

STATE ARBITRATION BOARD

July 7, 1997

NOTICE

In the case of Okaloosa Asphalt, Inc. (now Couch Construction L.P.) versus the Florida Department of Transportation on Project No. 600~~00~~⁵-3511 in Walton County, Florida, both parties are advised that State Arbitration Board Order No. 1-97 has been properly filed on July 3, 1997.



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

S.A.B. CLERK

JUL 13 1997

FILED

Copies of Orders & Transcript to:

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

J.C. Darnell, P.E., Vice President/Couch Construction, L.P.

STATE ARBITRATION BOARD

ORDER NO. 1-97

RE:

**Request for Arbitration by
Okaloosa Asphalt, Inc. (Now Couch Construction L.P.) On
Job No. 60050-3511 in
Walton 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 10:05 a. m. on Thursday, May 22, 1997.

Prior to commencement of the hearing, the Board met to consider the relationship between the criminal investigation that is on-going in regard to this project and the contractual matters at issue in the Contractor's claim. The Board decided to base its decision on only the contractual matters and the parties were so advised.

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 1-97 in this cause..

ORDER

The Contractor submitted a request for arbitration of a six part claim in the total amount of \$ 249,748. The amount claimed included a 15% add-on for job site overhead and profit and interest for one year at the rate of 10% per year.

At the beginning of the hearing the Contractor presented a Revised Summary of Arbitration Claim which dropped Part 2 of the claim, revised the amount claimed for Part 3 of the claim and added an amount for Extended Home Office Overhead. The total amount of the claim as revised is \$228,038.

The Contractor explained that Part 2 was dropped, because, after they received the DOT Primary Rebuttal (Exhibit No. 3), it became apparent to them that the work effort for which compensation was to be made with the asphalt tickets which DOT is refusing to include in the measurement of Type "S" Asphaltic Concrete (Part 2) duplicates the work effort for which payment is being claimed in Part 3.

The Contractor stated that an amount for Interest was not entered in the Revised Summary of Claim, because they assumed that the Board would calculate the amount due based on the amount awarded.

DOT expressed concern with changes to the claim that they did not have the opportunity to evaluate prior to the hearing. The item for Extended Home Office Overhead to the claim was a DOT concern, because considerable effort is required in examining the Eichleay Formula calculations. They mentioned that this might require an audit of the Contractor's records. They were also concerned with withdrawal of Part II of the claim that contains testimony related to other parts of the claim. The Chairman advised DOT that they may submit a written statement to the Board on these matters by no later than June 10, 1997.

On June 10, 1997 the Board received a Secondary Rebuttal Exhibit addressing the following:

1. The impact of information contained in the part of the claim that was withdrawn on Parts 1 and 3 of the claim.
2. Additional rebuttal in regard to the section of Part 3-D of the claim dealing with the slowing of paving operations caused by addition of an Asphalt Rubber Membrane Interlayer.
3. Rebuttal to the part of the claim dealing with Extended Home Office and Field Overhead.
4. Rebuttal to the part of the claim dealing with Interest.

A copy of the Secondary Rebuttal Exhibit was furnished to the Contractor on the date it was received by the Board.

On June 12, 1997, the Board received from the Contractor a statement in regard to the Secondary Rebuttal Exhibit.

The Contractor presented the following information in support of the various parts of his claim.

Differing site conditions and plan errors caused 18 Supplemental Agreements and overruns in quantities which increased the dollar amount of this contract by 27%, whereas, those same conditions and errors increased the contract days by 125% which is totally disproportionate.

PART I \$30, 440

The amount claimed here is the amount that DOT was to pay us in accordance with executed Supplemental Agreement No.8 dated June 3, 1994 which was intended to provide compensation for the value of the Recycled Asphalt Pavement (RAP) material we lost due to a construction change that reduced the average depth of milling of the existing pavement. This was a lump sum Supplemental Agreement.

By letter of April 25, 1994 we supported the quantity of RAP we lost and the per ton value of this material. The quantity was based on a comparison of the actual tons of RAP milled to the theoretical quantity that we would have received if milling had been accomplished to the plan depth of two-inches. The quantity of RAP actually milled was determined using the number of loads times an average tons per load that was determined by DOT. They did not choose to weigh each truck, which would have been costly and time consuming.

PART II WITHDRAWN

PART III \$115,899

This part of our claim covers several items of additional costs which were incurred because of unforeseeable work encountered due to deficiencies in the plans.

"A" \$28,004

Immediately after milling, sections of the base, subgrade and underlying soil failed under traffic. These failures continued to occur after the leveling course was placed and after the Asphalt Rubber Membrane Interlayer was constructed.

It is our position that the Supplemental Agreement dated May 24, 1994 provided compensation for Type S asphaltic concrete used to patch areas of pavement and base immediately behind the milling operation. Patching included preparation of the base hit by the milling machine (clean out, trim and fill with asphalt). It is our position that payment for the Type S asphaltic concrete used in this patching did not include compensation for subsequent failures of the base, subgrade and subsoil which occurred during the time milling was being done in March and April and extended through December as later operations were underway.

Item A covers the labor and equipment costs we incurred in removing and replacing base, subgrade and subsoil in the failed sections in preparation for placing of Type S Asphaltic Concrete Patching. Entries in the DOT Diary do not always support the tabulation we submitted, because some days we worked 16 to 18 hours and DOT did not have a sufficient number of inspectors to staff the job at all times when we were working.

The Contractor introduced an affidavit by Arrie Taylor Roberts III in which he stated that the Chief Inspector on the project told him that removal of unsuitable material under the roadway and replacing base material and the reconstruction of the roadway was being paid for by using asphalt tickets. He also stated that the scope of this work was entirely different from the work commonly referred to as "patching existing pavement".

"B" \$9,010

This is the value of the RAP material used to backfill the prepared areas described in Item A to the bottom of the Patching (500 tons at \$17 per ton). Use of RAP for this purpose was substantially less expensive than using Type S Asphaltic Concrete Patching at \$115.00 per ton.

"C" \$49,119

This is a charge for standby time at our asphalt plant caused by the slowing of paving operations caused by the extra work described in Item A.

"D" \$28,198

The conditions described in Item A caused us to incur inefficiencies in utilization of our crew and equipment in paving operations. In numerous instances we were instructed to stop mainline paving operations and move to a patch area to fix a potentially hazardous condition. We also encountered problems in effectively scheduling paving equipment and trucks due to DOT making decisions late in the work day as to whether work would commence the next day as patching or mainline paving.

In addition to the above we incurred increased costs in our laying and hauling operations from 4/18/94 to 5/9/94 due to inefficiencies caused by the DOT decision to switch from a Crack Relief Layer to an Asphalt Rubber Membrane Interlayer. After earlier rejecting our quote for this change, only two days before the Crack Relief Layer work was scheduled to begin, DOT instructed us to make this change. This forced us to locate a different grade of aggregate for cover material than specified for Crack Relief Layer and to use a subcontractor with whom we did not have a working relationship.

“E” \$ 1,192

On two days, we used 16.46 tons of Type II Asphaltic Concrete for patching instead of Type S. DOT made payment for this work under the pay item for Type II Leveling at \$32.57 per ton. A fair price for this work is \$105.00 per ton, which is \$10 per ton less than the price for Type S Patching.

“F” \$ 376

We are claiming the cost of overtime pay to our employees on Saturday 4/23/94 when they were making emergency repairs to the pavement. This work would not have been necessary if DOT had properly designed the pavement.

PART IV \$7,713

We are claiming compensation for the cost we incurred in removing and replacing 100 feet of friction course in a transition area at the beginning of the project as directed by DOT. The reason stated by DOT for requiring this work was to correct a straight-edge deficiency. There was no straight-edge irregularity in excess of the tolerance allowed by the specifications. DOT instructed us to remove and replace the pavement in this area to a depth of one- inch. The friction course was originally placed at a variable depth from $\frac{1}{2}$ " +/- to 1".

The previously existing pavement was badly rutted and some shoving was evident. The replacement pavement rutted to a depth of $\frac{3}{8}$ inch shortly after being placed.

DOT contends that the justification for requiring this work was that the surface of the pavement exhibited a series of closely placed corrugations (I. e.: washboarding). This did not appear until some time after the friction course was placed. The type of friction course used on this job is susceptible to distortion by truck traffic. We contend that the cause of the distortion of the friction course is that a thin layer of this material was placed over old ruts.

PART V \$4,505

We are claiming additional compensation for 53 Tons of Miscellaneous Asphalt at the contract unit price of \$85.00 per Ton. This is the amount that DOT deducted from the final pay quantity based on limiting payment for asphalt placed at new guardrail to 200 lbs. per square yard.

The contract documents do not limit payment for this tonnage pay item to a certain spread rate. DOT procedures, even though long standing, do not alter the terms of a contract.

DOT contends that when 339-8, 330-9.2.2 of the Standard Specifications and Standard Index Drawing Nos. 400 and 513 are read as a whole limiting payment to 200 lbs per square yard is justified. Our position is that 339-8 stands alone and there is no restriction there as to the number of tons of Miscellaneous Asphalt to be paid for.

The mix we used weighs 111 lbs. per square yard-inch which is 222 lbs. per square yard at 2 inches thick. Without the deduction made by DOT the spread rate is 235 lbs. per square yard which is within a reasonable tolerance.

PART VI \$14,000

We are claiming compensation for excavation done between Station 1125+00 and Station 1132+00 (left side) above the finished grade of the ditch pavement. The new ditch pavement was lower and wider than the existing ditch pavement at this location.

We contend that, since this work is categorized in the contract as an Erosion Control item, the excavation in question here is not covered by Special Note 2 on Sheet 5 of the Plans.

Per Article 524-10 (Basis of Payment) the only excavation included in the compensation for the Item Concrete Ditch Pavement is that below the finished grade of ditch pavement.

At one point during the work, DOT requested a quotation for this excavation, but later said that compensation for it was included in payment for Item No. 524-1-2.

There were other areas on the project where excavation was necessary above the finished grade of the ditch pavement, but our subcontractor did not realize that extra payment was due until after that work was completed.

JOB SITE OVERHEAD (@ 2%) AND PROFIT (@13%) \$18,451
THIS APPLIES TO ONLY PARTS 2 & 3

EXTENDED HOME OFFICE OVERHEAD PER EICHLEAY FORMULA \$36,940

The Eichleay Formula is accepted in most courts of law in which we have been involved. Our calculations are based on our revenue and overhead records. The amount claimed is reasonable for a project that overran in days as many as this one did.

In our calculations, we deducted that home office overhead which was included in the Supplemental Agreements we signed.

INTEREST AT 10% PER YEAR TO BE BASED ON THE AMOUNT AWARDED

We are requesting that we receive interest at 10% per year based on the amount awarded by the Board.

The Department of Transportation rebutted each part of the Contractor's claim as follows:

PART I

Parts 2 and 3 of the Contractor's claim are interrelated with this Part. We are unable to sort out the overlapping payment that may have occurred between these parts.

When the Final Estimate for the project was being prepared, we discovered that this Supplemental Agreement had not been paid. The Chipley Final Estimates staff denied payment due to there being insufficient back documents (field measurements) provided by the DOT field staff.

PART II

This part of the claim contained information that is interrelated with Part 1 and 3 of the claim. We contend that information contained in this part of the Contractor's claim dealing with false asphalt tickets should not be ignored by the Board since it is intimately involved in Parts 1 and 3 of the original Request for Arbitration.

PART III

The Supplemental Agreements covering Type S Asphaltic Concrete Patching and Asphalt Rubber Membrane Interlayer were executed by the Contractor after work from which this part of the claim arose was completed. The Contractor did not bring up costs caused by delays at the time he signed these documents.

“A” “B” “C”

The costs claimed in these items were included in compensation for the item Type S Asphaltic Concrete Patching at \$115 per ton. The Contractor had full knowledge of the type of work included in compensation for Patching when they quoted a price for Type S Asphaltic Concrete Patching.

The Contractor has not provided sufficient back-up documentation to support the inefficiencies he has claimed occurred.

The statements contained in the affidavit by Arrie Taylor Roberts III should not be considered here, because he was not assigned to the project on a full time basis so has only secondary knowledge of the items under review. Also, since he was a roadway inspector, he had absolutely no first hand knowledge of any negotiations, understanding or agreements made on the project.

“D”

Our statements made in regard to Items A, B and C also pertain to the portion of this item dealing with inefficiency of the Contractor’s paving operations. The costs claimed for trucking and laydown costs are totally unsubstantiated and without back-up. They do not indicate any effort to use trucks or other resources on other projects. .

The Contractor signed the Supplemental Agreement covering the Asphalt Rubber Membrane Interlayer (ARMI) containing a paragraph stating the payment constitutes full and complete settlement of all issues set forth in the agreement after all ARMI was placed on the project..

During the hearing, we asked the Contractor whether or not they had attempted to back charge the subcontractor for some, all or none of the the inefficiencies encountered. The contractor answered, “I don’t know”.

“E”

Both Type II Asphaltic Concrete Leveling and Type S Asphaltic Concrete Patching were produced on the days in question. It does not make sense to assume after the fact that the Type II Asphaltic Concrete was used for other than touching up the leveling course. The Contractor did not submit any documentation to support his claim.

“F”

The costs which are being claimed as an extra are included in the unit price for the pay item Type S Asphaltic Concrete Patching. The contractor did not provide sufficient documentation.

