

STATE ARBITRATION BOARD

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NOTICE

In the case of Anderson Columbia Co., Inc., versus the Florida Department of Transportation on Project No. 29010-3547 in Columbia County, Florida, both parties are advised that State Arbitration Board Order No. 1-95 has been properly filed on August 21, 1995.



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

S.A.B. CLERK
AUG 21 1995
FILED

Copies of Order & Transcript to:

Jimmy B. Lairscey, Jr., PE, Director Office of Construction/FDOT
T.H. McRae, President, Anderson Columbia Co., Inc.

STATE ARBITRATION BOARD

ORDER NO. 1-95

RE:

Request for Arbitration by
Anderson/Columbia Co., Inc. on
Job No. 29010-3547 in
Columbia County

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

H. Eugene Cowger, P. E. Chairman
Bill Deyo, P. E. Member
John Roebuck, Member

Pursuant to a written notice, a hearing was held on a
request for arbitration commencing at 9:15 a.m., Wednesday,
May 31, 1995.

The Board Members, having fully considered the evidence
presented at the hearing, now enter their order No. 1-95
in this cause.

ORDER

The Contractor presented a request for arbitration of
a claim in the amount of \$55,616.40 based on an alleged area
in determination of the final pay quantity for the item
Reworking Shoulders.

After the project was underway, the Department of
Transportation determined that, over substantial lengths of
the project, the elevation of the existing earth shoulder,
that was to remain in place, was high enough to cause water
to stand on the outer edge of the new pavement. A
Supplemental Agreement was entered into to provide for
correction of this problem. This document provided for a

substantial increase in the pay quantity for the item Reworking Shoulders. The quantity of Reworking Shoulders added by Supplemental Agreement was based on an estimated width of 12 feet. The scope of the added work did not fully coincide with the Description article of Section 577 Reworking Shoulders of the project Special Provisions.

The Contractor contends that the width of reworking of shoulders should be the same as the width of Seeding (22.5') instead of the width of mixing of the shoulder (8'). His position is that the final pay quantity should be based on the approximate limit to which excess material on the shoulder was bladed down the slope because that work is a part of Reworking Shoulders.

The position of the Department of Transportation is that, since the work described in Section 577 requires mixing, payment for Reworking Shoulders is limited to the width within which mixing is accomplished (8'). During construction, it was determined that the minimum practical width of mixing was eight feet and the Project Engineer directed mixing to that width with surplus material to be graded on to the adjacent front slope. Seeding was authorized to a width of 22.5 feet in order to encourage growth of Bermuda Grass. This was beyond the lateral limit of grading in most cases.

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

- a. The reworking of shoulders work added by Supplemental Agreement differs significantly from that described in Section 557 Reworking Shoulders.
- b. The Supplemental Agreement did not include additional drawings or specifications describing the additional work to be done under the item Reworking Shoulders.
- c. It is not clear from the testimony that, during negotiations leading up to the Supplemental Agreement, there was agreement between the parties that the pay area for Reworking Shoulders was to be limited to the width mixed.
- d. The width used in determining the pay quantity and establishing the unit price for Reworking Shoulders that were included in the Supplemental Agreement was 12 feet.

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

The Department of Transportation shall reimburse the Contractor in the amount of \$15,000.00 for this claim.

The Department of Transportation is directed to reimburse the State Arbitration Board in the amount of \$ 189.60 for Court Reporting Costs.

The Board points out that its decision on this claim is based on the particular set of circumstances that existed in relation to this project. Since the work in dispute was added

by Supplemental Agreement and the scope of the work to be done did not coincide with the Description Article of Section 557, this decision of the Board should not be taken as setting a precedent for the Method of Measurement for the Reworking Shoulder item on other projects where the work accomplished is as described in Section 557.

S.A.B. CLERK
AUG 21 1995
FILED

Tallahassee, Florida

Dated: 21 August 1995

Certified Copy:

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

21 August 1995
Date

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

Bill Deyo
Bill Deyo, P. E.
Member

John P. Roebuck
John P. Roebuck
Member

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

Mr. H. E. "Gene" Cowger, Chairman
Mr. Jack Roebuck
Mr. Bill Deyo

APPEARING ON BEHALF OF ANDERSON COLUMBIA CO., INC.:

Mr. T. H. McRae
Mr. Rudy Warren

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Henry Haggerty
Mr. John Walker
Mr. Jim Martin
Mr. Ray Parrish

APPEARING ON BEHALF OF WILLIAMS EARTH SCIENCES:

Mr. James S. Daniel
Mr. Richard Mellette
Ms. Lesli McCurdy

* * *

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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. Bill Deyo was appointed as a member of the
6 Board by the Secretary of the Department of
7 Transportation. Mr. John Roebuck was elected by the
8 construction companies under contract to the Department
9 of Transportation.

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

13 The term of Mr. Deyo began March 21, 1995, and
14 will expire June 30, 1995. The terms of Mr. Roebuck
15 and myself began July 1, 1993 and expire June 30, 1995.

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

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

21 CHAIRMAN COWGER: The documents which put this
22 arbitration hearing into being are hereby introduced as
23 Exhibit No. 1. This consists of the contractor's
24 request for arbitration and all of the information that
25 was attached thereto.

1 (Whereupon, Exhibit No. 1 was received in evidence.)

2 CHAIRMAN COWGER: The DOT rebuttal package, which
3 was submitted to the Board approximately ten days ago,
4 and also to the contractor at the same time, is
5 presented as Exhibit 2.

