

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. 29030-3518 in Columbia County, Florida, both parties are advised that State Arbitration Board Order No. 2-95 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. 2-95

RE:

Request for Arbitration by
Anderson/Columbia Co., Inc, on
Job No. 29030-3518 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 11:10 a.m., Wednesday,
May 31, 1995.

The Board Members, having fully considered the evidence
presented at the hearing, now enter their order No. 2-95
in this cause.

ORDER

The Contractor presented a request for arbitration of a
two part claim in the total amount of \$151,261.25.

PART I Amount Claimed: \$19,847.25

The Contractors alleges that the Department of
Transportation used an incorrect width in determination of
the final pay quantity for the item Reworking Shoulders, thus
resulting in underpayment for this item.

After the project was underway, the Department of
Transportation determined that 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 over substantial lengths of the project. A Supplemental Agreement was entered into to provide for correction of this problem. The document provided for a substantial increase in the pay quantity for the unit price item Reworking Shoulders and added a lump sum pay item for Final Dressing. 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 coincide with the Description article of Section 577 Reworking Shoulders of the project Special Provisions.

The Contractor contends that the pay width of reworking of shoulders was 12 feet, the approximate width of grading, not 8 feet, the width to which mixing was done. 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 this work is a part of Reworking Shoulders.

The Contractor also is claiming compensation for shoulder areas that were reworked left of Station 557+73 to Station 591+33 and right of Station 557+73 to Station 600+73. that were not included in the final pay quantity for Reworking Shoulders. DOT Daily Reports of Construction show reworking of shoulders between these limits.

PART II Amount Claimed: \$131,414.00

The Contractor contends that the Department of Transportation did not include all areas shown in the plans

to receive topsoil treatment in the final pay quantity for the item Topsoil. His position is that the Topsoil pay quantity should include all areas in which grassing, excluding overseeding, but including Reworking Shoulders, was accomplished even though material classified as topsoil was not always added. He bases his position on a plan note (first Typical Section note on Sheet 3) that reads "All permanent grass areas, excluding overseeding, are to receive a topsoil treatment."

The dispute here is essentially over payment for Topsoil in areas where reworking of shoulders was accomplished. The Contractor presented information showing that, on another project, the final pay quantities for Topsoil and for Reworking Shoulders were identical.

The Department of Transportation rebutted

PART I

Since the work described in Section 577 requires mixing, payment for Reworking Shoulders is limited to the width within which mixing is accomplished (8'). 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.

Reworking of shoulders to provide for positive drainage of the pavement was to be accomplished only in areas authorized by the Project Engineer. He did not authorize reworking of the shoulders in the additional locations for

which the Contractor is claiming compensation.

PART II

The work under the item Topsoil, as set out in Section 162 of the project Special Provisions, includes preparing a layer of mixed material favorable to plant growth, over areas of the project which are to be grassed, grassed and mulched or sodded by either spreading of topsoil or appropriate soil supplements and mixing with the existing underlying soil. Only areas where such treatment took place and testing indicated that organic content and pH values were within the specification ranges are to be included for payment under the item Topsoil.

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

PART I

- a. The scope of 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 for Reworking Shoulders to be included in the Supplemental Agreement was 12 feet.

e. DOT did not dispute that reworking of shoulders was done left of Station 557+73 to Station 591+73 and right of Station 557+73 to Station 600+73. They denied payment, because reworking of shoulders was to be done only in area authorized by the Project Engineer and authorization was not given for these areas.

PART II

a. The plan note the Contractor referred to as justification for paying for Topsoil in the areas in question describes areas in which topsoil treatment is to be done, but the Method of Measurement for this item is contained in Section 162 of the Special Provisions.

b. Approximately 90 percent of the quantity of Reworking Shoulders done on the project was added by Supplemental Agreement.

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

PART I

The Department of Transportation shall reimburse the Contractor in the amount of \$19,000.00 for this part of his claim.

PART II

The Department of Transportation shall reimburse the Contractor nothing for this part of his claim.

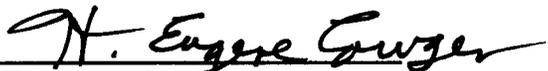
The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$ 101.10 for Court Reporting Costs.

The Contractor is directed to reimburse the State Arbitration Board the sum of \$ 101.10 for Court Reporting Costs.

The Board points out that its decision on PART I of this claim is based on the particular set of circumstances that existed in relation to this project. Since, in this instance, 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.

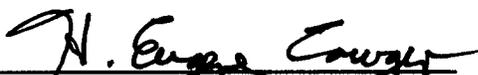
Tallahassee, Florida

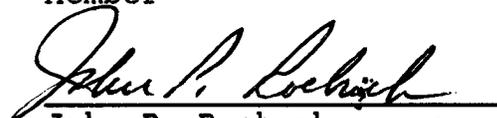
Dated: 21 August 1995


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

Certified Copy:


Bill Deyo, P. E.
Member


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


John P. Roebuck
Member S.A.B. CLERK

21 August 1995
Date

AUG 21 1995

FILED

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

* * *

I N D E X

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P R O C E E D I N G S

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

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

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

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

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

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

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

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

2 CHAIRMAN COWGER: Okay. During this hearing, the
3 parties may offer such evidence and testimony as is
4 pertinent and material to the controversy and shall
5 produce such additional evidence as the Board may deem
6 necessary to an understanding and determination of the
7 matter before it.

8 The Board shall be the sole judge of relevance
9 and materiality of the evidence offered.

10 The parties are requested to assure that they
11 receive properly identified copies of each exhibit
12 submitted during the course of this hearing or in
13 advance of this hearing, and to retain these exhibits.