PART IV

The surface deficiencies in the area in question here were closely spaced surface irregularities (washboarding) that were the result of poor workmanship. The Contractor was experiencing problems with controlling the screed on the paver.

We cannot document this, but, at the time the friction course was originally placed in this area, we questioned whether tack coat had been applied to the existing pavement prior to placing the friction course. If a tack coat is not placed in this situation, it is likely that slippage will occur, and result in surface irregularities. This is particularly true in locations such as this one where traffic is slowing down at a traffic light.

Our position is supported by the fact that “washboarding” did not re-occur in the friction course after the corrective work was done.

The Contractor has not supplied documentation to support the costs he is claiming.

PART V

When read as a whole, DOT Specifications 339-8, 330-9.2.2 and Standard Index Nos. 400 and 513, limit payment for 2" thick asphalt placed at guardrail installations to 200 lbs. per square yard.

The Contractor had total control of grading of the subgrade and the thickness at which this asphalt was placed. Payment was made for the full depth of asphalt placed in irregular areas where the Contractor did not have control of the thickness.

The Contractor was free to furnish a mix that weighed 100 lbs. per square yard instead of one that weighed 111 lbs. per square yard.

The Contractor was aware of our long standing policy of limiting payment for Miscellaneous Asphalt used to pave at guardrail installations to 100 lbs. per square yard-inch.

PART VI

The cost of excavation above the finished grade of this run of ditch pavement is to be included in the drainage items per Special Note 2 on Plan Sheet 5 which reads "Excavation required for structure improvements to be included in items for Rework Shoulders and Drainage Items." The Coordination of Documents Article in the Standard Specifications provides that plan notes control over the Standard Specifications.

We did not ask for a quotation for excavation above the final grade of the ditch pavement at this location. The quote in the amount of \$14,000 was for removal of material that a subcontractor had stockpiled in the right of way behind the ditch pavement. We subsequently allowed this stockpiled material to remain in the right of way.

The quantity of excavation used by the Contractor to support the \$14,000 claimed is substantially greater than the quantity excavated above the ditch pavement at this location. Also, the unit price used is out of line.

Since the Contractor did not give us advance notice of intent to file this claim, we were denied the ability to verify the costs being incurred.

JOB SITE OVERHEAD (@ 2%) AND PROFIT (@13%)

Each Supplemental Agreement and time extension granted on this project was based on settlement of all outstanding issues. The time extensions, time suspensions and granted days were negotiated and/or agreed to in good faith by both parties in relevant time frames as to their occurrence.

EXTENDED HOME OFFICE OVERHEAD PER EICHLEAY FORMULA

DOT does not recognize the Eichleay Formula as a basis for claiming of extended overhead. If we were to agree that this overhead is compensable, an extensive audit of the Contractor's records would be required. The Contractor has produced only a single sheet of paper and a 20 page document containing very little specificity to document these costs.

If the Contractor had their busiest year in 1994 as they stated, how can it be possible that their overhead was greater than that they illustrate as already having been paid for in the Supplemental Agreements.

The Eichleay approach is fair when the Contractor has lost work due to situations arising on a particular project and this subsequently causes the Contractor to lose new work. How can this be a fair approach when the Contractor, by their own admission was busier than they have ever been before.

INTEREST

The Contractor has not requested a specific amount of interest.

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

PART I

There is a fully executed Supplemental Agreement covering payment for the RAP material the Contractor did not recover. Payment is to be a lump sum amount.

PART III

The letter from the Contractor dated March 15, 1994 quoting the unit price for Type S Asphaltic Concrete Patching used in the Supplemental Agreement covering correction of failed areas of pavement and base utilizing Type S Asphaltic Concrete preceded the date on which milling began on the project. How could failure of the base, subgrade and subsoil have been anticipated and included in that price.

On other jobs where the same unit price for patching was established by Supplemental Agreement, the work did not include removal of a substantial depth of base or removal of subgrade or subsoil. On those jobs all excavated base was replaced with Type S Asphaltic Concrete. On this job repairs to the base and subgrade extended well below the patching depth encountered on the other jobs.

Payment for excavating and replacing the failed base and subgrade was clouded by issuance of alleged false asphalt tickets.

There were several unique circumstances during the life of the project that mitigate the Department of Transportation rebuttal statements in regard to the impact of "full and complete settlement" clauses contained in various Supplemental Agreements that the Contractor signed during the course of the work.

PART IV

The area in which the surface irregularities occurred is adjacent to a traffic signal where traffic is starting and stopping.

The Contractors statements in regard to the existing pavement being severely distorted and the surface irregularities in the originally placed friction course not being apparent immediately after it was placed were not rebutted by DOT.

The Contractor failed to submit documentation of extra costs claimed for certain items.

PART V

DOT did not produce evidence to show that their policy of limiting payment for Miscellaneous Asphalt placed at a guardrail installation to 200 lbs. per square yard is support by the contract documents.

PART VI

The Contractor did not document the quantity of excavation involved or the unit price for this work.

Special Note 2 on Sheet 5 of the Plans on which DOT relied in saying that compensation for the excavation in question was included in drainage items covers excavation required for Structure Improvements. Ditch pavement is not a Structure Improvement.

JOB SITE OVERHEAD (@ 2%) AND PROFIT (@13%)

The Contractor claimed this expense for only Parts 3 and 4 of their claim. These Parts of their claim are outside the limits of the Supplemental Agreements executed for the project.

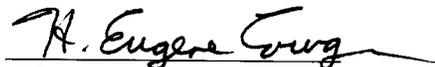
From the foregoing and in light of the testimony and exhibits presented, the State Arbitration Board finds as follows:

The Department of Transportation shall reimburse the Contractor for the various parts of their claim as follows:

PART I	\$30,440.64
PART III	\$60,000.00
PART IV	\$ 3,000.00
PART V	\$ 4,505.00
PART VI	\$ 5,000.00
JOB SITE OVERHEAD AND HOME OFFICE OVERHEAD	\$11,500.00
INTEREST	\$20,000.00

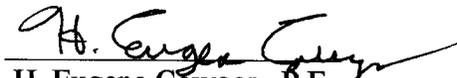
The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$468.20 for Court Reporting Costs.

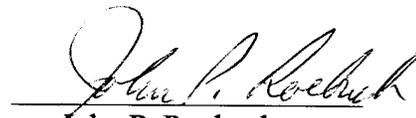
Tallahassee, Florida
Dated: July 3, 1997


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

July 3, 1997
DATE

'JUL 3 1997

FILED

STATE ARBITRATION BOARD
STATE OF FLORIDA

S.A.B. CLERK

MAY 3 1997

FILED

COUCH CONSTRUCTION, L.P.,)
formerly Okaloosa Asphalt, Inc.,)

- and -)

PROJECT NO. 60050-3511

LOCATION: S.R. 83
Walton County, Florida

DEPARTMENT OF TRANSPORTATION)
_____)

ORIGINAL

RE: Arbitration In The Above Matter

DATE: Thursday, May 22, 1997

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

TIME: Commenced at 10:05 a.m.
Concluded at 12:36 p.m.

REPORTED BY: Mindy Martin, RPR
Notary Public in and for
the State of Florida at Large

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

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

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Steve Benak
Mr. Stan Swiatek
Mr. Dennis Thomason

APPEARING ON BEHALF OF COUCH CONSTRUCTION, L.P.:

Mr. Cloyce Darnell
Mr. Alan Cummings
Mr. Daniel Johnson

I N D E X

EXHIBITS

Exhibit No. 1 Received in Evidence	4
Exhibit No. 2 Received in Evidence	4
Exhibit No. 3 Received in Evidence	4
Exhibit No. 4 Received in Evidence	56
CERTIFICATE OF REPORTER	96

P R O C E E D I N G S

1
2 MR. COWGER: This is the hearing of the State
3 Arbitration Board established in accordance with Section
4 337.185 of the Florida Statutes. Mr. Bill Deyo was
5 appointed as a member of the board by the secretary of the
6 Department of Transportation. Mr. John Roebuck was elected
7 by the construction companies under contract to the
8 Department of Transportation. These two members chose me,
9 H. Eugene Cowger, to serve as the third member of the board
10 and as chairman. Our terms began July 1, 1995, and expire
11 June 30, 1997. Will all persons who will make oral
12 presentations during this hearing please raise your right
13 hand to be sworn in.

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

16 MR. COWGER: The documents which put this arbitration
17 hearing into being, the request for arbitration, and the
18 documents attached to that request are hereby introduced as
19 Exhibit Number 1. Does either party have any other
20 information it wishes to put into the record as an
21 exhibit?

22 While we were off the record, the contractor
23 introduced a two-page document which is a revision to the
24 summary of the arbitration claim. We'll identify that as
25 Exhibit Number 2.

1 Approximately two weeks ago the department submitted
2 to the board and provided the contractor with a copy of a
3 document called the Primary Rebuttal Exhibit which will be
4 identified as Exhibit Number 3. The only new exhibit is
5 Exhibit Number 2.

6 (Whereupon, Exhibits No. 1, 2 and 3 were received in
7 evidence.)

8 MR. COWGER: DOT, do you need any additional time to
9 examine that at this point? You'll be given an opportunity
10 to deal with it as we go on.

11 MR. BENAK: Depending what goes on, we may need a lot
12 of time to investigate it. We may need an audit.

13 MR. COWGER: I've not had a chance to examine it,
14 what the difference is. Okay.

15 MR. ROEBUCK: Primarily, this claim is the typo
16 adjustment in item three, right?

17 MR. DARNELL: Item three is the typo adjustment on
18 the amount that was originally shown on item three. And
19 we've dropped out item two because that's included in item
20 three. And when originally prepared, we had no real clue
21 as to exactly what item two was defined to be. And then it
22 adds the Eichleay formula for extended home office over at
23 the bottom.

24 MR. ROEBUCK: And you noted that the interest is
25 whatever the interest is with the award.

1 MR. DARNELL: Right. I don't know how that's
2 handled, so I just felt we would do the interest on
3 whatever is awarded.

4 MR. COWGER: DOT, you'll be given the opportunity,
5 and if I fail to give you the opportunity when we're about
6 ready to close out, please remind me, and if you feel it's
7 necessary, you'll be given the opportunity to present a
8 written rebuttal to this particular exhibit if it appears
9 necessary, okay? So we'll proceed on, then, under those
10 circumstances.

11 During this hearing the parties may offer such
12 evidence and testimony as is pertinent and material to the
13 controversy and shall produce such additional evidence that
14 the board may deem necessary to an understanding in
15 determination of the matter before it. The board shall be
16 the sole judge of the relevance and materiality of the
17 evidence offered.

18 I'm asking that the parties assure that they have
19 received and properly identified each exhibit that's
20 submitted during the course of this hearing and to please
21 retain those exhibits. The board will furnish parties a
22 copy of the court reporter's transcript of this hearing
23 when we furnish you the final order, but we will not
24 furnish copies of the exhibits.

25 The hearing will be conducted in an informal manner.

1 First the contractor's representatives will elaborate on
2 their claim, and then the Department of the Transportation
3 will offer rebuttal. Either party can interrupt to bring
4 out a pertinent point by coming through the chairman.
5 However, for the sake of order, I must instruct that only
6 one person speak at a time.

7 So we're ready to proceed now. Contractor, do you
8 have an opening statement?

9 MR. DARNELL: Yes. I'm Cloyce Darnell. At the time
10 this contract was contracted and performed, the company was
11 called Okaloosa Asphalt, Inc., a wholly-owned subsidiary of
12 Couch, Inc. I was president of that company during that
13 time. Okaloosa Asphalt, Inc., was formed in 1990 when
14 Couch bought the assets of old Okaloosa Asphalt Enterprises
15 which had been in business since 1961.

16 I came to Okaloosa Asphalt in 1971, and for my 26
17 years there we never filed a claim, that I can recall, in
18 any way. We'd always tried to work with the contractors to
19 solve the problems, and we had filed no claims and no
20 lawsuits up until some claims that were filed back in
21 December of '96.

22 This job, description of the job essentially entailed
23 milling the existing pavement, resurfacing, widening
24 shoulders, and doing some drainage work. It was supposed
25 to be a 3R job, as I understand it. The plans were as bad

1 as they can get. The department had not included in their,
2 apparently in their evaluation any soil investigation as to
3 what was underneath the roadway, nor very, I would say,
4 effective, if that, as far as the depth of the existing
5 pavement.

6 Now, the department's intent, and I think it's
7 accurately and correctly intended, is to build a cross
8 slope into the pavement structures when they're resurfacing
9 and repaving. That road has been there for years and
10 years. And the trough slope was not uniform in certain
11 areas, certainly a lot flatter than probably what they
12 wanted. But we were, the intent was to mill into the road
13 a cross slope of two percent.

14 And the department realized early on and asked that
15 possibly we would be getting into the milled, milling into
16 the existing base course. And they asked for a price to do
17 some patching which indicates, of course, they expected we
18 might hit base course because of the milling.

19 There were excessive contract modifications to this
20 contract because of some of the design flaws, among others,
21 including the existing soil conditions and the evaluation
22 of that, both pertaining to the road structure, road bed
23 structure, and also to the drainage structure items. But
24 there are 18 supplemental agreements.