6 Does either party have any other information it
7 wishes to put into the record as an exhibit?

8 (Discussion off the record) .

9 (Whereupon, Exhibit No. 2 was received in evidence.)

10 CHAIRMAN COWGER: Back on the record. While we
11 were off the record, the contractor presented another
12 document called a claims booklet, which the DOT will be
13 given the opportunity to review prior to beginning of
14 testimony.

15 DOT, do you desire any additional time to review
16 the Exhibit No. 3, the package that was presented by
17 the contractor this morning?

18 MR. HAGGERTY: No, sir.

19 (Whereupon, Exhibit No. 3 was received in evidence.)

20 CHAIRMAN COWGER: Okay. During this hearing, the
21 parties may offer such evidence and testimony as is
22 pertinent and material to the controversy and shall
23 produce such additional evidence as the Board may deem
24 necessary to an understanding and determination of the
25 matter before it.

1 The Board shall be the sole judge of relevance
2 and materiality of the evidence offered.

3 The parties are requested to assure that they
4 receive properly identified copies of each exhibit
5 submitted during the course of this hearing or in
6 advance of this hearing, and to retain these exhibits.

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

11 The hearing will be conducted in an informal
12 manner. First the contractor's representative will
13 elaborate on their claim, and then the Department of
14 Transportation will offer rebuttal.

15 It's been agreed that since this is a two-part
16 claim, that we will deal with each part individually
17 during the hearing.

18 Either party may interrupt to bring out a
19 pertinent point by coming through the Chairman.
20 However, for the sake of order, I must instruct that
21 only one person speak at a time.

22 We have now reached the point that the contractor
23 can begin his presentation.

24 MR. McRAE: My name is Ted McRae. I'm the
25 president of Anderson Columbia Company. The project is

1 29010-3547. This project is U.S. 90, which runs out
2 east of Lake City approximately -- a little over six
3 miles.

4 The project involved milling and resurfacing the
5 existing roadway, widening the existing roadway one
6 foot and constructing a paved shoulder and then
7 reworking the existing grass shoulders.

8 Our claim is primarily -- not primarily -- is
9 concerned with the reworking of the existing grass
10 shoulders. We feel that we have been underpaid for
11 reworking the grass shoulders.

12 There are several points that I think we would
13 like to make this morning on this. After the contract
14 had been let and awarded and we began sometime after
15 this, began work, it was discovered that a great deal
16 of the shoulders were too high.

17 I think in some of the correspondence, the DOT
18 has characterized it as being too low. That is
19 incorrect. The shoulders were too high.

20 It was decided to rework a greater quantity of
21 the shoulders than the plans called for.

22 There was already a unit price established in the
23 contract. And so we entered into a supplemental
24 agreement. The supplemental agreement did not affect
25 the price, but it affected the quantities.

1 We reworked the shoulders. Our point of
2 contention is that the Department did not pay us for
3 the quantities that we did -- that we did on the job,
4 and they did not even pay us for the quantities that
5 were anticipated in the supplemental agreement when it
6 was negotiated.

7 The Department took the -- through their
8 representative -- paid us for eight feet of shoulder
9 rework. Their determination was based upon eight feet
10 was all that was paid because that was the approximate
11 width of the mixture.

12 We contend that if you read the specifications
13 for reworking shoulder item, which is in our booklet,
14 that reworking the shoulders is one of the -- mixing
15 the shoulders is one of the items of reworking the
16 shoulders, one of the processes.

17 Nowhere in that spec that we see where it says
18 you get paid the width the mixer runs.

19 When you take a shoulder that's high, and the
20 reason these shoulders were reworked is because they
21 were high, then this surface material has to be placed
22 somewhere. This surface material was placed down the
23 slope of the shoulder.

24 If we are only paid the width of the mixture,
25 then we are not being compensated for balancing the

1 shoulders, dressing the shoulders, exposing the surface
2 material down the slope. That's what we have asked to
3 be paid for is the approximate width of dressing this
4 material down the slope.

5 The Department in a letter took the
6 measurements -- rather, the shoulders were measured in
7 June of '92. We contend this was even before we had
8 finished the work. We don't even think they had to
9 measure the shoulders because all they had to do was
10 take eight feet and say this is the width we're going
11 to pay you times the length.

12 In the letter that -- a letter to Johnny Walker
13 from Jim Martin, the Department states -- and that
14 letter is dated July 5, 1994 -- in paragraph -- I guess
15 it would be paragraph 3 it states, "The supplemental
16 agreement estimated a 12-foot width throughout both
17 sides of the job for the mixing and blading (rework
18 shoulders) excluding those areas already denoted in the
19 plans. It was unknown at the time of the supplemental
20 agreement what the drop-off at the edge of the pavement
21 would be or how much of the shoulders would need to be
22 reworked. The areas to be reworked were to be
23 determined at a later date."

24 Now, this is dated July 5th. They determined in
25 June. How could they write a letter on July 5th and

1 say it was unknown, and when they took their -- they
2 paid the quantities in June.

3 So, that's the reason we think there's
4 inconsistencies in this. They measured the shoulders,
5 made a determination of what to pay us in June, and
6 wrote a letter in July, even before the supplemental
7 agreement was issued. The supplemental agreement was
8 not issued until August. They measured it in June,
9 wrote a letter in July, and said it was unknown at that
10 time. The supplemental agreement was issued in August.
11 It was based on 12 feet wide.