14 The Board will furnish the parties a copy of the
15 court reporter's transcript of this hearing, along with
16 its final order, but will not furnish the parties
17 copies of the exhibits.

18 The hearing will be conducted in an informal
19 manner. First the contractor's representative will
20 elaborate on their claim, and then the Department of
21 Transportation will offer rebuttal.

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

1 We can now go then on to the contractor beginning
2 his presentation.

3 The contractor will begin his presentation in a
4 moment. It's also stipulated between the parties that
5 all of the testimony presented in relation to job
6 number 29010-3547, concerning the dispute over
7 reworking shoulders, is applicable to this project,
8 also.

9 There will be some additional testimony in regard
10 to reworking shoulders, and then we will go on to the
11 second item dealing with topsoil. Do both parties
12 agree to that?

13 MR. McRAE: Yes.

14 MR. HAGGERTY: Agreed.

15 MR. DANIEL: The only additional to it is in
16 this project there was a pay item for final dressing,
17 and in the supplemental agreement there was an
18 additional \$23,000 paid under the final dressing pay
19 item as it related to the shoulder rework, as a lump
20 sum.

21 CHAIRMAN COWGER: Did I understand the testimony
22 to be now that the price for final dressing was
23 increased?

24 MR. DANIEL: Yes, sir.

25 CHAIRMAN COWGER: Did that increase have to do

1 with the reworking of shoulders?

2 MR. DANIEL: Yes, sir.

3 CHAIRMAN COWGER: Okay.

4 Mr. McRae, I think it would probably be
5 appropriate for you, if you have any additional
6 comments, in regard to the reworking of shoulders.

7 MR. McRAE: Okay. The issue is basically the
8 same, is that the Department has taken the position
9 that they only pay the width of the mixer.

10 This was another project where the shoulders were
11 too high. And it was -- a lot of it was discovered
12 after the work was done and where the -- where they
13 went and decided there were certain areas that would be
14 reworked and certain other areas that would not be
15 reworked.

16 Those areas that were reworked were -- were too
17 high. This material, the surface material was again
18 dressed down the slope.

19 On page 5 of your booklet that we have given you
20 this morning, from the plans, plan sheet number 6, you
21 will see -- where it's highlighted -- a summary of
22 reworking the shoulders.

23 The Department already had in their thing certain
24 areas they wanted reworked. Now we just took the
25 privilege of, or of writing out to the side the width.

1 You will see 27, 27, 19, 20, 31, 18 and 20, for an
2 average width of 23.1.

3 So, when the designer designed the thing, he did
4 not come back in here and say that he was going to
5 rework -- we were going to rework eight feet. He had
6 it as high as 27 to 31 feet in one instance.

7 CHAIRMAN COWGER: May I interrupt you for a
8 minute?

9 MR. McRAE: Yes.

10 CHAIRMAN COWGER: Those widths were merely back
11 calculated from the station length and the square
12 yards?

13 MR. McRAE: That's right. So, that was the only
14 additional thing I was going to add on the reworking of
15 the shoulders was to say that eight feet was all that
16 was anticipated to be done. The designer didn't
17 anticipate doing eight feet on the areas where he had
18 previously had in here.

19 I think the other issue on -- the shoulder issue,
20 on reworking the shoulders, is this thing about the
21 width.

22 MR. DEYO: Can I ask a question on that. Are
23 there specific project features, topo features that
24 would have led the designer to include extra widths in
25 these areas, to your knowledge?

1 MR. DANIEL: Yes, sir. This project did not have
2 the additional grading included in the concrete
3 structures and the culvert extensions and the widening
4 areas. These areas were isolated to the culvert
5 extensions and the drainage improvements in some of the
6 widening areas. The transitions on each end -- on each
7 end of the project --

8 MR. DEYO: These stations then would correspond
9 with cross drain location?

10 MR. DANIEL: Yes, sir, box culvert extensions.

11 MR. MARTIN: Turn-out lanes.

12 MR. McRAE: If you look on the -- did we put a
13 typical section in the packet?

14 MR. HAGGERTY: Previous page.

15 MR. McRAE: If you look at the typical section on
16 the right at the top, reworking shoulders, it doesn't
17 show the width. It just shows reworking shoulders.
18 That typical shoulder, if I'm looking at it right,
19 shows it to the toe of the slope.

20 When they came back and added the reworking
21 shoulder item to the -- to increase the quantities,
22 this is another one where they increased the
23 quantity -- I assume it was by supplemental agreement?

24 MR. DANIEL: Yes, it was.

25 MR. McRAE: Still did not come back and say we

1 are going to do this by supplemental agreement, now you
2 can only do it eight feet wide. That's not in the
3 supplemental agreement that I'm aware of.

4 Those are the only things I wanted to address,
5 Mr. Chairman, about the reworking of shoulders on this
6 project.

7 MR. HAGGERTY: The only thing that I could
8 perhaps add is that we did, in fact, you know, do the
9 supplemental agreements.

10 The Department has felt very strongly, as
11 directed by Ben Watts, to decentralize and put the
12 decision out to the lowest possible person on that,
13 which would be our project personnel and the
14 contractor's superintendent.

15 We provided the, you know, the pay items and then
16 the actual determination was made in the field by the
17 superintendent and by our representative.

18 CHAIRMAN COWGER: Am I correct, though, that the
19 actual negotiation of the supplemental agreement
20 involved the district construction office?

21 MR. HAGGERTY: Yes, sir.

22 MR. DANIEL: These were done at the same time.
23 The jobs were running concurrently. They were bid at
24 the same time, built at the same time, the crews moved
25 from project to project back and forth, and it was

1 basically the same crews, is that correct?