25 When this contract was entered into, the original

1 contract days were 210. The original contract amount was
2 \$3,432,476. When the job was completed, contract days used
3 was 473. Calender days used was 522. There was a net
4 increase of contract days of 263 as opposed to an original
5 contract days of 210. That's an increase of 125 percent
6 contract days used. But the increase, corresponding
7 increase in work in dollar volume was only \$939,000 and
8 change but a 125 percent increase in time and a 27 percent
9 increase in dollars, which is totally disproportionate.

10 As we began this work, I encountered all kind of
11 problems regarding the milling, hitting the base, and
12 failures of the material immediately under the base.
13 I won't call it base material because it wasn't base
14 material. It would not meet any kind of base material that
15 we use today. And the road bed was failing, actually
16 crumbling and rutting under the traffic. And the daily
17 diaries adequately document that.

18 We could have shut this job down on occasions, as
19 correspondence in the documents represent, but we didn't.
20 We tried to cooperate based on good faith with the DOT,
21 that we'd be treated fairly and we were not. But we
22 cooperated to try to provide a safe road, save a lot of
23 money and a lot of heartache to the taxpayers and
24 especially involving the safety issues.

25 This is a major two-lane highway, Highway 331. It's

1 the direct route from Montgomery to Panama City Beach.
2 This work was being performed in the spring, March, April,
3 May, right on through into the late spring, and it
4 continued on into the following year.

5 MR. ROEBUCK: Summer-spring job.

6 MR. DARNELL: But this is the high season. At times,
7 traffic would be backed up three or four miles literally in
8 certain phases of this operation. So everybody was under a
9 lot of pressure to try to get the job built, built
10 effectively, safely, and as quickly as possible.

11 This is a claim for \$228,000. Some of the things
12 I'll just touch on very briefly that we have not claimed
13 were extended field overhead due to this extensive delay in
14 time involved, additional plan delays, which the extended
15 field overhead we estimated was roughly \$65,000. We think
16 it would have been at least \$80,000 in plant idle time
17 delays due to many of these things that you will see as we
18 go through this process.

19 We had other things we could have claimed and tried
20 to, especially regarding erosion control items, \$10,000 to
21 \$20,000 on redressing and resodding and erosion control
22 items that washed away. There's just a lot of things that
23 we could have done.

24 Now, we've not been treated fairly. We've not been
25 paid fairly for the work we did and the fact that we got

1 what was needed to be accomplished in a timely manner, even
2 under these conditions.

3 What I'd like to do, if you will allow me, is to
4 start with some of the lesser complicated claim items and
5 get those out of the way before we get to the more time
6 consuming and more controversial items. I'd like to start
7 with number six.

8 MR. COWGER: May I interrupt you just a second. Ones
9 that pretty much stand alone, like on number six, it might
10 be a good idea for you to present your case and let the DOT
11 rebut before we go to the next item.

12 MR. DARNELL: That's fine.

13 MR. COWGER: It will be a lot cleaner.

14 MR. DARNELL: I understand.

15 MR. COWGER: Okay.

16 MR. DARNELL: Claim number 6 is for excavation, the
17 excess excavation that's the ditch paving on the north end
18 of the project. Our claim is for removing -- there was no
19 excavation item in this contract. Later, and toward near
20 the end of the work, there was a subsoil excavation item
21 added, but that was not what I would call a regular
22 excavation item, and there was no regular excavation item.

23 Now, we asked to be paid -- the department actually
24 asked us for a price for this work after we had raised the
25 issue. We gave them a price of \$14,000 and that was

1 rejected. And it was rejected on the basis that the pay
2 item 524-1 includes the cost of the excavating below the
3 finished grade. Payout on 524-1 does include excavation
4 below the finished grade of the concrete ditch paving. It
5 does not include the excavation above the finished grade of
6 the concrete pay item.

7 Now, we asked to be paid for that because there was
8 not a regular excavation pay item. Now, the existing ditch
9 paving was fairly steep and fairly narrow. And with the
10 new ditch paving and excavation, it was deeper, wider at
11 the bottom and sloped more on the slopes. So the
12 difference between that grade and the finished grade is
13 what we're talking about.

14 And I think the department's position is not accurate
15 in that it says that that is covered under the pay item,
16 number one, that it's covered under the pay item and that
17 clearly is not the case. And number two, the department's
18 position is that the note on sheet five, note number two,
19 it says that excavation required for structure improvements
20 be included in items of rework shoulders and drainage
21 items. This is not a drainage item. This is an erosion
22 control item.

23 The pay items are categorized in the contract
24 itself. And in the categorization of the pay items, ditch
25 paving is listed as an erosion control item. So that

1 negates the state's argument that this is a drainage item.
2 And the specifications themselves clearly state that
3 excavation is from the finished grade below the finished
4 grade. The department does not contend the work wasn't
5 done; it's just that they don't want to pay us for it. And
6 we feel that they should pay us for it. And that's it in a
7 nutshell.

8 MR. COWGER: Before DOT starts, is this area between
9 1125 and 1132 the only area that this occurred?

10 MR. DARNELL: No, it's not the only area.

11 MR. COWGER: It's the only area you're claiming on?

12 MR. DARNELL: It's the only area that we had some
13 reasonable idea of the volume involved, because the other
14 areas were done, this was one of the later areas done, and
15 the others were already done and nobody caught it. The
16 fact is nobody realized that we should have been paid for
17 it. There was 5,000 square yards of ditch paving done.

18 MR. COWGER: Okay, DOT, I guess we're ready for you
19 to rebut that.

20 MR. BENAK: All right. I'm Steve Benak. I'm
21 district construction engineer with the Florida Department
22 of Transportation in district three. The item in question
23 here is 524-1-2, ditch pavement concrete, four inches. It
24 is not in the erosion control section, which is 104. It is
25 a drainage item. The note does apply in this case. The

1 note is on page 5 of the contract, of the contract plans,
2 and it indicates that excavation required for structure
3 improvements to be included in items for rework shoulders
4 and drainage items. And it being a drainage item, a 524
5 item, it is not an erosion control item. So what else did
6 we have, Stan, on this issue?

7 (Discussion off the record)

8 MR. SWIATEK: One item of note, Mr. Darnell said that
9 we requested, that the department requested a price for
10 this. And their original quote does in fact open with "Per
11 your request." That happens a lot. But a lot of times
12 letters that we get with quotes, we didn't request this
13 quote, but it was sent in that way.

14 Dennis Thomason was the project engineer at that
15 time. I recall having a conversation about did you ask for
16 this and no, we didn't. Now, there was discussion. There
17 was another issue in this area which was some bad material
18 that was stockpiled out of the clear zone but on the
19 right-of-way in the area close to this ditch pavement but a
20 little bit north of the ditch pavement.

21 The contractor and their subcontractor, Coastal
22 Materials, was requested to remove that material off the
23 right-of-way and they refused to do it saying that they
24 didn't have to. And after a job site meeting which I was
25 not in attendance at but Mr. Thomason was, you know, a day

1 later we get a quote for removing \$14,000 of excavation.

2 And the quote is for regular excavation, because
3 that's what the discussion was about on the job site, but
4 it mentions nothing about ditch pavement, because that was
5 not the issue at the time. It was the material behind the
6 ditch pavement up on the right-of-way that needed to be
7 removed when the job was being finished.

8 Further in our rebuttal we show and prove that the
9 amount of ditch pavement and regular excavation being
10 requested is, I mean, it's substantially more cubic yardage
11 because it's not for the ditch pavement; it's for the
12 stockpiled material.

13 In order to finish the job on time, we subsequently
14 decided to let them leave this bad material on the
15 right-of-way. It was dressed and grassed and it's still
16 there. And payment for this excavation, which was never
17 done, one, it never belonged to ditch pavement and, two, it
18 was never done because the material is still on the job
19 site, but it's dressed and grassed.

20 MR. DARNELL: If it wasn't done -- Gene, would you
21 ask if it wasn't done, how did it get the ditch paving in
22 there. And also, I'd like to submit to you, there's a
23 list, out of the contract, a list of work items by category
24 which clearly show in section five, erosion control, the
25 524-1-2 is concrete ditch pavement (handing document to

1 Mr. Cowger).

2 MR. COWGER: The point you're making is that it's
3 showing --

4 MR. DARNELL: In the contract.

5 MR. COWGER: -- this list of items by work category
6 which was included in the contract under erosion control,
7 not under drainage?

8 MR. DARNELL: Correct.

9 MR. COWGER: Pass that on around.

10 MR. DEYO: (Examining document)

11 MR. ROEBUCK: (Examining document)

12 MR. BENAK: Is this in the advertisement?

13 MR. DARNELL: It's in the contract.

14 MR. BENAK: In the back of the contract in the --

15 MR. DEYO: Blank.

16 MR. ROEBUCK: Blank.

17 MR. BENAK: (Examining document)

18 MR. SWIATEK: (Examining document)

19 MR. BENAK: Also, there's a standard specification
20 which we attached in our packet. It would be way in the
21 back, back there, almost the last page, that describes, you
22 know, the work to be done and how it will be paid for,
23 ditch pavement, which is a 524 item, which is contained in
24 the CES of the plans and then referred to back to the
25 standard specifications on how to pay. In there also it

1 says that the required excavation will be included. It's
2 524-10, basis of payment.

3 MR. DARNELL: Steve, if you'll read all of that
4 paragraph.

5 MR. COWGER: Are we looking at 524-10?

6 MR. ROEBUCK: Yes.

7 MR. BENAK: Yes, sir.

8 MR. COWGER: Go ahead. I guess it's your turn.

9 MR. BENAK: He was telling me something.

10 MR. COWGER: What was it?

11 MR. DARNELL: It says such price of payment shall be
12 full compensation for all the work specified in this
13 section and shall include all excavation below the finished
14 grade of the ditch pavement. It does not say anything
15 about the excavation above the finished grade ditch
16 pavement.

17 MR. BENAK: And then you take your order of
18 documents, and then you have your set of plans, of which
19 the plans are higher in the order of documentation. You go
20 to the note that refers to the excavation for the
21 structures. Therefore, this document outweighs this
22 document.

23 MR. DARNELL: It doesn't change the pay item.

24 MR. BENAK: The pay item is 524.

25 MR. DARNELL: And I was reading from the pay item.

1 MR. COWGER: I think we're down to arguing on this
2 thing. I think the board has got all the facts they need
3 to address entitlement.

4 MR. SWIATEK: Mr. Cowger?

5 MR. COWGER: Sure.

6 MR. SWIATEK: I'd like to know what -- the real quote
7 was not for ditch pavement.

8 MR. COWGER: I understand.

9 MR. SWIATEK: I'd like to know why this claim doesn't
10 include the remainder of the ditch pavement on the project
11 if that is, in fact, what the claim is about. If it is for
12 ditch pavement, why is it only this one small section when
13 our contention is that it has nothing do with ditch
14 pavement? It has to do with waste material left on the
15 project.

16 MR. DARNELL: Do you want me to answer that?

17 MR. COWGER: Yes.

18 MR. SWIATEK: That's just a question that we can't
19 answer --

20 MR. DARNELL: Because our people and our sub wasn't
21 smart enough to realize that this was not included in the
22 pay item until we got to this point. This was some of the
23 last ditch paving on the project.

24 MR. SWIATEK: That's correct.

25 MR. COWGER: I think that takes care of that. I do

1 have one question, though, and then we're going to move on
2 to another item. You mentioned that this work was done at
3 the end of the project. I note in the letter dated March
4 16, 1995, there's a statement that says it all includes the
5 cost of additional mobilization and maintenance of traffic
6 required to perform this work.

7 MR. DARNELL: Right.

8 MR. COWGER: I'm curious as to why mobilization was
9 necessary.

10 MR. DARNELL: To move the equipment in to get this
11 stuff to -- well, I don't know. I guess it was more of the
12 maintenance of traffic than necessarily mobilization. Now,
13 I think this area, I'm not sure if this area was that
14 confined where they had to put the trackhoe, the bigger
15 trackhoe in there. I can't recall. I know they had a
16 trackhoe in there at one point, but I don't know if that
17 was for this area or not. But that included all those
18 things.

19 MR. COWGER: For purposes of the question, it just
20 seemed like that the contractor was in there doing other
21 sections, your subcontractor, of ditch paving, and why was
22 it necessary to mobilize equipment, and how does additional
23 maintenance of traffic fit into this?

24 MR. DARNELL: Well, because, number one, that's what
25 my sub quoted. That's number one what it is. And I can't

1 sit here and explain that fully away. And I realize --
2 that's a good question. I will say this, and I think Stan
3 will confirm this, often we're asked to give prices, and
4 they'll say, well, does that include mobilization and
5 maintenance of traffic. And this is not to pass off the
6 question; it's to say that that's not uncommon to have, and
7 especially in a lump such price.

8 MR. COWGER: I understand. I'd like the DOT to have
9 the opportunity to say anything further they want to say
10 about part six. Board members?

11 MR. SWIATEK: One recollection I have also during
12 discussion about this issue is how were they going to get
13 this material from off the back slope across the ditch
14 pavement without busting the ditch pavement, because the
15 ditch pavement was already in and that is not what this
16 price was for. This price was for waste and material on
17 the back slope.

18 MR. COWGER: This material that you just referred to
19 was not the cut from the ditch pavement?

20 MR. DARNELL: No, sir.

21 MR. COWGER: It was that stockpiled surplus you're
22 talking about?

23 MR. SWIATEK: It was stockpiled from various places
24 on the north end of the project.

25 MR. COWGER: Mr. Deyo?

1 MR. DEYO: No questions.

2 MR. COWGER: Mr. Roebuck?

3 MR. ROEBUCK: No questions.

4 MR. COWGER: Okay. Let's go. Next part.

5 MR. DARNELL: Item number five was a request for
6 miscellaneous, an underpayment for miscellaneous asphalt of
7 \$4,500. The department would not pay us for more than 200
8 pounds per square yard and takes the position that that is
9 all that they're allowed to pay for miscellaneous asphalt.