12 So, we think there's some inconsistencies in the
13 Department's position. I guess that's the reason we're
14 here today because we couldn't agree with the
15 Department on how we should be paid for it.

16 Really, basically, that's our claim, should we be
17 paid for areas that we took the surface material from
18 the shoulders down the slopes, and that we feel the
19 Department was inconsistent in their measurements or in
20 reaching some kind of equitable agreement on paying for
21 the proper quantities.

22 MR. DEYO: I have a question. The June final
23 measurements is the June 18, 1992 date that's in your
24 summary?

25 MR. McRAE: Right.

1 MR. DEYO: The July date is the memo dated July
2 of '94, but the supplemental agreement date is August
3 of '92?

4 MR. McRAE: That's right.

5 MR. DEYO: The supplemental agreement processing
6 was done in '92?

7 MR. McRAE: If I said the letter was '92 -- it
8 was July of '94, right.

9 CHAIRMAN COWGER: Do we have any further
10 questions then? Let's let the DOT go ahead with their
11 rebuttal if they would, please.

12 MR. HAGGERTY: I'm Henry Haggerty. As Ted says,
13 the area of disagreement is on reworking shoulders,
14 whether the reworked shoulders should be paid for in
15 the areas which are mixed or where they are mixed and
16 graded.

17 We contend the specifications say mixed. The 12
18 feet was an estimated amount to ensure we had
19 sufficient money to pay the contractor.

20 What happened, we determined working with
21 Ken Sweet, who was the superintendent for Anderson
22 Columbia, the areas and the width were predetermined.
23 That's the area of contention.

24 I'm going to turn it over to Sandy Daniel, who
25 was the resident engineer on the project.

1 MR. DANIEL: Okay. Mr. McRae is correct in
2 identifying -- we discovered the shoulders were too
3 high after construction started.

4 The project consisted of a one-foot widening on
5 an existing 11-foot lane on each side. So, it's a
6 22-foot roadway. We added a foot to each side for a
7 travel lane and added a four-foot paved shoulders.

8 The original shoulders on the road were eight
9 feet wide. We took five feet of the existing grass
10 shoulder and converted it to asphalt pavement section
11 with the shoulder pavement and widening.

12 When we discovered the existing grass shoulder
13 was higher than the base, the problem was that it was
14 going to cause standing water in the travel lane, not
15 necessarily standing water on the shoulder.

16 There were several discussions on how to handle
17 this. Part of the discussion was to leave it as it
18 was, to accept the job as it was. The other option was
19 to bring maintenance forces in to do it. There was
20 some discussion on canceling the contract and rebidding
21 it.

22 This was all kicked back to the district office,
23 from our standpoint as the CEI consultant on the job.
24 It came back to us from the district office that they
25 had chosen to resolve it with Anderson Columbia.

1 The solution was to come up with a reworked
2 shoulder, a modified operation that was fair to the
3 contractor, fair to the DOT, and something we could
4 afford to do.

5 The area of the shoulder that actually needed to
6 be reworked was only three feet that was left. If we
7 had clipped the three-feet off and picked it up, hauled
8 the material off, it would have solved the problem that
9 we had of the standing water and not disturb the rest
10 of the shoulder.

11 Discussions with Anderson Columbia's personnel
12 indicated that the smallest area they could rework
13 economically was eight feet because that was what the
14 nominal dimension on the mixers were, the equipment,
15 and they could handle an eight-foot section.

16 Now bearing in mind that because of the slope and
17 the existing grass shoulder and the existing grass
18 slope of the fill section, we only needed four feet.
19 The mixer pulled a pass eight feet wide, the material
20 was compacted with a rubber tired roller. It was
21 tractor drawn. The motor grader made three passes
22 clipping off the excess material and wasting it on the
23 slope.

24 The entire area that was disturbed was 12 feet.
25 The 12-foot area took an additional four feet, took the

1 excess material that was not mixed in the balancing
2 operation and was placed on it. It was overseeded with
3 the shoulder, and it was paid for as overseeded area,
4 the entire section that's in discussion now. That was
5 paid for overseed.

6 The reworked shoulder item that we paid for on
7 this project, this work under, the pay item itself,
8 calls for seed and mulching. It calls for, in the pay
9 item, the DOT pays for the grass, pays for the hay,
10 pays for everything else involved with it except the
11 actual operation of applying the seed and the mulch.

12 This was not done. We paid for overseed. We did
13 not seed and mulch the disturbed areas.

14 The criteria for this, on the areas that we have
15 reworked, was any area where the turf was two and a
16 half inches above the existing -- the new structural
17 asphalt that was placed -- the process was discussed
18 with Anderson in detail. The personnel understood what
19 was going on.

20 It was agreed to and handed back to us from the
21 district office that this was the operation to be used.

22 The areas, the specifications, the special
23 provisions in the DOT specifications, outline an
24 operation for reworked shoulders. This was modified.
25 The actual section, the actual operation consisted of

1 mixing the existing material, compacting the existing
2 material, striking it off with a motor grader,
3 disposing of the excess on the front slope with the
4 pass with the motor grader.

5 And it was not seeded and mulched, it was just
6 overseeded.

7 The reworked areas I talked about was only needed
8 to be three and a half to four feet wide, depending on
9 the variations in the shoulder.