2 MR. McRAE: Yes.

3 MR. DANIEL: This was all going on at the same
4 time, with the same area superintendent, same paving
5 crews. The grading operations were basically performed
6 by the same dozen or two people and the same equipment,
7 really, same type of equipment.

8 CHAIRMAN COWGER: I have a couple of questions.
9 Are we through on the reworking?

10 MR. DANIEL: No.

11 CHAIRMAN COWGER: Okay.

12 MR. ROEBUCK: You want to show your video?

13 CHAIRMAN COWGER: Before we get to that, though,
14 there was a statement by the contractor that there were
15 certain areas that he didn't get paid for for reworking
16 shoulders. Stations 557+73 to 591+73.

17 MR. DANIEL: If you will look at our packet that
18 we submitted, there was some additional work that
19 Anderson Columbia contracted directly with
20 G. W. Hunter or somebody, on some additional gas
21 station lane additions. It was paid for separately and
22 not included in the final estimates because it was
23 under DOT permit.

24 MR. WARNER: We were keying in on the DOT diaries
25 for areas of rework. The area he is talking about,

1 I don't know. The area he is talking about was a
2 fairly long area.

3 MR. DANIEL: This was the plan sheet in the
4 permit documents for the additional driveway and some
5 decel lane work and some grading work and some drainage
6 work that was done under permit.

7 That area was eliminated from the project, for
8 any pay items except for -- I'm not sure -- I will
9 probably say something that I will get banned from not
10 working for DOT again, but I think we paid for the
11 striping on it.

12 MR. MARTIN: You did under my direction.

13 MR. DANIEL: I can still work for DOT. The
14 permit work was done concurrently with the project and
15 we skipped that in the shoulder rework. The other side
16 of the road reworked was paid for. The area in
17 question was either not reworked or it was done under
18 permit with this.

19 CHAIRMAN COWGER: Does the contractor agree with
20 that or not?

21 MR. McRAE: No, I don't agree with that. What
22 station are you talking about?

23 MR. MARTIN: Down there at the interstate.

24 MR. McRAE: I heard 4,000 feet. I haven't
25 contracted with George Hunter for no 4,000 feet.

1 MR. DANIEL: The area of 4,000 feet either wasn't
2 reworked or anything that was done was done under that
3 permit.

4 MR. WARNER: Your diary says it was.

5 MR. McRAE: The only thing I did was put it on a
6 service station, repaving a service station and
7 repaving a little turn lane. That wouldn't have been
8 but a hundred or two hundred feet at the most.

9 I'm talking about reworking shoulders. I didn't
10 have any reworking shoulders in this paved area, of
11 course. All I had was that little hundred feet or so
12 going into the man's service station.

13 MR. DANIEL: Or 500 for transition, around
14 that --

15 MR. McRAE: You talk about 4,000 feet, I'm not
16 agreeing to that.

17 CHAIRMAN COWGER: What was that drawing you just
18 showed us?

19 MR. MARTIN: That was a drawing that went with
20 the permit, as approved by --

21 CHAIRMAN COWGER: This is a permit issued to the
22 property owner?

23 MR. DANIEL: Yes, and they contracted directly
24 with Anderson for that work. The dispute from Anderson
25 is one side of the road only.

1 CHAIRMAN COWGER: No, it's both sides, right and
2 left, between about 557 and 600.

3 MR. DANIEL: That's 300 feet, right?

4 CHAIRMAN COWGER: No, that's 3300 feet.

5 MR. DANIEL: Okay.

6 CHAIRMAN COWGER: I don't see on this permit
7 drawing where it shows any work of reworking shoulders.

8 MR. DANIEL: This project was done the same way
9 as U.S. 90 was. It was premarked, the areas were
10 predetermined.

11 MR. McRAE: What we're saying is that station
12 557 and 591 left and from 557 to 600 right was -- the
13 diary says we reworked the shoulders and you didn't pay
14 us. That's what we're saying. You didn't pay us
15 anything in those areas. That had nothing to do with
16 George Hunter's service station.

17 MR. ROEBUCK: Your final estimates man can't
18 comment on it?

19 MR. WALKER: I don't have the daily diary.
20 I would have to look and see what the daily diary says.
21 Okay? I'm looking for a copy of it.

22 CHAIRMAN COWGER: Just to set the record on this
23 thing, this part of the claim I didn't dream up. It's
24 clearly covered in the letter dated November 22, 1994,
25 to Jim MacLaughlin from Ted McRae on page 4.

1 Just so we get it in the record. That was a
2 part of the original submittal package for the
3 arbitration by the contractor. May I call a
4 five-minute recess.

5 (Short recess)

6 CHAIRMAN COWGER: Back on the record.

7 Mr. Haggerty, do you have a comment you want to
8 make?

9 MR. HAGGERTY: We will show on this video that
10 basically what we did on this job is to mark on the
11 pavement and the rework was in the agreed-upon width.

12 The other thing is the diaries I think should be
13 submitted as part of the information that if we are
14 disputing an area where it says copies of those diaries
15 that Mr. Warren talked about should be submitted.

16 MR. ROEBUCK: Did you have a copy of them?

17 MR. MCRAE: Yes, in our --

18 MR. DEYO: They're in the package.

19 MR. WARNER: We don't have a copy, I don't think,
20 verbatim of the diary, but we tell you exactly what
21 date the writing is on.

22 MR. DEYO: On page 14 of the DOT diary he's got
23 the dates, April --

24 MR. WALKER: There's no specific stations listed
25 on any of those dates except for the last one, on page

1 2 of that.