10 I contend that this is not a square yard pay item.
11 And we have a contract pay item for miscellaneous asphalt
12 is by the ton. Now, the department says that when read as
13 a whole, sections 339-8 and section 330-9.2.2, in
14 considering those, the department has no choice but to pay
15 for miscellaneous asphalt at the equivalent rate of 200
16 pounds per square yard while placing two inches at
17 guardrail posts area.

18 Well, our pay item 339 does not incorporate section
19 330, which is clearly incorporated in the structural pay
20 items such as asphalt and concrete, such as section 331,
21 332, 337. Section 339 does not incorporate section 330 by
22 reference or any other way. Section 330 itself refers to
23 asphalt and concrete, and it does not tie itself from 330
24 to 339.8.

25 Now, they also refer intimately to the index 513,

1 which is the structural layer contention that 100 pounds
2 per square yard equals one inch. Well, index 513 is not
3 incorporated in any way by reference or any other way to
4 section 339.8. Rather, section 339.8 says we're going to
5 pay you per ton.

6 But the department measures the square yards, as
7 their document shows, they measure the square yards and
8 convert it to all they're going to pay us for at 200 pounds
9 per square yard. Well, our mixed designs was 111 pounds
10 per, a calculation of 111 pounds per square yard. The
11 department says, well, we didn't tell you what mix design
12 to use; you could have used one weighing 100. Yes, we
13 could, if we had one, but that's sand asphalt and that's
14 not something normally run, but the specifications, 339,
15 allows us to use any DOT-approved mix.

16 Well, when we go and put it down and we get penalized
17 on a 200-pound-per-square-yard basis. They allow no
18 tolerance whatsoever, which is allowed in regular
19 operations of laying asphalt or grading work. We have only
20 asked essentially to be paid for 220 pounds per square
21 yard. There's some reasonable tolerance allowed. The
22 specifications does not incorporate 330 or index 513. And
23 we should be paid for this asphalt. There's no basis for
24 them to reduce our pay as long as we're in some reasonable
25 range of 220 to 230 pounds per square yard.

1 I will also say, although as Stan says, or the author
2 of this document says many times, there is no
3 documentation. But I was at one of the state asphalt
4 conferences a few years ago. And Jimmy Lairscey
5 specifically addressed this issue in saying, well, it was
6 paying for the tons they put down as long as it's a
7 reasonable depth. And we should be paid for that asphalt.

8 MR. COWGER: And the actual spread rate, do you have
9 that?

10 MR. DARNELL: Approximately, I think around 235
11 pounds per square yard. And the department admits in part
12 of their, somewhere in here, that it should be two inches
13 for these bicycle paths, guardrails, et cetera, but I'd
14 like to offer you some pictures showing an enormous amount
15 of miscellaneous asphalt placed on steep slopes in
16 erosion-controlled areas in which we simply could not, with
17 reasonable efforts, control the spread rate when we're
18 paving ditch pavement down to concrete eight to ten feet
19 wide. And that's where the bulk of the miscellaneous
20 asphalt on this project went is on those slopes going to
21 the ditch paving.

22 MR. COWGER: One question. The only area in
23 contention today, though, is that that was used in the
24 vicinity of the guardrail, right?

25 MR. DARNELL: I don't think so.

1 MR. COWGER: You don't think so?

2 MR. DARNELL: I think Stan's -- as the way I see it,
3 the DOT's response is in the areas of bike paths,
4 guardrails, et cetera, you know, the 200 pound rule, and
5 I'm not aware of any 200 pound rule or any 200 pound
6 policy, because I can't find it and we've never seen it and
7 we've argued against this for years. So it's not that we
8 are aware specifically of a policy or a rule, but the state
9 is aware we've been arguing this for years.

10 MR. COWGER: Okay. I think we need to let the state
11 go ahead and begin their rebuttal. The only thing, DOT, at
12 some point I would like you to address how you arrived at
13 the deduction. And not in numbers but in theory.

14 MR. BENAK: Okay.

15 MR. COWGER: Particularly, did you make a deduction
16 in the areas, other than the areas adjacent to the
17 guardrail, okay?

18 MR. BENAK: Okay. I think Stan and Dennis will get
19 to that a little later, but I think Cloyce hit it right on
20 the head: When he has control over it. These areas were,
21 the subgrade was brought up by the contractor. He had
22 control of that. He had control over putting the asphalt
23 down in these areas. And, you know, the contract is clear
24 in that it indicates that we're limited to 200 pounds under
25 the guardrail.

1 Jimmy Lairscey, I believe his statements were in
2 association with an already-existing guardrail where we had
3 to bring miscellaneous asphalt up to a certain level, yes,
4 we're going to pay you. The contractor did not have
5 control in that situation. In this situation he has
6 control. And all we're asking for is 200 pounds. And, you
7 know, it's quite simple. Do you all want to address the
8 other portions?

9 MR. SWIATEK: Yeah. Kind of, in answer to your
10 question, Mr. Cowger, you know, page 26 of 32 of our
11 attachments to this section, that right there is an example
12 of when it is something that is out of the contractor's
13 control, full payment is allowed, you know, for whatever
14 gets put in the hole, you know, for nonstandard type
15 areas.

16 You know, in areas where it's totally under his
17 control as far as thicknesses and grading and what have
18 you, those are the areas where it's routinely cut back and
19 has been for years. And there have been project engineers
20 that worked for me that were relatively new at being
21 project engineers and didn't cut it back and it gets cut
22 back with the final estimate. It used to get cut back in
23 Tallahassee in final estimates, when they used to do final
24 estimates. And it's been something that, that's just the
25 way it's been for years and years.

1 Two other small things. Well, one small thing,
2 again, in nonstandard areas we pay the full amount. The
3 contractor in this claim is requesting payment for patching
4 guardrail posts. They put the asphalt down first and then
5 drive the guardrail posts through it. And then they come
6 back and patch around the posts.

7 We don't pay for that because that's a method that
8 they choose to use. It saves them money instead of, you
9 know, trying to pave around the posts. But it causes
10 corrosion and blowouts through the hole that's knocked into
11 the asphalt. Those are listed at no pay in our sheets and
12 cut back and he's claiming for that. And also he's
13 claiming for some areas on certain days where full tonnage
14 was paid, and those are listed in our exhibits and in the
15 rebuttal.

16 The other thing of note is that he's asking to be
17 paid for asphalt that's based on a plus tolerance for his
18 grading work. And tolerances are plus and minus. And they
19 usually sum up to zero, I would venture to say. And the
20 assumption in his calculations is that it's always going to
21 be to his benefit. He's asking for payment for asphalt
22 that is always to his favor but not to the negative side on
23 grading columns, for example.

24 There's nothing unusual about the way that we have
25 done this. We do it on every single job. And Mr. Darnell

1 debates the issue every single job.

2 MR. DARNELL: Well, I don't think that a policy that
3 is not written or the opinions of what somebody wants to do
4 or does not want to do in final estimates is a change to
5 the contract document.

6 Now, the department has not sat here and argued that
7 anything that I've said is inaccurate regarding their
8 inability to go to index 513. The index 400, whatever it
9 is, regarding guardrail does say two inches. It does not
10 say 200 pounds per square yard. And we cannot put a mix
11 out there with a dense-graded aggregate that we have to use
12 and control it with any reasonable tolerance at less than,
13 we feel like that at least the 222 pounds, if nothing more,
14 should be paid, and we should not be penalized.

15 And I must admit, I've got to make a comment here.
16 There is, in this response, "It is the opinion of this
17 reviewer that the contractor should have and indeed may
18 have factored this overrun into the bid price for
19 miscellaneous asphalt." Somebody else must be doing our
20 thinking for us, but that's just pure speculation and that
21 should not be considered, because that's simply not true.
22 The contract says we get paid by the ton and that's what we
23 want.

24 MR. COWGER: One more question about how the quantity
25 was determined, if I could. Those photographs that were

1 circulated a while ago showing asphalt being put on slopes,
2 was that cut back to 200 pounds per square yard, or was
3 that left at whatever the ticket showed?

4 MR. SWIATEK: I couldn't answer that right now
5 without checking daily reports and corroborating when that
6 is placed with the asphalt reports that we have in our
7 exhibits. So I could let you know, you know. We could
8 check on that.

9 MR. COWGER: I don't think it's worth it.

10 MR. DARNELL: I can answer it.

11 MR. SWIATEK: Well, I mean, I would venture to say
12 that if it was cut, it probably should in that particular
13 area. That may have been an area where it should have been
14 paid.

15 MR. COWGER: Full depth?

16 MR. SWIATEK: Yeah. That is an abnormal area. It's
17 not normal. If it was cut maybe we should have on that
18 particular instance.

19 MR. COWGER: Let's let Mr. Darnell answer the
20 question. And then if DOT wants to comment on it, fine.

21 MR. DARNELL: The DOT's documents that they submitted
22 match up in measured areas of square feet and so forth,
23 which I assume they used to determine the reduction in
24 taking so many square feet, therefore so many square yards,
25 at 200 pounds. And the plans show the location of the

1 guardrails. And every place it shows the plans, the
2 guardrail locations they have measured the miscellaneous
3 asphalt eight feet wide, eight feet wide, six feet wide,
4 ten feet wide (examining document). So I suggest to you
5 that these measurements included the guardrail station
6 areas.

7 MR. SWIATEK: Can I see those pictures? I may have
8 misinterpreted those pictures.

9 MR. COWGER: I think we can ferret away on through
10 that thing and come up with whatever answer we need.
11 I think we need to get on to some more parts of the claim.

12 MR. SWIATEK: I misinterpreted these pictures. This
13 area here, this was paid at full depth. This was a
14 particular problem area that we had on the south end of
15 this project, and this asphalt here was paid full depth,
16 the full amount. I was thinking this was another guardrail
17 section up close into the center of the job that was an
18 added guardrail section that wasn't in the plans.

19 MR. COWGER: Okay.

20 MR. SWIATEK: It's just a little bit further south of
21 the plans, I think. These pictures here were paid in full
22 depth. I'm sorry.

23 MR. DARNELL: Just a couple of those are at the south
24 end. The others are on up further. It's just a little bit
25 of those --

1 MR. SWIATEK: There was a long extension guardrail at
2 the center of the project, maybe a mile or so south of the
3 plan, that had a little bit of asphalt that ran down the
4 slope and I thought that was it. That was the one I was
5 referring to.

6 MR. COWGER: I think we've discussed that item
7 enough. Let's go on to the next one. Mr. Deyo, do you
8 have any questions?

9 MR. DEYO: No.

10 MR. COWGER: Let's go on to the next one, then.

11 MR. DARNELL: Item four is request for payment for
12 milling and paving on the south end of the project that we
13 were directed to do which we performed on a notice of
14 intent to file claim. And we were directed to mill 100
15 feet and pave it back.

16 Now, the correspondence clearly shows that we
17 disagreed on the basis that the straightedge deficiency of
18 6/16 of an inch did not exceed specifications in the
19 transition area. I'm not sure which -- well, that's in
20 section 330, but anyway, 6/16 is allowed in the transition
21 area.

22 Now, the department's response was that we had poor
23 workmanship and that we stated there was a washboarding
24 effect irregularities. We had never stated there was a
25 washboarding effect, because that's not the case. There

1 was a straightedged deficiency of 6/16 of an inch, which
2 was within the specification tolerances.

3 And we were directed to go -- I wrote a letter.
4 I asked Stan -- I asked Dennis, tell me what's wrong.
5 Because when we paved initially there was not a problem and
6 it gradually occurred. So when we went and looked at this
7 job, it was clear to see that what had happened, we had
8 milled to a point and stopped milling, put the structural
9 course on. Then we came over that with the friction
10 course. We came to that same point and transitioned from
11 one inch to nothing in 50 feet.

12 And the old road, which is at the end of the job near
13 the light at Freeport on 331, was badly rutted and shoved a
14 little bit, because that's where the trucks are stopping.
15 And we explained that but to no avail. So we had to go
16 mill it out and repave it.

17 We feel like that that was totally uncalled for as
18 having to do it at no cost. If the department felt like
19 that's something they wanted done that just had to be done,
20 then they ought to be able to pay for it. We gave notice.
21 We met the specifications is what I'm saying, and nobody
22 has argued that we did not meet the specifications. But
23 yet they had to do it.

24 Now, I will submit to you a couple of pictures that
25 we took this week at that same end that shows right near

1 the end of the pavement, the old -- the new pavement where
2 it ties to the old, we've still got, right back in the new
3 pavement, 3/8 to 1/2 inch ruts which were existing just
4 like it was when they made us mill it out. The problem is
5 putting the thin layer of asphalt over old ruts. You can't
6 do it effectively without something going wrong.

7 MR. COWGER: Does this picture on the back have
8 anything to do with it?

9 MR. DARNELL: No.

10 MR. COWGER: For the record, these photos, taken on
11 5-19-97, show from 3/8 to a 1/2 inch of rutting in the
12 wheel paths?