10 The mixture that was used was seven and a half
11 feet wide. The Department, with our -- and we agreed
12 with the concept -- were paid for an eight-foot width
13 to not jeopardize damage to the existing asphalt base
14 that was just constructed, flexible pavement section,
15 by not crowding it as much as possible.

16 The areas that needed to be reworked were
17 documented on the pavement with paint. It was measured
18 with the DMI for estimating purposes, and calculated on
19 a 12-foot width.

20 After it was determined that funding was
21 available and encumbered, we went back and measured the
22 areas defined and tied them with station-to-station
23 measurements for the final estimate. That was -- that
24 is in the final estimate process.

25 When the eight-foot dimension was applied to it,

1 it was calculated that that was the area that was paid
2 for, the actual areas that were reworked only.

3 Prior to starting work, the Anderson Columbia
4 general superintendent instructed his people to repaint
5 the marks that were on the pavement that our personnel
6 had placed. That was redone with our supervision so
7 their operators could see the areas that needed to be
8 reworked. It was not the entire job that was reworked,
9 it was only isolated areas.

10 The scope of the work was clearly understood by
11 all the personnel involved in the job, from our
12 standpoint, the DOT's standpoint, and from Anderson
13 Columbia's standpoint. It was discussed in detail
14 between myself, the project engineer that was under my
15 supervision, the senior inspector on the job, the
16 inspectors on the job, Mr. Ken Sweet, who was the area
17 superintendent for Anderson on the job, who was
18 responsible for it, that was -- that dealt with us and
19 interfaced with us on all the problems and any changes
20 on the project, it was his responsibility.

21 Mr. Tom Brunner and Mr. Jim Martin were our
22 project managers, program managers from DOT, that were
23 overseeing us and feeding us the input from the
24 district office with regard to how this was to be
25 resolved.

1 There is a photo in the exhibits, Exhibit 2.
2 It's an eight and a half by 11. It's a color copy of
3 the project photograph that was taken in the general
4 operations. The project photograph shows a four-foot
5 paved shoulder. It also shows the area that was
6 reworked on the shoulders.

7 The area on the far right of that photograph in
8 the bottom of the ditch is an area that we will discuss
9 later. It was the area where it had stockpiled
10 material and additional work, the contractor agreed to
11 do in lieu of letting him stockpile his material in
12 that area. You can see the dimensions on that, the
13 area that was disturbed.

14 The next photograph is typical of what went on on
15 the project, the next two photographs. It shows areas
16 reworked, areas disturbed. The final photograph was
17 later. The first three photographs in that exhibit
18 show the reworked shoulders for the paved shoulder
19 areas.

20 Based on our understanding of the agreement from
21 the district office between Anderson Columbia and the
22 Department of Transportation, we prepared a final
23 estimate based on our understanding of the agreement.
24 They were to be paid for the eight-foot shoulder,
25 eight-foot rework as a modified reworked shoulder area,

1 not as a pay item, as is outlined in the
2 specifications, i.e., no seed and mulching, no
3 additional mixing. It was just the areas that were
4 disturbed.

5 We paid for the work that was done under the
6 direction we had. We did not pay for any work that was
7 not done. Our contention, and the DOT's position for
8 the 20 years I've been around them, is to pay the
9 contractors the money they're due and not to pay them
10 any more than they are due.

11 We paid for the work that was performed. In our
12 opinion, the claim is for work that was not performed.

13 MR. HAGGERTY: I'd like Jim Martin to -- Jim,
14 that memo that Ted McRae talked about on July 5, 1994,
15 maybe Jim can clarify that.

16 MR. MARTIN: That memo was written in response
17 from a request from John Walker with the Anderson
18 contention that they had not received full payment.
19 I wrote that memo based on a review of the project
20 records at the time, and my recollection.

21 While it's true the assay was not executed fully
22 until the 27th, in August; the initial, we began
23 working up quantities in April of that year. That is
24 the quantity that we came up with at that time. When
25 I say it was not known at the time, that is prior to

1 him doing the work when I say that.

2 The first draft that was actually sent of the
3 assay was sent July 31, 1992. As you all know, we
4 cannot get every assay turned out within a week.

5 MR. HAGGERTY: John Walker is our district final
6 estimates engineer. And, John, would you address from
7 the final estimates point of view.

8 MR. WALKER: Okay. In Mr. Warren's claim he has
9 made two points, one, daily diary showing dates of
10 October 15, 16 and 17, 1992, saying he wasn't paid for
11 work done on those dates.

12 If you will look at Exhibit 1, in the exhibit
13 file folder, the daily diaries do show rework shoulder
14 and asphalt, Type S mix, as a controlling item of work,
15 on the back of the daily diary sheet.

16 These items were listed, specifically for weather
17 days, time extensions. These are the items that he has
18 to complete during that day or during that time.

19 If it rains or if the weather doesn't permit this
20 work, then we have to grant him weather time. That's
21 what they're listed here for.

22 On the front, the actual work that was done on
23 that day, specifically on the 12th, no work. No work
24 shown done by the contractor on the project for that
25 day. It's still listed on the back.

1 These items were listed for two reasons: one,
2 the asphalt work still had to be done. A controlling
3 item of work for rework was listed there for the areas
4 in Exhibit No. 2, in the first photograph.

5 The areas out in the ditch where he stockpiled
6 material, he was allowed to stockpile this excess
7 material in the ditches and repair those at his own
8 expense. That was agreed to by his personnel.