2 MR. HAGGERTY: I don't think we're talking a
3 great deal. I think the actual copies of the diaries
4 should be submitted to the Board.

5 CHAIRMAN COWGER: All right. Now --

6 MR. DANIEL: One other comment on that. In what
7 we were doing, the areas that were authorized, marked
8 on the pavement, were paid for. There were some
9 isolated areas throughout the job that the contractor
10 used as staging areas to stockpile aggregates for crack
11 relief, stockpile excess material to be excavated and
12 rehandle and replace those at his expense.

13 I don't know if those areas are in the areas he
14 talked about, but they were repaired by Anderson in a
15 separate agreement that was signed and documented
16 between the Department and the contractor to allow him
17 to use those areas.

18 MR. McRAE: That doesn't have anything to do with
19 the shoulders.

20 MR. DANIEL: No, but what I'm saying is if the
21 daily diaries indicated reworking that area,
22 grading-wise, it could have been any of those items.
23 The areas that we authorized or the Department
24 authorized for rework were paid for.

25 CHAIRMAN COWGER: Are you saying then that these

1 areas that we have been discussing from approximately
2 557 to 600 the DOT did not authorize payment for?

3 MR. DANIEL: There was probably not even any work
4 done in that area. The work that was preauthorized and
5 predetermined was documented that it was done and it
6 was paid for.

7 MR. WALKER: It was marked on the pavement. His
8 people understood exactly where they were supposed to
9 rework.

10 CHAIRMAN COWGER: Your contention, DOT, is that
11 these areas we are talking about now, both left and
12 right, you did not authorize any work to be done in the
13 way of reworking those areas?

14 MR. DANIEL: And if there was any work done in
15 those areas, it was paid for in the final estimate. If
16 it's not in the final estimate, the work wasn't done.

17 CHAIRMAN COWGER: Mr. Warren?

18 MR. WARREN: There's one thing they did do on
19 this contract, not just this specific area, but all
20 these turn-outs, according to the way you're supposed
21 to measure it, were to be deducted. They deducted
22 every one of them in these 12 miles, and the specs say
23 you are clearly not to. So it's probably an offset
24 there even if we are in error in some ways.

25 MR. WALKER: We did look at our final

1 measurements. There were some very, very small areas
2 and some very large areas that were not included in the
3 designated areas, anywhere from 21 feet up to 1,000
4 feet.

5 I don't have any evidence from the contractor
6 that any turn-outs were deducted other than his
7 statement. There are short runs of guardrail, drainage
8 structure, et cetera, that were deducted.

9 If we gave him -- just gave him all of the areas
10 less than a hundred feet, the total amount due would be
11 \$820 and some change.

12 MR. WARNER: Your specs doesn't qualify a hundred
13 feet. It says no deduction was made for the areas
14 occupied by turn-outs in rule --

15 MR. WALKER: Give me the pictures --

16 MR. WARNER: It's shaded out here. Any small
17 gaps have been deducted because I used your final
18 measurements.

19 MR. WALKER: There are a lot of small gaps. If
20 there's more than one turn-out in an area between those
21 two turn-outs --

22 MR. WARNER: Also identified those areas that did
23 not require shoulder rework, too. So that's not in
24 those areas.

25 MR. McRAE: Mr. Chairman, we are of the

1 contention -- we didn't bring the diaries, but we are
2 of the contention that the diaries show these areas of
3 rework and are not included in the pay.

4 CHAIRMAN COWGER: Do you have the diaries?

5 MR. McRAE: We have the diaries, but we didn't
6 bring them.

7 CHAIRMAN COWGER: Can you furnish us copies of
8 those?

9 MR. WARREN: Yes.

10 MR. McRAE: If the diaries -- we will stipulate
11 that if the diaries don't show that, we don't want any
12 pay for that. If they do show that, we want pay.
13 I don't know how else to do it.

14 MR. WARNER: Let me point out on November 22,
15 1994, we spelled this out to Mr. MacLaughlin with DOT,
16 and to this date this is the first we've had a rebuttal
17 on this.

18 CHAIRMAN COWGER: Let me direct your attention,
19 DOT, to the contractor's original request for
20 arbitration package. In that package back toward the
21 end are some notes taken from apparently DOT field
22 books. And they are pages 10, 11 and 12 in the lower
23 right-hand corner. Are those your notes covering the
24 pay areas for reworking shoulders?

25 MR. WALKER: These pages?

1 CHAIRMAN COWGER: Yes.

2 MR. WALKER: Yes, they are.

3 CHAIRMAN COWGER: In looking through there, I do
4 not see any areas between 557 and 600 being paid for
5 except on page 12 there was a short area -- maybe not a
6 short area -- there was an area on the left-hand side
7 right there at the bottom. It's between those
8 stations. It appears like essentially there was no
9 payment made within 557 to 600 on either side.

10 MR. WALKER: That's correct.

11 CHAIRMAN COWGER: Okay. I think what we need to
12 do here is give the contractor the opportunity to
13 furnish to us copies of any DOT diary entries that show
14 reworking the shoulders within these specified areas.
15 And if he can do that, we will consider that.

16 DOT, we give you the opportunity to do the same
17 thing, and if you find areas within these limits that
18 show some sort of work going on, if you disagree that
19 that, in fact, did cover reworking, we want you to
20 submit it to the Board.

21 So, we are giving both parties the opportunity to
22 submit additional information on this one issue to the
23 Board between now and June 20th.

24 Now, are we ready to watch the video?

25 MR. DANIEL: Okay. I'm going to turn the sound

1 down. I will leave it up where you can hear it, but
2 mainly what you will hear on the sound is country music
3 from a radio in the pickup.