13 MR. DARNELL: Yeah.

14 MR. COWGER: Through this section that we're
15 discussing.

16 MR. DEYO: (Examining photographs)

17 MR. ROEBUCK: (Examining photographs)

18 MR. DARNELL: The purpose of these is to demonstrate
19 how the old road was, that we had to transition a thin
20 layer of asphalt over.

21 MR. COWGER: Do you have anything else to say on the
22 matter?

23 MR. DARNELL: We ought to get paid. We met the
24 specifications. And we were directed to perform work that
25 was outside of the contract requirements.

1 MR. COWGER: DOT, whenever you're ready.

2 MR. SWIATEK: Let me take a second to look at this
3 (examining photographs).

4 MR. COWGER: Sure.

5 MR. SWIATEK: This is right at the transition?

6 MR. DARNELL: Yeah, it's very close to the end of
7 the -- now, that transition was milled out. Remember, we
8 had -- you all directed us to mill out a full inch and pave
9 it back. That's not the thin transition. That's with a
10 full inch on it. And it's still rutting.

11 MR. SWIATEK: All right. The only thing that I would
12 offer on this one besides what we have already put in our
13 rebuttal here is we did have a similar problem with the
14 structural course in this very area on the other side of
15 the roadway that the contractor did correct before he put
16 the friction course out.

17 And throughout the job, especially in the southern
18 end of this project, they had, they did have problems with
19 screed controls on their Barber Green spreader. There was
20 shimmying and shaking all the way up and down the road but
21 not enough to cause a straightedge deficiency. And this
22 is, I think, and correct me if I'm wrong, this is the only
23 area on the entire project where we had to have a
24 straightedge corrected, isn't it?

25 MR. THOMASON: We only had one we left in at no pay,

1 I believe.

2 MR. SWIATEK: There was another one left in at no
3 pay. Mr. Darnell took exception to the word washboarding.
4 There were more than one deficiency very close together,
5 probably within about five or ten feet. And when you came
6 around and slowed down around this curve, you would just
7 literally shake. So it was a safety hazard.

8 And also the specs are clear on what a straightedge
9 deficiency is. And we're right at the cusp of the, you
10 know, something that should clearly be taken out, we also
11 have the right, the spec, to remove texture problems. And
12 a lot of this would have been a texture problem if not a
13 straightedge deficiency. And the fact of the matter is
14 that it was corrected and it's not a problem anymore. And
15 it was a workmanship problem.

16 MR. COWGER: Before you start, I do have a question.
17 The area in question is at the end of the project, and it's
18 in an area where the plan shows transitioning from zero
19 pavement thickness up to match the --

20 MR. SWIATEK: From a half inch to a full inch.
21 I don't believe it's zero.

22 MR. COWGER: To match the area where there was new
23 pavement?

24 MR. SWIATEK: Correct.

25 MR. COWGER: And this was friction course, FC-3,

1 placed correctly over the existing pavement; is that
2 what --

3 MR. SWIATEK: I don't know the answer to that.

4 MR. COWGER: The point is, the area in question,
5 there was no structural course underlying it, no new
6 structural course underlying this area. This was friction
7 course of some type put on the old pavement; is that
8 correct?

9 MR. COWGER: Yes.

10 MR. SWIATEK: There was an issue at the time of
11 whether this area was tacked. And the type of washboarding
12 seen would be associated with slippage between surfaces.
13 And we couldn't find any documentation. I don't really
14 think it ever found its way to correspondence or anything
15 like that, but if it wasn't tacked -- we believe the tack
16 man stopped at the end of the structural course and didn't
17 carry to where the friction course was going. That's total
18 recollection on our part. There's no documentation. But
19 that was an item of debate at the time.

20 And the washboarding would be representative of
21 slippage between asphalt layers under traffic. And this is
22 in an area where people are slowing down up to a traffic
23 light, so slippage would be a reasonable reason for this
24 problem to occur.

25 MR. COWGER: Mr. Darnell?

1 MR. DARNELL: It is approaching a major light, and a
2 lot of heavy trucks come down through there. And with the
3 friction course, especially thinner, less structural value
4 than an S mix, for example, friction course, when you have
5 heavy trucks starting to stop, you can have some shoving,
6 especially when it's on an old road.

7 I'm looking for the section in this -- well, it's in
8 section 337, I think. Let me look at something there.
9 I can't find it right now. I may have to look for it some
10 more. But the department has not argued that I am wrong in
11 the 6/16 straightedge deficiency is acceptable in the
12 transition areas. I've never been told that we did not
13 meet the specifications. I was told to take it up and mill
14 it out and put it back. And my position is that we do meet
15 it. The specs do allow 6/16 of an inch in the transition
16 areas.

17 MR. BENAK: I think it also refers to, in there, the
18 opinion of the engineer. And I think we'd get the
19 bituminous engineer to come and look at it and run a
20 straightedge over it. And then he makes a recommendation
21 up to me and then, you know, whether we take it out or
22 leave it. So, you know, it was just not Stan and Dennis
23 looking at it. It was, you know, our district expert and
24 his opinion that it needed to come out.

25 MR. COWGER: I don't think we're here to talk about

1 whether or not it was taken out or the decision that DOT
2 made to take it out. We're here to talk about who's going
3 to pay for it. And looking in the package of information
4 regarding this particular claim, there's a letter dated
5 July 28th, 1995. And, let's see, the first sentence says
6 this letter will serve as your written directive to
7 remove -- to repair the straightedge deficiencies and
8 surface irregularities at the beginning of the friction
9 course in the south lane of the above-referenced project.

10 I'm still a little confused in what I've heard in the
11 way of testimony. And the words "surface irregularity"
12 kind of jump out at me. And I'm curious to hear from DOT,
13 other than straightedge deficiencies, what other surface
14 irregularities were there?

15 MR. SWIATEK: Well, the straightedge deficiency would
16 be something that would fall into the tolerance level.

17 MR. COWGER: Right.

18 MR. SWIATEK: Which, like I say, we're right at the
19 tolerance level.

20 MR. COWGER: Right. I understand that.

21 MR. SWIATEK: The surface irregularity, anything
22 underneath that tolerance, which is washboarding, multiple
23 ripples, only one or two of them were close to the
24 allowable tolerances. The rest of the ripples -- you know,
25 if these ripples were all by themselves without the other

1 ones in close proximity, there wouldn't have been anything
2 said about it. But the fact that there was one right after
3 the other in such a small area, and, really, I wish I'd put
4 in that letter the 330-12.2 spec, which is texture and
5 finished surface, because really they fall into a texture
6 category problem which we routinely have to replace, are
7 routinely replaced or left at no pay.

8 You know, the department doesn't arbitrarily call for
9 removal, obviously. There was another place we left at no
10 pay, which was of the same magnitude of surface
11 irregularities as this. But there were multiple ripples
12 that occurred in that area.

13 MR. COWGER: You've answered my question.

14 MR. DARNELL: One last quick comment.

15 MR. COWGER: We're getting ready to leave this item,
16 but go ahead.

17 MR. DARNELL: Dennis has acknowledged to me the
18 problem wasn't there when we completed the paving problem
19 operations. If we would have had this enormous machine
20 problem, it would have been noticed at the time, not a
21 couple of months later after traffic had been on it, and it
22 had deteriorated and shoved this asphalt.

23 So this doesn't hold water because we just did not
24 have that problem until after traffic was exposed to it for
25 some time. And there's never been a word mentioned in any

1 correspondence whatsoever regarding surface irregularities,
2 just the straightedge.

3 MR. SWIATEK: It's in that letter there (indicating).

4 MR. COWGER: DOT, do you have anything else to say?

5 MR. BENAK: No, sir.

6 MR. COWGER: Mr. Roebuck?

7 MR. ROEBUCK: No.

8 MR. COWGER: Mr. Deyo?

9 MR. DEYO: No, sir.

10 MR. COWGER: Let's go to the next one.

11 MR. DARNELL: Now, let's move, if we may, to item
12 number one.

13 MR. COWGER: Before we start, can somebody answer the
14 question that I have before I forget to ask it. This
15 supplemental agreement that we're going to be discussing,
16 was it a lump sum supplemental agreement or a unit price?
17 There's nothing in the documentation that indicates which
18 it was.

19 The second page of the supplemental agreement that
20 usually lists the pay items and all was not included in
21 anything that we have. So my question is, when you look at
22 that second page of the document, did you have a lump sum
23 item, or did you have X number of tons at \$17 or whatever
24 that price was?

25 MR. SWIATEK: It was after the fact so it was lump

1 sum, basically, with some quantities attached.

2 MR. COWGER: But in the document itself, you had a
3 pay item in there for a lump sum payment?

4 MR. SWIATEK: I believe it's a lump sum. Am I right,
5 Steve?

6 MR. BENAK: I don't know.

7 MR. COWGER: I'm sorry, Mr. Darnell. That was off
8 the track, but that was important to know.

9 MR. SWIATEK: It would have been paid at that lump
10 sum. It wasn't an adjustable one.

11 MR. DARNELL: Can we take a five- to three-minute
12 break?

13 MR. COWGER: I think that would be a good idea.

14 (Recess)

15 MR. COWGER: We're beginning on part one now?

16 MR. ROEBUCK: Yes.

17 MR. DARNELL: Item number one. As shown in the
18 correspondence submitted, supplemental agreement was agreed
19 to pay the contractor \$30,440 for asphalt it did not get
20 because the DOT asked us to mill at a lesser depth than
21 shown on the plans, or we had to to keep from hitting the
22 base so often.

23 The letter from Okaloosa Asphalt to the DOT dated
24 April 25th defined the number of tons, the value per ton
25 lost, and came to a figure amount of \$30,440. The RAP

1 shortage, as shown on page two of that letter, was a
2 shortage of 1,776 tons, which was less than ten percent of
3 the calculated theoretical tons it should have gotten.

4 So the letter was submitted April 25th to the
5 department in supplemental agreement number eight, which we
6 contend is a lump sum supplemental agreement, because the
7 amount is exactly as submitted in the letter, was signed
8 between the department and contractor.

9 The department basically says they didn't have
10 documentation, according to their opening statement, they
11 didn't have documentation on weight tickets and so forth.
12 Well, there was no way to weigh something you didn't get.
13 And they didn't, the department didn't choose to weigh all
14 the trucks it did get, but there was some sort of, the
15 method was apparently they weighed some trucks early on,
16 averaged the weights, counted the trucks, and determined
17 this number of truckloads, and therefore to these
18 quantities. And we haven't been paid that. So that's
19 basically our position in a nutshell. We had a
20 supplemental agreement and it has not been paid.

21 MR. COWGER: Before the DOT starts, I want to ask
22 something that relates to what you just said, Mr. Darnell.
23 The attachment to the April 25th, 1994, letter that
24 Okaloosa wrote to DOT shows the way the quantity of 1,776
25 tons was derived?

1 MR. DARNELL: Correct. Do you want me to explain
2 that?

3 MR. COWGER: Explain that a little bit more.

4 MR. DARNELL: Okay. The date that the milling was
5 done is shown on the left. The square yards milled for
6 that day is shown.

7 MR. COWGER: For that day.

8 MR. DARNELL: Now, the quote, actual tonnage milled,
9 that was based off of the number of loads times an average
10 tons per load that was determined early on in lieu of
11 having to stop those trucks and weigh them every truckload
12 that we did get. And these were kept up with daily.

13 And the fourth column is the tonnage that calculates
14 at 200 pounds per square yard. And the difference in the
15 last column, and you can see a couple of days we actually
16 said we got a little more than, a little less or a little
17 more than we should have gotten, theoretically. So the
18 difference adds up to 1,776 tons. I'm assuming the math is
19 correct. I've not checked the mathematics.

20 MR. COWGER: Okay. That's fine. I think that
21 column, actual tonnage milled, was really the question
22 I had and you've explained that.

23 MR. DARNELL: Okay.

24 MR. COWGER: There was a count of the number of loads
25 and, in your mind, an agreed-upon average weight per

1 truck. Multiply those two together and you get the actual
2 tons milled?

3 MR. DARNELL: The actual tons of milled material that
4 we got, that's correct.

5 MR. COWGER: Right. The actual tons that you
6 actually, as best you could determine, the number of tons
7 that you actually milled that day. Then the next column
8 tells you what you should have gotten?

9 MR. DARNELL: Right.

10 MR. COWGER: Okay. Are you finished? DOT?

11 MR. BENAK: My first question is on this number two,
12 that little dash, does that mean you withdraw on this claim
13 or does it mean zero?

14 MR. DARNELL: We're working on number one.

15 MR. COWGER: He just wants to know, though.

16 MR. BENAK: I just want know.

17 MR. COWGER: Is number two gone?

18 MR. BENAK: Is it here or is it gone?

19 MR. DARNELL: It's gone.

20 MR. COWGER: Does that answer your question, Steve?

21 MR. BENAK: Yes, sir.

22 MR. COWGER: Okay. Go ahead.

23 MR. BENAK: You can't address number one by itself.
24 You have to address one and three and the gone one, number
25 two. They are intertwined. Based on the investigation

1 that's ongoing at this time, we were given instructions not
2 to pay because of the alleged fraudulent activity that was
3 ongoing.

4 MR. COWGER: On all three parts?

5 MR. BENAK: Yes, sir. Well, we didn't know about
6 part number three at the time.

7 MR. COWGER: Yeah.

8 MR. BENAK: We just knew about one and two.

9 MR. COWGER: Okay.

10 MR. BENAK: And part three is associated with one and
11 two. We've got supplemental agreements that we thought
12 were paying for both of them. And then number three is an
13 expansion of those supplemental agreements. So we've
14 already agreed to, you know, the department's exposure
15 already by the supplemental agreements. Our problem is we
16 don't know how much to pay at this time.