9 Finally, the second issue is final measurements
10 being taken in accordance with our contract. In
11 accordance with Article 913 we are supposed to have pay
12 quantity designated and determined by calculation. And
13 in this case we had predetermined areas, specific
14 width, station to station.

15 We went out and actually said this area needs to
16 be reworked, marked it on the pavement, and reported
17 it.

18 Field personnel then after the fact came back and
19 verified that those areas had been reworked. If you
20 will look at the photograph, Exhibit 2, the second and
21 third page, these are areas where he has actually asked
22 for 22 and a half feet. The sign on the shoulder in
23 the first photograph only shows -- or the sign there is
24 only four feet wide. That can't be 22 feet.

25 I feel like all the measurements and areas paid

1 for are correct as submitted.

2 CHAIRMAN COWGER: Are you through?

3 MR. HAGGERTY: That's it, sir.

4 CHAIRMAN COWGER: Let me ask a couple of
5 questions. The actual area that was -- that somebody
6 earlier said was disturbed, including the area in which
7 material was bladed down the slope, was approximately
8 how wide?

9 MR. DANIEL: A maximum of 12 feet.

10 CHAIRMAN COWGER: And then the seeding -- the
11 overseeding extended beyond that --

12 MR. DANIEL: Yes, sir.

13 CHAIRMAN COWGER: -- out onto areas that had not
14 been disturbed? Is that what it amounts to, from your
15 testimony?

16 MR. DANIEL: Yes, sir. The overseeding on the
17 project is part of a state-wide effort to eliminate
18 paved grass. It was overseeded with Bermudagrass, you
19 know, from the bottom of the ditch to the edge of the
20 pavement.

21 CHAIRMAN COWGER: But nothing was done beyond the
22 12-foot mark, other than seeding?

23 MR. DANIEL: That's correct, except for the areas
24 the contractor disturbed in his operations in the ditch
25 bottoms and on the shoulders that he repaired at his

1 expense.

2 CHAIRMAN COWGER: Another question. You talked
3 extensively about agreements between DOT and Anderson
4 Columbia at the time the supplemental agreement was
5 being negotiated that said that the payment for the
6 reworking of shoulders was going to be limited to eight
7 feet, which was approximately the width of the mixer.

8 Looking over the supplemental agreement, there's
9 nothing in the supplemental agreement that says that.
10 Is there any written documentation of that anywhere?

11 MR. HAGGERTY: No, there isn't.

12 CHAIRMAN COWGER: I haven't seen anything.

13 MR. HAGGERTY: No, there isn't. What we did, we
14 didn't know the type of equipment that they were going
15 to use to mix that, and we assumed 20 feet -- 12 feet
16 wide and then when they actually showed us the piece of
17 equipment was a mixer that was seven foot, six inches
18 wide, that's why we agreed on the eight feet.

19 CHAIRMAN COWGER: Okay.

20 MR. ROEBUCK: Did Mr. Ken Sweet agree on that as
21 well?

22 MR. DANIEL: Yes, sir.

23 MR. ROEBUCK: But just verbally, just in
24 conversation?

25 MR. DANIEL: Yes, sir. The process took about

1 six weeks to decide what we were going to do. It went
2 back and forth. And the Department was leaning toward
3 letting maintenance do it because there just was not
4 funding available to support it.

5 Then it went back to the district office. The
6 contractor and the district office personnel got
7 together and decided they could work up something we
8 could do and at least minimize the cost to DOT and
9 minimize the effect to Anderson as far as how it was to
10 be done.

11 CHAIRMAN COWGER: Is there any dispute in this
12 claim about the longitudinal limits in which shoulder
13 reworking was done? Mr. Warren or Mr. McRae?

14 MR. WARREN: No, sir.

15 MR. ROEBUCK: Was your claim limited to the
16 painted area?

17 MR. WARREN: Right. We took their stations and
18 keyed on those as far as working the quantities.

19 MR. ROEBUCK: And went to 12 feet more or less
20 with the width?

21 MR. WARREN: What this is in the special
22 provisions, which overrides everything, defines areas
23 of grassing, it says where you don't have the
24 sufficient drop-off to the edge of pavement to some
25 point out, if it qualifies for reworked shoulder.

1 It does not say you get part reworked shoulder,
2 part grassing. Anything done in that area is supposed
3 to be reworked shoulder.

4 The Department on other jobs demonstrate what is
5 reworked shoulder and what is grassing. On this job
6 they did not do it. They did not clarify it on their
7 supplemental agreement. Their supplemental agreement
8 did not address or change any of the standard documents
9 on the contract.

10 MR. McRAE: Mr. Chairman, can I say something?

11 CHAIRMAN COWGER: Certainly.

12 MR. McRAE: I guess this is kind of rebuttal, but
13 I'm the one that negotiated this with the Department.
14 I don't remember whether it was Henry or one of his
15 people. It might have been James Rogers.

16 MR. HAGGERTY: It was between me and James Rogers
17 and you, the three of us.

18 MR. McRAE: It's never been discussed with me,
19 and -- about limiting it to eight feet. You know, if
20 it was limited to eight feet, why was a supplemental
21 agreement made on 12? The only thing I ever knew was
22 we were going to rework the shoulders and the mixer was
23 going to be eight feet.