4 All right. We are off and running. This is 441.
5 As we come down the process here, you can see on the
6 side, you will see the orange paint marks. Those are
7 areas on the pavement where we are -- we have
8 delineated the work that needs to be done.

9 This is still shots that were taken on 11-3 at
10 5:04, which is what you're seeing on the screen. These
11 are still shots off of that video. You will see the
12 orange paint in the lower right-hand corner. It is
13 showing where it started, stopped.

14 This is another section, the same thing, showing
15 some more marks, another set of marks that you can see
16 it. At 35 miles an hour it's kind of tough to see it,
17 or however fast Richard was driving when he did it.

18 This video tape was taken by Richard Mellette,
19 who is with us today. This is, in fact, work that was
20 done on the job.

21 As you're riding along, this is prior to any
22 shoulder rework, mixing, grading, anything being done.

23 This is one of the culvert extensions or bridges
24 that was not extended on the project. We just got a
25 guardrail treatment because as Mr. Deyo alluded to

1 earlier, this is a three-hour project.

2 This is a rework operation. This is the, you
3 know, standard mixer that everybody I think has seen
4 and has used. The actual dimension of that mixer is
5 seven and a half feet.

6 There's another shot out of the back of what a
7 typical operation is.

8 And we are coming up --

9 MR. McRAE: Can you hold that right there?

10 MR. DANIEL: I will try.

11 MR. McRAE: Well, that screwed up what I wanted
12 to say. Back it up a little bit. Do you see that dirt
13 right there? Something has got to happen with that
14 dirt. You can't just have a six or eight-inch drop-off
15 there.

16 CHAIRMAN COWGER: Are you talking about here
17 (indicating)?

18 MR. McRAE: Yes.

19 MR. DANIEL: We will address that, it is coming
20 up in the video tape what is happening in the
21 operation.

22 MR. HAGGERTY: Those mixing operations are done
23 between the orange marks in the road.

24 MR. DEYO: Only in those predetermined areas?

25 MR. DANIEL: Yes.

1 CHAIRMAN COWGER: There is no argument about
2 that, is there?

3 MR. DANIEL: What you're seeing here is a mower.
4 The project was mowed -- had to be mowed no more than
5 seven days prior to the overseeding operation to the
6 rest of the right-of-way. This was all seeded at the
7 same time, just like 90. This is typical. This is
8 your same operation. This goes on for 12 or 14 miles.

9 This is what happened to that row of dirt that
10 Mr. McRae pointed out. It was rolled back down,
11 compacted. Then the motor grader followed behind this.

12 I want you to see this skip right in here. That
13 is -- appears in this still taken of that shot. That
14 was taken on the 10th at 10:41. That shows the skip in
15 the areas that were eliminated or not reworked.

16 This one in particular had an area that had a
17 drainage improvement in it at the low point in the road
18 that was paid for under separate pay items or paid for
19 as your rework area. As Mr. McRae pointed out, that
20 was 20 some-odd feet wide. That was not part of the
21 operation that was in question, or not done at the same
22 time.

23 This is after the fact, after the work has
24 been -- after the section has been reworked. The
25 shoulder that you're looking at here is four feet. The

1 area adjacent to it. The photographs that were in the
2 exhibit, DOT, we submitted to the Board.

3 MR. HAGGERTY: Where is the mixed areas?

4 MR. DANIEL: Right in here (indicating on film).
5 You can see the skipped areas where the grass is still
6 adjacent to the road. The new grass has not germinated
7 and come back up.

8 This is the section where the guardrail, bridge
9 area, or actually on the fill area on the south end,
10 I guess where the box culverts were extended.

11 MR. McRAE: Sure is a nice looking job.

12 MR. DANIEL: Yes. This is prior to the friction
13 course going on. We're still riding on the structure
14 here.

15 CHAIRMAN COWGER: Is there anything else -- there
16 it is. I thought we had probably seen all we needed to
17 see.

18 MR. HAGGERTY: We severely edited it.

19 MR. DANIEL: In going through this thing, it was
20 a lot of the same stuff over and over again. That was
21 the short version of what actually was involved in it.

22 CHAIRMAN COWGER: Can we leave this part of the
23 claim now? Has anybody got anything else they've just
24 got to say about it?

25 MR. HAGGERTY: Agreed.

1 MR. DANIEL: Well, can I make one more comment?
2 As you see on the video tape, everybody -- nobody
3 disputes the actual work that was done. Everybody
4 understood what the Department asked for and what the
5 contractor agreed to do.

6 The only thing I think we are arguing about is
7 that four-foot area on whether it's mix width or actual
8 disturbed width that had soil deposited on it.

9 CHAIRMAN COWGER: Plus the area between 557 and
10 600.

11 MR. DANIEL: Well, I'm not in disagreement on
12 that. My opinion on that is that the work that was
13 identified that was performed was paid for. The
14 longitudinal limits of that work were defined in the
15 final estimate and paid for.

16 CHAIRMAN COWGER: Let's go on to part two then,
17 if we could.

18 MR. DANIEL: Did we look at the photos? Did you
19 all look through the photos that were submitted?

20 MR. HAGGERTY: They looked at them.

21 MR. DANIEL: There was one thing in there. Hang
22 on just a second. The photo, the first eight by ten
23 shows the actual width, shows the four-foot shoulder.
24 That was typical of what went on on the project, that
25 and the video tape.

1 CHAIRMAN COWGER: Okay. Now can we move on to
2 topsoil?

3 MR. DANIEL: Yes, sir.

4 CHAIRMAN COWGER: Mr. McRae.

5 MR. McRAE: Thank you, Mr. Chairman. I think the
6 topsoil is a real simple issue. They had a topsoil
7 item in the contract, the plan sheet number 3, which
8 was in your booklet, which is your typical section
9 number 1. It's highlighted. We have it marked 4.
10 It's DOT plan sheet 3.