17 MR. DEYO: Question. But at the time the
18 supplemental agreement was executed by the department, you
19 agreed with the nonavailability of RAP material?

20 MR. BENAK: Yes, sir.

21 MR. DEYO: So the \$30,000 was agreeable to the
22 department as a settlement on that for them not having the
23 RAP material available or use of the --

24 MR. SWIATEK: If I could speak to that. At the time
25 that that supplemental agreement was agreed to, the project

1 engineer on this project at the time was the one that was
2 providing all this information and all the backup
3 documentation that was supposed to be provided for this or
4 that would have been provided at the time the final
5 estimate would have been prepared.

6 That project engineer is also under investigation,
7 and he is no longer employed by the department and the fact
8 the documentation that would be required was never
9 produced. Nobody knows if it was ever produced or if it
10 would have been produced. Nobody knows. And the
11 supplemental agreement was not paid by final estimates of
12 the department because of the lack of documentation that
13 should have been produced to back it up. At the time the
14 supplemental agreement was negotiated, and what have you,
15 that documentation was on the word of the project engineer.

16 MR. DEYO: But on a normal milling operation, it's
17 depth, right?

18 MR. BENAK: Yes.

19 MR. SWIATEK: If you're keeping records.

20 MR. DEYO: It's not tonnage.

21 MR. SWIATEK: That's correct.

22 MR. DEYO: It's strictly the measured thickness in an
23 area. And the basis for the supplemental agreement was
24 just that, a reduction in the milling depth. And you
25 agreed to that at the time. So was it reduced to about one

1 inch -- or two inches was shown in the plans and they
2 couldn't do it because of base protrusion, so you cut it
3 back to one?

4 MR. SWIATEK: Typically would, you know, say you're
5 milling two inches, and if you're going to shallow up to
6 one inch, you keep a field book of the stations and the
7 width and the length and you can calculate the tonnage.
8 Those records at the time that the supplemental agreement
9 was being prepared on the word of the project engineer is
10 also under investigation. They were being kept and he
11 substantiated these. I have never seen them. Until this
12 day I haven't seen them. They haven't, they weren't kept,
13 according to inspectors that were --

14 MR. DEYO: So DOT didn't keep records to show that it
15 was --

16 MR. SWIATEK: That is correct.

17 MR. DEYO: -- reduced milling depth for whatever
18 station, whatever it was?

19 MR. SWIATEK: That's correct.

20 MR. COWGER: Are you through with your questions?

21 MR. DEYO: Yes.

22 MR. COWGER: Just a quick question. As I see the
23 documents here, though, the milling that failed to produce
24 the number of tons the contractor said he should have
25 received of RAP was done on dates prior to the date of the

1 April 25th letter from Okaloosa, which established a
2 proposed amount for the supplemental agreement. Then the
3 supplemental agreement itself was executed by the
4 contractor and the department some two months later.

5 MR. SWIATEK: Yes.

6 MR. COWGER: Okay. Go ahead.

7 MR. DARNELL: When we received the final estimate on
8 this project, I was going over it, and I saw that they had
9 never, had not paid us. And they'd never paid us for this
10 supplemental agreement. The final estimate came in
11 November of '95.

12 And I called Stan and asked him. And he said, well,
13 you should have been paid that. I approved that for
14 payment. I'll call and find out. He called me back and
15 said I talked to Eddie Wilson, and the reason they haven't
16 paid it is because of lack of documentation and weight
17 tickets, something to that effect.

18 And we kept up with it. I think the Department of
19 Transportation knew how many loads it was. And nobody ever
20 questioned this whatsoever because it was either to pay us
21 to slow down our trucks, take our trucks to truck scales
22 and the department have to man the scales to weigh trucks,
23 or base it on a reasonable basis which it was based on.

24 But to come after the fact and say, well, we don't
25 have the documentation after they knew they were going to

1 pay -- and I'd like to point out, we're talking less than
2 ten percent. This road was to average a two-inch cut. And
3 we're only talking a loss, which would have been 19,000
4 tons, we're talking 1,700 tons. We're talking less than
5 ten percent of two inches, which is barely two-tenths, not
6 a quarter of an inch average loss. So it's not that
7 you're -- and I've never seen anybody cross-section a
8 milled surface to determine quantities, to determine these
9 field books.

10 MR. COWGER: Board members, I've think we heard
11 enough on this. What do you all think?

12 MR. DEYO: Unless DOT has any other --

13 MR. BENAK: Well, I hadn't really gotten finished
14 with what I was saying.

15 MR. COWGER: Oh, I'm sorry. I thought you were
16 through.

17 MR. BENAK: I got interrupted.

18 MR. COWGER: Excuse me.

19 MR. DEYO: He was tying it to three and two.

20 MR. BENAK: Right. I was putting them all together.
21 And, you know, our request is that you all hold ruling on
22 these issues based on ongoing investigation is all that
23 we're requesting. And now I'm done.

24 MR. COWGER: That was easy. I thought you were going
25 to go on and on.

1 MR. BENAK: Unh-unh.

2 MR. COWGER: Without getting over into the forbidden
3 area of talking about the criminal investigation in any
4 depth, you've got a fully, what I don't understand is
5 you've got a fully executed supplemental agreement that set
6 up a lump sum payment, and you're now refusing to pay for
7 it.

8 MR. BENAK: Yes, sir.

9 MR. SWIATEK: Yes, sir.

10 MR. COWGER: Because of some activities that occurred
11 that were, allegedly occurred that were remote from this
12 issue, were they not?

13 MR. SWIATEK: No, sir, they were not remote from this
14 issue. The number two that they backed out of their claim,
15 item number two, we have reason to believe that fraudulent
16 asphalt tickets were produced to pay for this RAP material,
17 and then the supplemental agreement was issued to pay for
18 it again. And that is the essence of why we decided that
19 it shouldn't be paid, because we don't know. But we have
20 people that, you know, it's been interviewed by various law
21 enforcement agencies that have given testimony to that
22 effect. I mean, you've got to put yourself in our
23 position.

24 MR. COWGER: I understand.

25 MR. SWIATEK: What do you do. You know, the best

1 thing to do is do nothing.

2 MR. DARNELL: That's the problem.

3 MR. SWIATEK: And all this comes to light after the
4 supplemental agreement was executed. Now, this
5 supplemental agreement was executed and not paid for the
6 entire duration of this project and not a word was said
7 about it.

8 MR. COWGER: You never paid any money under that
9 supplemental agreement?

10 MR. SWIATEK: That supplemental agreement was never
11 paid. And when Mr. Thomason went to do the final estimate,
12 because he took the job over after the project engineers
13 were relieved of his duties, he got their final estimate,
14 he walked them out, and he said that supplemental agreement
15 was never paid, \$30,000 never paid, never questioned for a
16 year plus. And, you know, you've got to put yourself in
17 our position, and we figured we don't know what to do so --

18 MR. COWGER: There's something interesting that's
19 happened here, though. The contractor has withdrawn any
20 claim for part two which has to do with these alleged
21 fraudulent asphalt tickets, which you're saying might have
22 been duplication of payment for the same work that's
23 covered by the supplemental agreement. Now that that's
24 been withdrawn, looks to me like that takes the issue of
25 duplication of payment out altogether.

1 MR. BENAK: No. On part three it's on these same
2 issues also. It expands on the issues of part one and part
3 two, really, in portions of it. So there is some --

4 MR. DARNELL: Part three, the part we were not sure
5 and clear, because they wouldn't tell me exactly why that
6 30,000, part two was deducted from the payment. But once
7 we found out definitively after we got these documents,
8 then we realized that part three included a request for all
9 of the work that we'll get more into in part three that
10 part two was used to pay for.

11 We've never asked to get paid twice. We don't want
12 to get paid twice for anything. That's why we dropped this
13 one out, because part three included the costs of
14 reimbursement we were seeking that we had claimed under
15 part two. But none of that has anything to do with part
16 one. What my concern is why did the department not pay
17 this thing for six months. Why had the department not paid
18 it when you approved it for payment on final estimate
19 anyway. Why had it not been paid.

20 MR. SWIATEK: I can answer that. Because the project
21 engineer was taken off the project and the new project
22 engineer just --

23 MR. COWGER: We don't want to go into that any
24 deeper, I can assure you. To sum up what Mr. Darnell just
25 said, though, he's saying that there was duplication

1 between part two as originally submitted and part three.
2 But I think he's also saying that that does not apply to
3 part one.

4 MR. DARNELL: That's correct. Part one stands
5 alone. We were shorted RAP. They signed an agreement to
6 pay us for it. They have not argued that issue. We want
7 our \$30,000.

8 MR. COWGER: We've clarified that now. I think it's
9 appropriate to let DOT rebut that in any way that they
10 would like to.

11 MR. SWIATEK: I have two things. One, again, the
12 time line in this thing played out with when the
13 supplemental agreement was approved and negotiated and
14 everything, there was a project engineer on the project
15 that was responsible for this documentation, and on his
16 word this documentation was being kept. To this day, to
17 back up the attachment to Mr. Darnell's letter or any other
18 time, there is no documentation as to the quantity.

19 The department clearly understands that there is a
20 value to lost RAP that he didn't mine off the roadway.
21 There's no doubt that there's a value to that RAP. But
22 without proper documentation that was supposed to have been
23 prepared during the job, you know, how do you substantiate
24 spending that kind of taxpayer dollars on something that
25 you don't know. I don't know how to do that.

1 And, again, based on the testimony of the inspectors
2 on the project, this milling material was already paid for
3 in asphalt tickets. There's an inspector that says, look,
4 the asphalt tickets were paying for the milling, not for
5 all this other stuff in section three or section two. And
6 based on that record, that's why we didn't know what to do
7 and we were advised not to pay.

8 MR. COWGER: Don't you think it's time we leave this
9 subject? Mr. Roebuck, do you have a question?

10 MR. ROEBUCK: Yeah, I did. There seems to be no
11 reputation of the reason for that supplemental agreement,
12 that there was a shortage of RAP. It's a fact. Nobody --

13 MR. SWIATEK: There was less RAP produced than should
14 have been produced, but nobody knows how much at this
15 point. Nobody knows how much.

16 MR. ROEBUCK: Back three years ago somebody knew
17 enough to sign it, to sign a calculation.

18 MR. SWIATEK: But that individual is under
19 investigation right now. He doesn't work for the
20 department anymore.

21 MR. BENAK: He produced work, supplemental agreement
22 work estimate documents for that quantity with no backup
23 documentation for it is what Stan is saying.

24 MR. COWGER: What was he, a project engineer?

25 MR. DEYO: The question in my mind is what's normal

1 documentation for milling?

2 MR. SWIATEK: A field book or form that shows
3 stationing and the depths of milling and the width.

4 MR. DEYO: You're saying you don't have a field book
5 that shows depth of milling station to station?

6 MR. SWIATEK: No.

7 MR. DEYO: That's the bottom line.

8 MR. SWIATEK: That's correct.

9 MR. DEYO: But yet we have an executed supplemental
10 agreement to pay for reduction in RAP.

11 MR. SWIATEK: See, if we were to do this today, if we
12 were to shallow up on some milling, we would have those
13 records. You know, if the project engineer comes up and
14 says, look, here's this legitimate blah, blah, blah, you
15 know, we'd go ahead and prepare a supplemental agreement,
16 always knowing that come final estimate time, when the
17 final estimate is being put together, that all the
18 documentation would be there.

19 MR. DEYO: But that's not the contractor's
20 responsibility.

21 MR. SWIATEK: That's not the contractor's
22 responsibility.

23 MR. DEYO: To supply that documentation.

24 MR. ROEBUCK: Right.

25 MR. SWIATEK: Well, one question is where did he go

1 to -- the quantities come from that are in Mr. Darnell's
2 attachment? We don't have an answer to that, do we? The
3 actual tons milled, we don't know where those quantities
4 came from. I'd like to know that.

5 MR. DARNELL: Seem likes that would have been asked
6 before they signed the supplemental agreement.

7 MR. DEYO: I would think so.

8 MR. SWIATEK: By the project engineer.

9 MR. BENAK: The project engineer verified that for
10 us.

11 MR. DEYO: I think you've answered my questions on
12 that.

13 MR. COWGER: Do you have any further questions?

14 MR. DEYO: No.

15 MR. COWGER: Mr. Roebuck?

16 MR. ROEBUCK: No.

17 MR. COWGER: Ready to leave this item? Does anybody
18 have anything real compelling they need to say?

19 MR. DARNELL: I've got something compelling to say.
20 They're sitting over there talking about allegations by an
21 inspector that tickets were used to pay for the milling
22 shortfall. We're not fool enough to think that we're going
23 to write a letter asking them to pay us for milling that we
24 were shorted if we were getting paid somehow by some kind
25 of false tickets.

1 Now, we've been in business, I've been here 26 years,
2 and I've never had anything, any sort of accusation like
3 this. And I have before me an affidavit signed by the DOT
4 inspector at the time that says the tickets were printed
5 were used to pay for the excavation and disposal of the old
6 road and the old A7 gumbo material and the RAP that went
7 back in the holes, which we'll address more in section
8 three. I'll give you that, Mr. Chairman.