24 I mean -- or seven foot, six, is what it is, and
25 they agreed to eight feet.

1 Ken Sweet, my superintendent, has never agreed --
2 there is a misunderstanding there, Sandy, evidently,
3 because Ken Sweet says he has never agreed to eight
4 feet.

5 If you look at these pictures, you can clearly --
6 and the pictures they've got is not of the shoulders as
7 they're final dressed, but as they're in the process.
8 You can see right there in these pictures that it's far
9 greater than eight feet. After this material is
10 dressed and pulled on down all the way down the slope,
11 it's probably more than 12 feet.

12 If you look at the -- 105 of the Standard Index,
13 you can see what it says to do. It shows it dressed
14 all the way down to the toe of the slope. That's on
15 page 8 of the booklet.

16 On this Standard Index right here, it shows it
17 all the way towards the slope. Of course, the
18 Department has got the right to amend that if they want
19 to. We are not objecting to that.

20 One thing I do -- I also want to rebut is that we
21 were never -- we never were informed that this was
22 anything to do about modifies. The supplemental
23 agreement says it was a reworked shoulder item. All
24 the supplemental agreement did was change the quantity.
25 It was a bid item. It had a spec to go by, and the

1 negotiated supplemental agreement was a change in
2 quantity. That's all we ever agreed to was a change in
3 quantities. Then we got in this dispute about eight
4 foot versus 12 feet. Some places we say it's as much
5 as 20 feet.

6 You know, some places you had pipe, or pipe
7 extensions. Well, you had a transition in and out of
8 those pipe extensions. They just paid eight foot right
9 on by, ignored the transitions out to the pipe.

10 MR. DANIEL: We paid for the extensions.

11 MR. McRAE: You did?

12 MR. MARTIN: The extensions were included in the
13 cost of the structure. So was the sod.

14 MR. McRAE: Well, what about --

15 CHAIRMAN COWGER: Hold on, too many people
16 talking.

17 MR. McRAE: Anyway, what we're saying is,
18 I negotiated a supplemental agreement. I negotiated
19 with Henry and his assistant James Rogers. We never
20 discussed eight feet. The supplemental agreement was
21 done on 12 feet. It never -- never did we enter into
22 any agreement that we would take eight feet. And --
23 that I'm aware of, and my superintendent says he did
24 not agree to -- in fact, we never knew this was a
25 problem, never knew it was a problem until we got the

1 pay quantities.

2 Then we asked for -- we wrote all these letters
3 and had three or four meetings with the Department to
4 try to get it resolved because we don't think that the
5 reworking the shoulders is confined to just the width
6 of the mix when you've got a shoulder that's got too
7 much dirt and you're having to do something.

8 If the Department has said okay, you rework the
9 shoulders and the way we're going to pay you for the
10 disposal of this surface dirt is that we will give you
11 a regular excavation item to go in there and pick it up
12 and dispose of it.

13 Now, if you had done that that would be fair.
14 But when you say rework the shoulders, Mr. Contractor,
15 and you go out there and balance your shoulders and
16 dispose of it at your own expense, then we would have
17 had to do it differently.

18 MR. HAGGERTY: Can I --

19 CHAIRMAN COWGER: Can you hold that just a
20 second. What kind of bid items were there in the
21 contract, if any, for grading? Was there an item for
22 final dressing, anything in 120 at all?

23 MR. McRAE: No. Gene, what this job
24 anticipated -- and the Department has made a point, and
25 they are correct -- that we stockpiled some surface

1 material in the bottom of the ditches.

2 This is one of these projects where it had
3 widening. And the Department let the contract not to
4 disturb the shoulders except in very limited areas
5 because they didn't want to mess up the grass. And so
6 we had to pick up all this material that come out of
7 the trench and stockpile it somewhere on the project.
8 And we instructed to use it in the culvert extension,
9 to fill up for the culvert extensions.

10 The culvert extensions weren't ready, so we had
11 to stockpile the material somewhere; and we did, up and
12 down the project, at various locations in the bottom of
13 the ditch, out of the clear zones.

14 So, the Department did not anticipate doing any
15 shoulder reworking or grading or final dressing,
16 Mr. Chairman, except in very limited areas.

17 After the project got to going, it was
18 determined, because one thing, they put less asphalt
19 onto the job than they took off. The shoulders were
20 already high. The asphalt was lower elevation than the
21 shoulders, so it had a lot of shoulders that was too
22 high and was trapping water, like Mr. Daniel said.

23 So, they come back, marked these areas that were
24 holding water, which was a good, I don't know, half or
25 two-thirds of the project, they had to be reworked.

1 So, this surface material that come off of these
2 shoulders had to be dressed down the slopes. And, you
3 know, dressed out. That's all we were asking to be
4 compensated for.

5 I don't think we had any other problems with the
6 Department except that they took the position that
7 reworking the shoulders was strictly eight foot wide,
8 and we said in this instance it's greater than eight
9 foot wide because we had to work and dispose of the
10 material.

11 CHAIRMAN COWGER: Let me correct one thing.
12 I noticed -- Mr. Deyo pointed out to me -- that there
13 are bid items in the contract under excavation, one for
14 borrow. I don't think it's pertinent, but there's a
15 regular excavation item. What work did that cover?

16 MR. DANIEL: That covered the trenching for the
17 shoulder widening, for the widening operation and the
18 paved shoulders.