11 You will see the first note under typical section
12 notes. "All permanent grass areas, excluding
13 overseeding, which is the area outside of -- was
14 undisturbed areas -- are to receive a topsoil
15 treatment."

16 Now, I don't know how anything in the world could
17 be any clearer or simpler than that. And all we are
18 asking to be paid for is the topsoil areas that come
19 under this note.

20 And the Department has taken the position they
21 have not paid it. All they have paid topsoil on -- my
22 understanding is the area up and down the job where we
23 had turn lanes added or such as that, which is very
24 minor.

25 We say the majority of the job is covered under

1 all permanent grass areas. We just -- that's the basis
2 for that claim.

3 The Department took topsoil samples, if I'm not
4 mistaken, on most of this project. If you look at our
5 sheets number 13 and 14 in our claim, you will see
6 where there are constant areas that they have listed,
7 dressing shoulders, mixing shoulders, working
8 shoulders, hauling topsoil.

9 I guess it's real simple, Mr. Chairman. We just
10 ask to be paid according to that note.

11 You might also notice a lot of these notes are
12 out of the diaries, you will see it says quite often
13 dressing shoulders and slopes in the notes. I know
14 this might be pertinent also to the other items, but
15 their diary does say that we are dressing slopes.

16 MR. DEYO: Those areas where you say dressing
17 slopes, did you haul in material that you specify as
18 topsoil?

19 MR. McRAE: We did haul in a minor amount of
20 topsoil from off site. But topsoil, you know, can be
21 either hauled in from off site or the material on site
22 if it passes according to that index, 105, can either
23 be hauled from off site or material on site can be
24 utilized.

25 MR. DEYO: Your interpretation of that typical

1 section note on sheet 3 was that even if you didn't add
2 material that was topsoil classified material, that you
3 should be paid as topsoil treatment for the area?

4 MR. McRAE: Yes, that's right. If you look at
5 this -- at our number 6 in our booklet, which is the
6 index 105, you can do -- you can -- if you look at the
7 top, you can either salvage it and utilize it or you
8 can haul it in. If you don't have to build it up, then
9 you can utilize what is there.

10 CHAIRMAN COWGER: While we are at a pause, let me
11 ask a question. Is it agreed that Section 162 of the
12 Standard Specifications is the one that applies to the
13 topsoil on this job?

14 MR. DANIEL: As modified by the special
15 provisions on the project.

16 CHAIRMAN COWGER: Where would I find those
17 modifications -- well, here it is.

18 MR. DANIEL: 56, 57, 58 and 59 of the special
19 provisions that are attached.

20 CHAIRMAN COWGER: Okay. The answer to my
21 question then is no. There is a special provision that
22 covers topsoil?

23 MR. HAGGERTY: Yes.

24 MR. DANIEL: The special provisions specify, if
25 I may read 162-1, "The work specified in this section

1 consists of preparation of a layer of mixed material
2 favorable to plant growth over areas of the project
3 which are to be grassed, grassed and mulched, or
4 sodded. This shall be accomplished by use of a
5 six-inch muck blanket commercially available
6 supplements for topsoil."

7 CHAIRMAN COWGER: Where did you read that, from
8 what section?

9 MR. DANIEL: Section 162-1, topsoil, special
10 provisions on page 56. Job number 29030-3518.

11 CHAIRMAN COWGER: What is the point of what you
12 just said?

13 MR. DANIEL: We paid for the areas that were
14 treated in accordance with the special provisions. The
15 shoulders that were reworked were reworked as is,
16 without anything being added to them. The areas that
17 were top soiled, samples were taken. Samples failed.
18 In DOT's submittal, Exhibit 2, the topsoil samples
19 failed.

20 Over our objection, the district construction
21 engineer, Mr. Haggerty, accepted the project because
22 there was a stand of grass, which was the intention of
23 the project, to grow grass in the specific areas, and
24 paid in full without any penalties.

25 CHAIRMAN COWGER: I don't think we need to hear

1 any more about that because, as I understand it, DOT
2 has already made the decision to accept all areas that
3 were top soiled with no deduction.

4 MR. DANIEL: Yes, sir.

5 CHAIRMAN COWGER: Now, the pay area that you
6 arrived at was based on what?

7 MR. DANIEL: The areas that were treated.

8 CHAIRMAN COWGER: What does that mean?

9 MR. DANIEL: The areas that received the topsoil
10 treatment, i.e., the widening areas, the culvert
11 extensions.

12 MR. MARTIN: These would be specific areas --

13 MR. DANIEL: Specific areas in the final
14 estimate.

15 MR. MARTIN: Specific areas where material was
16 brought in or where they were treated to meet topsoil
17 requirements.

18 MR. DANIEL: The reworked areas on the shoulder,
19 the eight-foot-wide section of the shoulders that we
20 paid for were not treated, they were not sampled, they
21 were not tested for topsoil. It was not a requirement.