9 MR. SWIATEK: I never said that Mr. Darnell knew
10 about it.

11 MR. DARNELL: A little louder, please?

12 MR. SWIATEK: I never said that Mr. Darnell knew
13 about it.

14 MR. COWGER: DOT, I'm going to give you the
15 opportunity to look at this and board members too. And
16 then we're going to -- have you got some more copies?

17 MR. DARNELL: Yeah.

18 MR. COWGER: Good for you.

19 MR. DEYO: Are we introducing this?

20 MR. ROEBUCK: This is going to come up in --

21 MR. DARNELL: That's fine. We can introduce it here.

22 MR. COWGER: This will be Exhibit Number 4, then. We
23 are entering Exhibit Number 4 which is an affidavit from,
24 what is that, Arrie Taylor Roberts III, dated May 21st,
25 1997.

1 (Whereupon, Exhibit No. 4 was received in
2 evidence.)

3 MR. COWGER: DOT, since this was introduced for the
4 first time just now, we will give you the opportunity to
5 review this subsequent to the hearing. And if you wish to
6 submit a written statement to the board and furnish the
7 contractor a copy, you must do so between -- before June
8 the 10th. I think we're ready to leave the subject now.

9 MR. SWIATEK: Can I add something?

10 MR. COWGER: Sure.

11 MR. SWIATEK: Mr. Roberts was not assigned full time
12 to this project on 331. Mr. Roberts currently works for
13 Okaloosa Asphalt, for Couch, but he was not full time
14 assigned to this project. He may have filled in once in a
15 while there, but he works for Couch right now. It's just
16 worth noting.

17 MR. DARNELL: Is that meant to impugn his affidavit?

18 MR. SWIATEK: No, just speaking to a fact.

19 MR. COWGER: Let's leave this one. I think we've got
20 enough out. Now, I assume that there's a possibility that
21 this may come up in discussion of part three? Am I right
22 or wrong?

23 MR. DARNELL: Probably right.

24 MR. COWGER: Just keep it handy, okay. Now, on part
25 three -- and that completes it, then, when we complete part

1 three, right?

2 MR. DARNELL: That's correct.

3 MR. COWGER: Okay. Just making sure.

4 MR. DARNELL: Now, first, as I mentioned earlier,
5 I was not fully aware of exactly the reasons of the
6 deductions of number two. There was some implications from
7 Stan regarding why that was redacted, but it was one of
8 those untouchable subjects that nobody got into in great
9 detail. So we included it.

10 Now, after we got this document from Stan, from the
11 DOT's response or rebuttal, then we realized that some of
12 the items we were requesting in section three were the same
13 thing that some of that, well, all of that that was
14 requested in number two was to have paid for the work in
15 number three. So essentially two is gone and three
16 exists.

17 Supplemental agreement number six, which was executed
18 by the department for, quote, patching behind the asphalt
19 milling operations, I think we've all agreed earlier that
20 we realize, the department realized at some point that we
21 were going to hit the base in trying to mill what had to be
22 done.

23 And off of a previous project, we had priced \$115 per
24 ton for the preparation of that base that we hit with the
25 milling machine, which means we clean out, trim out, and

1 put whatever depth of asphalt the department told us to put
2 on the existing base after we hit it with the milling
3 operation.

4 That supplemental agreement does not, did not, does
5 not and never has included removal of existing pavement of
6 the asphalt on top of the failed base, disposal of that
7 pavement, removal and disposal of unsuitable material,
8 maintenance of traffic for it, providing our RAP material
9 to go in the holes, placing and compacting and preparing
10 for putting maybe two inches or so of asphalt on top of it
11 (indicating).

12 Now, I want to show you some pictures here for a
13 minute to give you some idea. This was happening. The
14 base was failing behind the milling operations, and we were
15 still having to go try to put leveling on base that was
16 failing and then, of course, pictures where the base had
17 failed after the milling operations. This is a picture of
18 base failure in certain areas where that had to be removed
19 (indicating).

20 MR. COWGER: Do these photos indicate that the
21 failing pavement was predominately on the outside two or
22 three feet of the roadway?

23 MR. DARNELL: The major parts of the complete base
24 failure was in the outside two or three, in some cases four
25 feet of the roadway but had to be removed in certain cases

1 even wider, because the new road was going to have a
2 four-foot shoulder on it. But those are typical of what
3 was happening after the milled surface -- this had a
4 leveling layer on it. Although there were base failures
5 behind the milling operations, these particular pictures
6 are after the leveling course had been placed.

7 Now, this is another typical example of some of the
8 excavations, Gene. I hate to bore you with these, but
9 I think it's important that you see all these pictures.
10 Some of them were two and in some places perhaps three feet
11 deep that we had to remove.

12 MR. COWGER: Can somebody answer for me what was the
13 existing base material? What kind material was it?

14 MR. DARNELL: I think these pictures answer it pretty
15 good.

16 MR. COWGER: Looks like sand clay.

17 MR. DARNELL: This is an A7 gumbo type thing.

18 MR. SWIATEK: The original roadway was a 20-foot
19 roadway of sand clay. And there was a two-foot widening
20 put on that that was questionable.

21 MR. COWGER: It was sand clay also or do we know?

22 MR. SWIATEK: Portions of it looked like it.

23 Portions of it, it may have been worse.

24 MR. DEYO: Looks like refuse.

25 MR. DARNELL: There were places where we took rail

1 ties out of the road where it was failing.

2 MR. COWGER: Well, let me ask you this. There's no
3 question that the work was done, is there, that the
4 contractor had to go in and in these failed areas removed
5 base and in some cases removed underlying subgrade
6 material?

7 MR. SWIATEK: In some locations that occurred, yes.

8 MR. BENAK: I think the key is how much now, trying
9 to determine how much.

10 MR. DARNELL: Here's one that's about 180 feet long,
11 and it's four feet to the main line and four-foot
12 shoulder. And that one is not even reflected in the daily
13 diaries as having been done.

14 MR. COWGER: Other than this area, do the daily
15 diaries pretty well reflect areas that repairs were made?

16 MR. DARNELL: These repairs were made from March
17 through, in cases, in December. These repairs were made
18 behind the milling operation. They were made after the
19 leveling operation in cases. They were made after we'd
20 already put the ARMI treatment down and the structure of
21 asphalt on top of it. Some were made in October and
22 December and shut the entire paving operations down, but
23 they are reflected to certain extents, but when you see in
24 there, it may just say patching.

25 They were made at various stages. At one point early

1 on the project engineer asked the district to provide a
2 layer of overbuild to prevent some of this from happening
3 on top of the leveling surface. They asked for 75-pound
4 overbuild to prevent this from happening, because basically
5 it had a very poor subsoil underneath the leveling course
6 after the milling. And that was denied. And we were
7 directed on March 20th, I believe it was, to stop doing
8 anymore patching and put the other, just go on with the
9 other progress and there wouldn't be anymore patching. And
10 we wound up digging through ARMI layer and structural
11 layers to dig this stuff out and fix it.

12 I told you what the supplemental agreement was not
13 for, and this is a picture of what it was not for,
14 including our RAP material going in these holes. And
15 I want to point out something right there. This was all
16 unforeseen work. And nobody could possibly anticipate what
17 we had to do here.

18 Now, at some point during these digging out and
19 putting in, the district materials engineer, Aubrey Graves,
20 and the district bituminous engineer, Frank Kreis, came
21 over to this job. And they saw that we were putting milled
22 material in these holes. They said stop, don't do that.
23 They directed the project engineer not to do that. Milled
24 material is not an approved base course material underneath
25 a roadway. It is underneath a shoulder. The project

1 engineer called the resident engineer. The resident
2 engineer called Steve Benak. Steve Benak said go back to
3 putting RAP in the holes. So we went back. We switched
4 from asphalt to RAP to asphalt back to RAP and with the
5 full knowledge of the department of what was going on.

6 Now, there's two reasons for that. I believe there's
7 two reasons. One, the RAP material that was going in the
8 hole was a whole lot better than what came out, no
9 question. It was a lot faster to get this road safe and
10 open and get something on it. I showed you a picture of
11 160 or whatever foot long section that we had gotten
12 ready.

13 But the other thing is that putting asphalt in these
14 holes, when you've got one foot, two foot, three feet deep,
15 you can't put it in a foot deep. You've got to put it in
16 layers and wait until it cools, try to compact it. And the
17 time element on this kind of road is critical.

18 I agree with the department's decision to put that in
19 there as far as the safety situation. I think collateral
20 to that is the fact that they saved somewhere in the range
21 of \$50,000 to \$100,000 by putting RAP in there, which has
22 not been paid for, as opposed to filling them up with
23 asphalt, which would have been paid for at \$115 a ton. So
24 they got the cake and ate it too. We haven't been paid.
25 They got the road open quicker, safety to the public, and

1 saved many thousands of dollars in filling in these holes
2 with not filling them in with asphalt.

3 This was unforeseen work. Section 4-4 says the
4 project engineer or the engineer can direct the contractor
5 to perform the work and determine the basis of adjustment
6 and that's exactly what happened. Anything otherwise, for
7 anybody to try to assume, state, or claim that our pay item
8 for patching behind a milling operation including
9 excavation, removal of asphalt, MOT, putting our material
10 in those holes, to get paid for an inch or two of asphalt
11 on top of it, it just defies logic. Now, with that opening
12 statement --

13 MR. COWGER: Before you go into any more detail, let
14 me ask you a question, if I could. You had a tonnage item
15 that was established for patching by supplemental
16 agreement.

17 MR. DARNELL: Correct.

18 MR. COWGER: Did I hear you say that there was a
19 period of time in there when some of that patching material
20 was actually used to fill back areas where base or subgrade
21 had been removed?

22 MR. DARNELL: There was times when we would dig out
23 and put some asphalt in a hole. There was two locations
24 where we dug those holes out three times and put asphalt or
25 milled material in them because of continuous failing and

1 drainage problems. There was some holes where asphalt went
2 in the holes. And there was lots of locations.

3 If the pictures, if you look at the pictures, the
4 long one where we built, we dug it out and it was about
5 nine feet wide, whatever depth, we brought the milled
6 material back up, and that hole alone, I estimate 250 tons,
7 and you leave it a couple inches down, you put your
8 patching S mix on top of that before you open it up to
9 traffic. And we worked some 13-, 16-, 15-, 16-hour days
10 doing this kind of thing. And sometimes the inspectors
11 weren't even there because they had a shortage of
12 manpower.

13 On the weekly diaries, the summary of weekly reports
14 prepared by the project engineer, on April 3rd and April
15 10th, it clearly states that because of the overtime
16 restrictions, they just did not have the manpower to keep
17 up with all the work that we were doing. And I think it's
18 important, because some of the work in these locations is
19 not even shown in the daily diaries.

20 Now, as kind of continuing on, we talked about the
21 excavation, the disposal, removal of existing pavement that
22 was there. We weren't paid for any of that. Now, the
23 plant delays are directly related. When we had to go and
24 we had to sit around with the plant to run ten tons or 20
25 tons, we had delays at the plants. And that's expensive.

1 And that's listed under item C.

2 D, E, and F are essentially self-explanatory, except
3 I want to talk about the ARMI layer that we started off on
4 this job. And I think this sort of set the tone for the
5 entire project as far as we were concerned. When you take
6 a whipping, you don't talk back very much. This job had
7 specified a crack relief layer. The department asked for a
8 price to put our asphalt rubber membrane interlayer on the
9 project well prior to us beginning the work. We gave them
10 a price; they rejected it.

11 The only person available to do that, the only people
12 available to do that ARMI treatment was Anderson Columbia
13 Company. We had a little cut. They cut a little bit.
14 I went back to the state a second time with a price. They
15 rejected it and told me don't bother coming back; we're not
16 going to do it. So we proceeded with our material and we
17 had stockpiled the correct number, what, 67 stone for the
18 crack relief layer. We had material. Everything is ready
19 to go.

20 And two days before we were getting ready to start
21 that work, and correct me if I'm wrong, Steve, but didn't
22 you go onto the job and tell our people we were going to do
23 the ARMI layer?

24 MR. BENAK: I can't --

25 MR. DARNELL: Well, we were directed that we were

1 going to do it, so I carried a letter up to Crestview
2 saying, well, you know, we're going to suffer all these
3 enormous costs if we have to change this process now. And
4 meanwhile the department had actually contacted the sub to
5 see when he could start work and was more or less doing our
6 business for us.

7 Edward Prescott called me, he was district operations
8 director at the time, and said we are going to do this.
9 I said, well, it's always been the department's
10 responsibility to decide what they want to do, but I'm
11 going to have some delays here. Well, anyway, I didn't
12 have a whole lot of choice. I did it.

13 I could not get a subcontract approved, because I did
14 not have a supplemental agreement. I could not submit a
15 request for subcontract -- you have to submit a request to
16 issue a subcontract. So I had to, I couldn't do a
17 subcontract because I didn't have a supplemental agreement
18 and couldn't get a request to sublet approved. So I'm
19 exposed to a contractor I'd never had any working
20 relationship with, and he absolutely killed us on his lack
21 of production.

22 Yes, we signed a supplemental agreement waiving all
23 claims, but we had to perform this work without a
24 supplement, directed by the DOT, and it just kind of threw
25 the rule book out the window. And obviously I wasn't happy

1 about it, because we suffered tremendous losses due to
2 that. And that sort of set the tone, well, we're going to
3 take some of the rules and throw them out the window.