19 CHAIRMAN COWGER: It's agreed that's all that
20 covered?

21 MR. McRAE: That's right.

22 CHAIRMAN COWGER: From the edge of the widening
23 trench outward, there was no grading-type pay item?

24 MR. DANIEL: No, sir.

25 CHAIRMAN COWGER: It was all to be included in

1 the cost of reworking the shoulders?

2 MR. DANIEL: Yes, sir. What was done with that,
3 there was no excess material picked up and hauled off.
4 There was no borrow material brought in that was not
5 paid for in this operation. The entire excess material
6 for that shoulder work was cut down, was deposited on
7 the slope.

8 CHAIRMAN COWGER: What happened --

9 MR. DANIEL: With a -- not with a front-end
10 loader.

11 CHAIRMAN COWGER: What happened to the material
12 that was stockpiled in the ditch bottom?

13 MR. DANIEL: It was hauled into the culvert and
14 pipe extension areas, and the excess was disposed of by
15 the contractor.

16 CHAIRMAN COWGER: It was moved longitudinally up
17 and down the job?

18 MR. DANIEL: And excess hauled off. It was an
19 excess job.

20 MR. HAGGERTY: Maybe to clarify a little bit, the
21 one area that we are in disagreement on is the eight
22 versus the 12 feet.

23 MR. ROEBUCK: Yes.

24 MR. WALKER: Eight versus 22.

25 MR. HAGGERTY: What we contend, the Department,

1 under 577 -- and if you look at Exhibit 4, at 577-4.4,
2 if you will read along with me, "The additional
3 shoulder material shall be mixed with the existing" --

4 MR. DANIEL: In the supplemental agreement,
5 special provisions, sorry.

6 MR. HAGGERTY: These are the special provisions.
7 It's marked page 39, under 577-4.4. "The additional
8 shoulder material shall be mixed with the existing turf
9 with a pulverized mixer or rotograder mixer to a
10 depth," et cetera, et cetera.

11 That's the difference in the opinion. They say
12 they mixed eight feet. We agree they mixed eight feet.
13 They said they graded an additional four feet and ought
14 to be paid. We say under the specs they should be paid
15 for eight feet. That's the difference in the opinion.
16 That's the area of contention.

17 If you look on page 534 of our specifications on
18 reworking shoulders, it -- under the same section it
19 talks about mixing of the shoulders.

20 CHAIRMAN COWGER: Why are we going back to that,
21 though, when we've got a special provision that
22 overrides it? I'm confused.

23 MR. HAGGERTY: They are the same. They're
24 consistent. That's the difference of opinion.

25 MR. McRAE: Can I say one last thing in rebuttal

1 of Mr. Haggerty. If you read this wording on 577-4.4,
2 it says, "The additional shoulder material." Well, we
3 didn't have any additional shoulder material.

4 Now, if you get up here in front of this item, if
5 you look at the description of the work, it says --
6 577-1, "The work under this section shall include
7 shoulder preparation, seeding, mulching, fertilizing,
8 watering, as specified."

9 Then you look under sequence of construction,
10 577-4.1. "Sequence of construction. Several
11 operations involved in the work shall proceed in the
12 following sequence: blade shoulders if necessary, add
13 and spread borrow material."

14 Well, there was no borrow material spread and
15 there was no mixing required of borrow material.

16 So, we are saying part of this operation as
17 described here was blade shoulders.

18 Our contention all along is that mixing -- the
19 specification or the plans do not limit the pay item to
20 just the areas of the mix.

21 MR. HAGGERTY: That's exactly -- that's the
22 difference of opinion. And like I discussed, this is
23 the first time since 1988, January when I took over
24 this job, that I've been in arbitration. It's an area
25 that needs working on, we've got a difference of

1 opinion.

2 CHAIRMAN COWGER: I think we have heard about all
3 we need to hear from both sides except it seems to me
4 like the crux of this whole thing is whether or not
5 there was agreement at the time the supplemental
6 agreement was negotiated that the pay width would be
7 confined to eight feet.

8 And the contractor is saying no way did I agree
9 to that, the DOT is saying what?

10 MR. HAGGERTY: That the supplemental agreement
11 was negotiated on 12 feet of width. And that at the
12 time when we negotiated the supplemental agreement, we
13 did not know the type of equipment they were going to
14 use. And the machinery that they brought in was a --
15 was machinery that was seven feet, six inches wide.
16 They made one pass with that piece of equipment.

17 So, they mixed less than 12 feet, they mixed
18 eight feet, and we paid them eight feet. That's the
19 difference of opinion.

20 MR. DANIEL: It is my understanding the agreement
21 was to rework the shoulders as narrow as practical.
22 That was to be done using standard equipment. That was
23 what Anderson's directions were.

24 MR. DEYO: Your definition of rework just
25 includes the area that's mixed?

1 MR. ROEBUCK: Mixed.

2 MR. DEYO: The width of the mixed area is all you
3 include in the area for reworked shoulders?

4 MR. HAGGERTY: Yes. This is standard practice
5 with the Department.

6 CHAIRMAN COWGER: DOT, what is your position,
7 though, on during the time the supplemental agreement
8 was being negotiated was there specific discussion that
9 payment would only be made for the area that was mixed?

10 MR. HAGGERTY: That's our understanding. This
11 specification has been in for about three or four of
12 our specification books. It says mixed. It was
13 developed to stop overlaying with thin courses and not
14 blading it and not mixing it so the material wouldn't
15 wash down over the slope. That's what the Department
16 has done for a number of years.