22 MR. DEYO: Now, Mr. --

23 MR. MARTIN: As we stated on topsoil, it's a
24 six-inch blanket. Under the rework shoulder item it's
25 four inches, but it was --

1 MR. DANIEL: It was not done.

2 MR. McRAE: Say that again.

3 MR. MARTIN: The topsoil is six inches, for
4 reworked shoulders it's four inches.

5 MR. DANIEL: A four-inch muck blanket was mixed
6 in.

7 MR. McRAE: That mixer will mix more than four
8 inches.

9 MR. MARTIN: I said reworked shoulders is four
10 inches.

11 MR. McRAE: Topsoil is six inches. Mr. Chairman,
12 can I make a comment?

13 CHAIRMAN COWGER: Yes.

14 MR. McRAE: If you read these topsoil specs, it
15 says topsoil material -- and I'm reading down at the
16 bottom of page 56 -- "Topsoil material may be obtained
17 from either/or a combination of the following sources.
18 (a) excavation within the limits of construction on the
19 project. Such material may be stockpiled or wind
20 rolled on the project in areas approved by the
21 engineer.

22 "(b), designated borrow pits for the project.
23 From other sources of topsoil provided by the
24 contractor."

25 So, to say that it's got to be a muck blanket,

1 that is not correct.

2 MR. ROEBUCK: The last word "or topsoil" --

3 MR. McRAE: Yes. So, we submit we did do this,
4 we mixed it. The specifications, or the plans say that
5 all areas that are going to receive a permanent grass
6 outside the overseeding area will be paid as topsoil.
7 That's all we have asked.

8 MR. DANIEL: This wasn't an overseeded area.

9 MR. McRAE: These areas where you reworked
10 shoulders weren't overseeded. This was paid as --
11 under reworking shoulder items.

12 MR. DEYO: The question on the index 105 that you
13 have in your package, salvage turf and topsoil. It
14 uses the term, use of the term topsoil on there. It
15 carries a unique connotation, I think. How do you read
16 note number 3, general note number 3 in the lower
17 right-hand corner?

18 MR. McRAE: "Topsoil obtained from borrow pits or
19 other sources may be used in lieu of excavated turf and
20 topsoil when economically feasible."

21 Well, the most economically feasible thing was to
22 use what was on the site. It wouldn't make sense to go
23 haul material on site if there was some on site.

24 MR. DEYO: The next sentence, no additional
25 payment will be made for substituted topsoil --

1 MR. WARNER: They are saying you won't be paid if
2 you bring it onto a job like that, but it will be paid
3 for as embankment if it is below the template. So you
4 will be paid for -- by the cubic yard for borrow.

5 MR. HAGGERTY: The contention of the Department
6 is that the topsoil is an item you either bring on or
7 you upgrade the material that is existing there. And
8 we paid for those areas. The project didn't have in
9 its entirety topsoil on the whole shoulder and
10 everything else. We paid for what the contractor
11 brought in or mixed, you know, put up to standard with
12 the treatment.

13 MR. WALKER: Where he added any additional
14 components to bring the pH into range.

15 MR. HAGGERTY: Like sulfur, for example. That's
16 what we're talking about. Right? All right.

17 MR. McRAE: The only thing you all paid for is
18 the areas where there was maybe culvert extensions or a
19 lane was added, a widening was added. That's the only
20 thing you all paid for topsoil. Eighty-five or ninety
21 percent of the job you always pay for any topsoil.

22 MR. HAGGERTY: The contractor didn't do any work
23 in those areas.

24 MR. McRAE: Yes, we did.

25 CHAIRMAN COWGER: All right. Let me see if I can

1 summarize this just a little bit, if I could. I heard
2 what the DOT said. They are saying that only those
3 areas where topsoil, regardless of where it came from,
4 off site or on site, was spread as a separate
5 operation, or that area was treated to modify the pH,
6 were included in payment.

7 The contractor's position is that all areas were
8 grassing. Mulching was accomplished, including the
9 reworked shoulder areas, excluding any areas where the
10 only work was overseeding, should be paid for under the
11 topsoil item. Isn't that basically what we're saying?

12 Okay. Now, let me ask of the contractor, in the
13 reworked shoulder areas, how do you justify saying that
14 those areas should be paid for under the item of
15 topsoil? What work did you do that justified it being
16 paid for?

17 MR. McRAE: Well, this has been a case on other
18 projects where they've had both items on the same
19 project, the same thing. That's one of the -- I guess
20 that's one of the great things that we always debate
21 about is a lot of times is inconsistency.

22 I understand that because you've got different
23 designers, different design consultants and a lot of
24 time there is no consistency.

25 You had a separate item -- you had two separate

1 pay items to accomplish this work is our contention.
2 And they only want to pay for one of them or partially
3 pay for one of them and not the other at all.

4 MR. HAGGERTY: We feel that you either pay for
5 one item or you pay for the other item.

6 MR. DANIEL: If you pay for shoulder rework, you
7 pay for topsoil, but you don't pay for both.

8 MR. McRAE: Oh, yes, you would. You have
9 projects --

10 MR. WALKER: You would pay both if he
11 supplemented that material with topsoil, an acceptable
12 pH material, or if he treated it with a -- as an
13 example Henry gave, sulfur.

14 MR. DEYO: Is that instruction written in either
15 the specification and/or construction manual?

16 MR. WALKER: No, it's not.

17 MR. DEYO: In your package you gave us today,
18 there is a final estimate for a job 7105-3520. Is that
19 just in error or was that there for a reason?

20 MR. McRAE: That was in there to show that they
21 paid for both items.

22 MR. DEYO: 3520 is not the reference, 3518 is the
23 referenced job?

24 MR. McRAE: That is in there to show that both
25 items are paid for on the same project.

1 MR. DEYO: That's the reason for including that?

2 MR. McRAE: That's what I'm saying, there's no
3 consistency. One project where they paid topsoil and
4 reworking shoulders, another project like this, they
5 don't want to. That's the point I was making about the
6 inconsistency.

