. Sloan used and Gene would like
24 to look at the daily book.

25 MR. RODGERS: Mr. Roebuck, he was asking for the

1 dailies that pertained to the November, December time
2 frame. We don't have those in ours. We have a lot of
3 them in there.

4 CHAIRMAN COWGER: Can you send them over to me
5 and let us have them?

6 MR. RODGERS: I have them here now.

7 CHAIRMAN COWGER: I will keep them.

8 (Whereupon, the hearing was concluded at 12:05 p.m.)

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