17 CHAIRMAN COWGER: One other question, and I think
18 this will be my last one. Hypothetical. If the Board
19 should decide that the contractor is due additional
20 compensation out to the limits of the area that was
21 actually reworked in accordance with the contractor's
22 interpretation, which would be the area mixed plus the
23 area into which material was bladed, is 12 feet a
24 reasonable width for that?

25 MR. HAGGERTY: Yes.

1 MR. ROEBUCK: Average?

2 MR. HAGGERTY: Yes, it is. The thing is on this,
3 John, this would set a precedent for the Department, is
4 that a fair statement?

5 MR. WALKER: It certainly would.

6 MR. HAGGERTY: In the final estimates we pay for
7 mixed widths. That will change the way the Department
8 is doing business.

9 MR. WALKER: It will affect lots of jobs.

10 MR. DANIEL: This is not something that's brand
11 new. It's something that's been going on for a number
12 of years. The only thing that is different is that we
13 did not cross section the job to determine how much
14 material had to be picked up to balance the shoulders
15 and get into the regular pay items. This was done to
16 expedite the project, modify it and dispose of it.

17 MR. ROEBUCK: You acknowledge the contractor had
18 some costs outside the mix area?

19 MR. DANIEL: No, sir.

20 MR. ROEBUCK: He did not have any costs?

21 MR. DANIEL: I don't think he did.

22 MR. WALKER: Rework constitutes mixing and
23 blading off excess material. Usually we require him to
24 pick that material up, dispose of it to keep from
25 killing grass outside the area. In this case to

1 expedite, he was allowed to roll that excess down the
2 front slope.

3 MR. DANIEL: It was cheaper than picking it up
4 and hauling it off.

5 CHAIRMAN COWGER: That's what was agreed to in
6 negotiating the supplemental agreement.

7 MR. WALKER: That was agreed to.

8 CHAIRMAN COWGER: Let's not get beyond that.

9 Mr. McRae, do you have any comments?

10 MR. McRAE: I am certainly amazed to sit here
11 and hear that this didn't cost me anything to dress
12 these shoulders. I'm sure glad they're not in
13 business.

14 MR. DEYO: Do we have a copy of the special
15 provision total in here?

16 MR. HAGGERTY: Yes, it's under Exhibit 4.

17 MR. DANIEL: The total special provisions are
18 applicable.

19 MR. HAGGERTY: That's what I was reading from.

20 MR. DEYO: That is what was in the contract?

21 MR. HAGGERTY: That's part of the contract, those
22 page numbers. That's part of the contract.

23 MR. McRAE: I guess, Gene, to me the special
24 provision says that part of this operation is blading.
25 And nowhere does it say in here that you are going to

1 get paid for just what is mixed.

2 One of the operations clearly says it's blading.
3 The only place I see that you really even have to
4 mix -- maybe the specs needs cleaning up -- but the
5 specs says you will mix it if you haul in borrow
6 material.

7 Now, we have always mixed it. I think that's the
8 proper manner to do is to mix it. But I think, also,
9 part of the operations, because it says it is, and it
10 is, is you're going to blade it. If there's surplus
11 material, I never knew I had to pick up surplus
12 material and haul it off for nothing.

13 CHAIRMAN COWGER: This is not part of your claim?

14 MR. McRAE: No.

15 CHAIRMAN COWGER: Hauling the material off?

16 MR. McRAE: No.

17 MR. HAGGERTY: It wasn't hauled off.

18 MR. McRAE: What I'm saying is that it was --
19 Mr. Walker said I had to -- the option I could have
20 picked it up and hauled it off myself. I understood
21 that's what he said. I didn't want to haul it off.
22 They didn't want me to haul it off. We were in
23 agreement on that. The best thing to do was dress it
24 down the shoulders.

25 CHAIRMAN COWGER: Gentlemen, I think we have

1 heard all the testimony we need to hear.

2 Mr. Roebuck, do you have any additional
3 questions?

4 MR. ROEBUCK: No, sir.

5 CHAIRMAN COWGER: Mr. Deyo?

6 MR. DEYO: No.

7 CHAIRMAN COWGER: I want to make one statement.
8 I made a misstatement at the beginning of this hearing,
9 talking about this particular claim being a two-part
10 claim. This is only a one-part claim. The next one we
11 will hear is a two-part claim. Just wanted to get the
12 record straight.

13 Okay. This hearing is hereby closed. The Board
14 will meet to deliberate on this claim in approximately
15 six weeks and you will have our final order shortly
16 thereafter.

17 (Whereupon, the hearing was concluded at 10:10 a.m.)

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CERTIFICATE OF REPORTER

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STATE OF FLORIDA)
COUNTY OF LEON)

I, CATHERINE WILKINSON, Court Reporter, do hereby certify that I was authorized to and did stenographically report the foregoing; and that the transcript is a true record of the testimony given.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 23rd day of June, 1995.

Catherine Wilkinson
CATHERINE WILKINSON
CSR, CP
Post Office Box 13461
Tallahassee, Florida 32317

STATE OF FLORIDA)
COUNTY OF LEON)

The foregoing certificate was acknowledged before me this 23rd day of June, 1995, by CATHERINE WILKINSON who is personally known to me.

Kathleen Grow
 KATHLEEN GROW
MY COMMISSION # CC278204 EXPIRES
April 20, 1997
BONDED THRU TRUDY FAIR INSURANCE, INC.