7 MR. WALKER: If material was brought in where the
8 area is treated, we would have paid for it.

9 MR. McRAE: I understand what Johnny is saying,
10 but it does not say that. It does not say that the
11 only time you will get paid for topsoil is if you bring
12 material in. It says furnished by the contractor. The
13 most economical area furnished by the contractor. The
14 most economical thing for me to do is utilize the
15 material on the project if it is available and if it
16 will reasonably meet the specs.

17 Now, this project was tested. Only a few
18 tests -- they've said that -- they've led you to
19 believe that the majority of this material failed.
20 That is not true.

21 MR. DANIEL: Six out of eight tests is a
22 majority.

23 MR. McRAE: Six out of eight of what you tested.
24 How much of the project was tested?

25 MR. DANIEL: The areas that we paid for.

1 MR. McRAE: That's right, but you don't know what
2 the rest of the project did because you didn't test it.
3 So, to say that the whole project failed is not
4 correct.

5 MR. DEYO: Are any test results, topsoil, in part
6 of any of the exhibits?

7 MR. DANIEL: Yes, sir, Exhibit 2. Don't hold me
8 to the number, but I believe there were eight samples
9 picked up in the areas that we paid for topsoil
10 treatment, and the areas that topsoil was placed on.

11 MR. HAGGERTY: It was my determination to pay
12 full payment for those areas because they had a good
13 stand of grass.

14 CHAIRMAN COWGER: We are not interested in
15 hearing that, gentlemen. It's been decided. That's
16 not here in dispute today.

17 To pursue just a little bit further this estimate
18 shown in the contractor's Exhibit 3 on pages 15, 16 and
19 17, this is an estimate from another job. It appears
20 to me that the square yards of topsoil are identical to
21 the square yards paid for shoulder rework.

22 MR. HAGGERTY: What you don't know there is if
23 that material was treated with sulfur or something and
24 made so the pH passed, or if they brought in additional
25 material and mixed it in. You have no way of knowing.

1 CHAIRMAN COWGER: Okay. Is that a common
2 occurrence in your district?

3 MR. HAGGERTY: Yes.

4 CHAIRMAN COWGER: Where soil is --

5 MR. HAGGERTY: Yes.

6 CHAIRMAN COWGER: -- treated to adjust the pH?

7 MR. HAGGERTY: Yes, sir.

8 CHAIRMAN COWGER: In this case, if that were what
9 happened, probably the decision to modify the pH would
10 have been made subsequent to the reworking of the
11 shoulder? You went out and tested it, found out the pH
12 was wrong, and you would have done it --

13 MR. McRAE: I have to disagree with Henry. I've
14 only known of one project or maybe two projects that we
15 have ever adjusted the pH. Normally it will pass.

16 There has been some, like I say, I can remember
17 like 441 north out of Lake City we adjusted the pH.
18 But that's not the norm where we have to adjust the pH.
19 Normally if it's got a good stand occur on it, when you
20 mix it up, it will normally pass. It will pass
21 organics and it will normally pass pH.

22 MR. HAGGERTY: I have to sign an exception on
23 most of those, and most of the time if we take the
24 test, we have problems with it passing.

25 MR. ROEBUCK: Here's one that you said passed in

1 the stockpile and failed in place. Now that's really
2 surprising, and yet the grass is growing good. So you
3 made the right decision to leave the stuff where it
4 was.

5 MR. MARTIN: The stockpile is not the proper
6 place to test it.

7 MR. ROEBUCK: Well, it gave him some reason to
8 put it down.

9 MR. DANIEL: The final estimate that you were
10 referring to off of that job, where is that --

11 MR. DEYO: The final estimate?

12 MR. DANIEL: Yes.

13 CHAIRMAN COWGER: Page 15.

14 MR. DEYO: Pages 15 through 19.

15 CHAIRMAN COWGER: While you are looking through
16 that, let me ask a question to the contractor. Is
17 there somewhere in this documentation that tells us how
18 you arrived at the 131,000 square yards that you're
19 claiming?

20 MR. WARREN: Yes, sir, it's in this original
21 arbitration package, I believe there near the back.

22 CHAIRMAN COWGER: Okay, it's on the last page of
23 the November 22nd letter to Mr. MacLaughlin?

24 MR. WARREN: Correct.

25 CHAIRMAN COWGER: So, the majority of it is in

1 the reworked shoulder area?

2 MR. WARREN: Correct.

3 CHAIRMAN COWGER: All but about 20,000 yards of
4 it. So, not precisely, but the dispute really boils
5 down to whether or not they should be paid for topsoil
6 in the reworked shoulder areas.

7 MR. ROEBUCK: Right.

8 CHAIRMAN COWGER: I agree there are a few
9 additional areas, but the bulk of the claim is right
10 there.

11 MR. McRAE: Correct.

12 CHAIRMAN COWGER: Gentlemen, I think we've heard
13 enough on this. Does either party have anything that
14 they're just crying to say?

15 MR. HAGGERTY: The only other thing, and I think
16 it's maybe been stated, but there was a final dressing
17 of the shoulder, final dressing of \$23,000 that was
18 also paid on that particular area. Is that right,
19 Sandy?

20 MR. DANIEL: Yes.

21 CHAIRMAN COWGER: Okay. Mr. Roebuck, do you have
22 anything?

23 MR. ROEBUCK: No.

24 CHAIRMAN COWGER: Mr. Deyo?

25 MR. DEYO: No, sir.

1 CHAIRMAN COWGER: The hearing is hereby closed.
2 the Board will deliberate on this claim in
3 approximately six weeks and you will have our final
4 answer shortly thereafter.

5 (Whereupon, the hearing was concluded at 11:15 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 hearing; 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 TROY FAIR INSURANCE, INC.