4 But the bottom line is we provided hundreds of
5 thousands of dollars worth of work. The department saved,
6 the public and the department saved maybe \$100,000 or more
7 in not using asphalt in those holes. We haven't been paid
8 for the excavation. We haven't been paid for any of the
9 work. And for the department to claim that we included
10 that in our patching price is ludicrous.

11 All I want is paid a fair price for the work we did
12 and the delays we suffered. And that's what the tickets
13 that were printed went to pay for, to a small degree.

14 MR. COWGER: And this whole part three totals out to
15 somewhere around \$100,000?

16 MR. DARNELL: Well, part three totals \$115,889.

17 MR. COWGER: Oh, there it is. I'm sorry.

18 MR. DARNELL: That's the one we had wrong twice.

19 MR. COWGER: I didn't see it. I don't know why.

20 Okay. Gentlemen, how about a two-minute break? I'll be
21 right back.

22 (Recess)

23 MR. DARNELL: I'm ready to close. Are they wanting
24 to -- what do you want us to do?

25 MR. COWGER: What about part three, now? Are you

1 finished and ready for DOT to rebut or do you want to --

2 MR. DARNELL: Other than, you know, this -- do I get
3 a last, do I get something after they rebut?

4 MR. COWGER: We're going to let you come back and
5 make a closing statement, as your attorney has advised you.

6 MR. CUMMINGS: You haven't commended me yet, Gene.
7 I've been waiting, holding my tongue.

8 MR. COWGER: Let the record show that we appreciate
9 Mr. Cummings' silence.

10 MR. DARNELL: Can we put him on there? Can we put
11 him on that claim list, the amount of money? I think the
12 main thing, finishing up that part, is that there is
13 absolutely no way that the patching price could ever, was
14 ever intended to include all of the work that we've
15 demonstrated had to be done. And it was never involved in
16 the scope of work of the patching which was intended to
17 patch behind the milling machine.

18 MR. DEYO: I have a question. You made a statement
19 about changing from the cracked relief to the ARMI layer.

20 MR. DARNELL: Correct.

21 MR. DEYO: You said work was done prior to or before
22 you had all the documents finalized on that?

23 MR. DARNELL: Well, all work was completed before we
24 had any documents signed of any kind. I mean, it had to be
25 done right then. The road was falling apart.

1 MR. DEYO: Okay.

2 MR. DARNELL: And the department chose not to put an
3 overbuild layer on the northernmost two and a half miles
4 which was requested by the project engineer.

5 MR. DEYO: You stated that.

6 MR. DARNELL: Yes, we had to do it without any
7 request to sublet approval, without any documentations, any
8 subcontract. And we had no way to protect ourselves from
9 our costs due to delays of that subcontractor. They tried
10 the best they could, but they had all kinds of problems
11 shooting this rubber. It was not exactly a finite process
12 at the time. And that's not the department's fault. I'm
13 just saying that we couldn't control it, because we weren't
14 allowed to go take the time to go through the process of
15 getting all the documentation processed.

16 MR. DEYO: Okay.

17 MR. COWGER: I think we're ready now for DOT to go
18 ahead and begin their statements in regard to part three.

19 MR. BENAK: Okay. This is, I guess, some of the same
20 issues as number one where we don't know just exactly how
21 much work was done out there. We know the work was done.
22 There were some suspicious tickets floating around that we
23 viewed and reduced the supplemental agreement by. And so
24 that's our problem is that we don't know just exactly what
25 to pay for.

1 Another point that needs to be made to the board is
2 that these supplemental agreements were signed after the
3 work was completed. He had the opportunity to figure just
4 exactly what he was talking about, all the issues and
5 damages that had occurred, and he could have refused to
6 sign the document and we could have renegotiated. But the
7 work was done, the documents were signed, both for the
8 patching and for the ARMI.

9 So, you know, we have a contractual document here
10 with note number four on there which indicates that
11 everything is included in this price. And that's the
12 exposure that the department has. It's not any of this
13 overhead. We've already addressed all the issues and
14 they're agreed to. And that's with supplemental agreement
15 number six which was the RAP, had the RAP supplemental
16 agreement and the ARMI supplemental agreement.

17 MR. COWGER: And the patching supplemental agreement
18 also?

19 MR. BENAK: And the patching.

20 MR. COWGER: So you've got three supplemental
21 agreements you're saying that were executed by the
22 contractor after the work that's covered by part three was
23 completed; is that your statement?

24 MR. BENAK: (Nodding head affirmatively)

25 MR. SWIATEK: (Nodding head affirmatively) There was

1 some patching done after the supplemental agreement was
2 signed, but it was totally separate and it was all paid
3 for. So there was nothing cut after the supplemental
4 agreement was signed, because it was measured properly and
5 patched out and all that good stuff.

6 MR. COWGER: Was that after --

7 MR. SWIATEK: Anything that was before the
8 supplemental agreement was signed.

9 MR. COWGER: Looking at DOT's rebuttal exhibit under
10 rebuttal three attachment, the second page kind of sets out
11 how the contractor developed the dollar amounts that he's
12 got in parts A, B and C. Just so the record can be
13 straight on this, it appears like that not quite all but
14 virtually all of this work was done prior to April the
15 23rd. There's a slight amount of work that was done after
16 that.

17 MR. SWIATEK: Yes.

18 MR. BENAK: Yes.

19 MR. COWGER: But most of it was done prior to that
20 time, just to get it in the record.

21 MR. DARNELL: I would like to take exception to what
22 Stan says. He says the supplemental agreement for patching
23 was done after the work and then he said, well, no, that
24 wasn't the case. No, indeed, it was not the case because
25 on April 23rd we were told, we had been told to stop work,

1 patching on the 20th. Well, the 23rd is when the highway
2 patrol called the project engineer at home and told him we
3 had to come down there and fix the road because it was
4 caving in.

5 Now, when you get into September -- now, during April
6 we had put the ARMI layer on, and we had put the first
7 layer of structural course on that road, okay. Now, in
8 September, there's one, two, three, four, five, six, seven,
9 there's seven times in September, October and December
10 where we had to go dig out the road, take the structural
11 course off, take the ARMI layer off, take the failed base
12 material out, excavate and put asphalt or milled material
13 in and bring it back and put it back to grade. Now,
14 I don't think it's fair to say that we had signed a
15 supplemental agreement after we had done all the work.
16 That's simply not true.

17 MR. COWGER: But you're referring only to the work
18 that was done in September and October now, right?

19 MR. DARNELL: I'm saying that this work was done
20 after the structural courses had already been put on. And
21 this is not patching behind a milling machine nor was most
22 of this up here patching behind a milling machine. It's
23 taking out the old road.

24 And the supplemental does not include that scope of
25 work which the department takes the position that it does

1 include all of that work. And that's totally ludicrous.
2 Obviously, again, we did all of this work, put our material
3 in the hole, and they didn't have to pay for asphalt going
4 in the hole. So we haven't been paid one way and the state
5 saved the other way. So I just don't understand the
6 logic of why they say we signed a supplemental agreement
7 after we had done the work when in fact that simply was not
8 true.

9 MR. BENAK: We paid premium price for that asphalt.
10 I mean, was it \$115 a ton? One hundred fifteen a ton and
11 that's not the normal price of asphalt. We realize that
12 there are other things that go into that that is involved
13 with patching, and that's why we paid a premium price for
14 that asphalt.

15 MR. SWIATEK: In their letter dated March 15th, '94,
16 they quote \$115 a ton, says it was added by supplemental
17 agreement to another state project on state road 83 north
18 of DeFuniak which required the same type of work. There's
19 no claim filed on that job. It's a different project
20 engineer.

21 And then on a subsequent job to this, on state road
22 85, which is in the same proximity to another one of their
23 plants, we offered them \$115 a ton for a patching price.
24 They wouldn't take it. We tracked their man-hours and
25 their equipment and paid on a claim that was only \$95 a

1 ton, and they should have taken the 115 and run. But they
2 didn't.

3 And it is representative of that type work. And that
4 type of work includes saw-cutting pavement, digging out bad
5 material, and replacing it with asphalt.

6 MR. CUMMINGS: Gene, let me say something. I don't
7 want to argue, so I'm not going to make an argument, so I'm
8 not going to be a lawyer. We anticipated this argument. And
9 you tell me, we brought A. J. Davis over here, this person
10 that we keep hearing is under investigation, who's willing
11 to go under oath right here at our call. We brought him
12 over here to tell you that the supplemental agreement for
13 patching was strictly for patching, the kind of explanation
14 that Cloyce has given you, and that the other type of work,
15 which is all the more difficult, deep undercutting,
16 extricating unsuitable material was not even in
17 contemplation at the time that the patching supplemental
18 agreement was entered into, totally different things.

19 He's here. Do you want us to bring him over, put him
20 under oath, clear it up, so we won't be just listening to
21 argument about innuendo, speculation, and suppositions?
22 There would be the man. He's willing to go under oath and
23 tell you that. You tell me. I'll go get him.

24 MR. DARNELL: Well, I --

25 MR. CUMMINGS: He's here.

1 MR. DARNELL: I think it's just totally absurd for
2 anybody to think that the patching, which again was
3 described and requested for the sole purpose of patching
4 behind the milling operation, when we exposed the base,
5 trim it out, clean it up, put whatever they wanted on it.
6 And you're talking about areas that may -- I have a picture
7 somewhere that's not as big as a normal desk, and even then
8 it wasn't behind the milling operation. That's the kind of
9 thing that we were getting \$115 a ton for and it's one
10 square yard. It might have taken 100 pounds.

11 MR. COWGER: You can see that good base material
12 there (examining photograph).

13 MR. DEYO: That's on a milled surface there
14 (examining photograph)?

15 MR. DARNELL: That's already been leveled, but there
16 was a spot and we had to take it out. And that's even
17 beyond, after the milling. The department has never argued
18 that this really was intended to patch behind the milling.

19 MR. COWGER: Let's pull back just a minute, though,
20 and go over the argument that the department made. The
21 department made an argument that when the contractor signed
22 that supplemental agreement for the patching, let's pull
23 that one up front, on May the 25th of 1994, that he was
24 aware of what was happening in regard to these repairs to
25 the base and subgrade, and he should have made it an issue

1 at that point.

2 Now, one thing I note in going through this is that
3 the price that was quoted by the contractor of \$115 a ton
4 was quoted by a letter that's in here dated March the 15th
5 which is before any of the, I don't like to call it
6 patching, before any of the base and subgrade repair work
7 was done, because this tabulation here on the second page
8 of the DOT's rebuttal three attachment shows the dates on
9 which the contractor incurred the alleged costs. And all
10 of those are subsequent to March the 15th, 1994. Am
11 I correct in saying that?

12 MR. DARNELL: Yes.

13 MR. SWIATEK: Yes.

14 MR. BENAK: He also indicates the scope of the work
15 in there.

16 MR. COWGER: Right.

17 MR. BENAK: The scope of the work of this item is
18 similar to the same item which was added by supplemental
19 agreement to another project on 83 north of DeFuniak.

20 MR. COWGER: But on that other project, was it
21 strictly patching?

22 MR. SWIATEK: Yes.

23 MR. COWGER: Or did you get into this same of kind
24 thing on that other project where you had to undercut the
25 base and all?

1 MR. BENAK: Yes.

2 MR. SWIATEK: It's the same.

3 MR. DARNELL: It was patching.

4 MR. SWIATEK: State road 83 is the same road.

5 MR. BENAK: Just north of town.

6 MR. SWIATEK: Yeah. And we did it on a subsequent
7 job to this on state road 85.

8 MR. DARNELL: Do you have a copy of that proposal, of
9 that scope?

10 MR. SWIATEK: Typically, paving, the patching behind
11 the milling machine is typically paid at the regular
12 structural price for asphalt. When you just walk out there
13 and dump it in the hole with a shovel --

14 MR. DARNELL: A wheelbarrow at a time.

15 MR. SWIATEK: And that's a structural -- that's how
16 we pay for patching on the milling machine. This
17 additional work is what causes the 115, the three and four
18 times the regular structural price.

19 MR. COWGER: That was not the question. On those
20 other jobs, were you paid under a supplemental agreement at
21 a higher price for patching?

22 MR. SWIATEK: The state road 83 project was and the
23 other one was paid on a claim, because they wouldn't take
24 the \$115 after.

25 MR. COWGER: On those two jobs, though, did you get

1 into having to undercut the base and the subgrade?

2 MR. SWIATEK: It's not patching unless you do. It's
3 structural asphalt.

4 MR. DARNELL: Behind the milling machine.

5 MR. SWIATEK: Unless you dig it up, it's not
6 patching; it's just structural asphalt repair.

7 MR. COWGER: But on those jobs did you have claims
8 come up for costing over and above the \$95 or whatever it
9 was?

10 MR. SWIATEK: It came up to \$95 a ton when we tracked
11 their actual costs. It didn't even get up to \$115 a ton.
12 And we did this type of work.

13 MR. DARNELL: The cost was 95. You add five percent
14 overhead, 15 percent profit, you get \$115. There's nothing
15 confusing about that.

16 MR. COWGER: That's not what I set out to discuss,
17 though. Okay. I think see what the answer is.

18 MR. CUMMINGS: I understand your question, but
19 I don't know the answer.

20 MR. COWGER: Well, I'm not sure I got an answer.

21 MR. DARNELL: The department asked for a price
22 because they anticipated hitting the base during the
23 milling operation. And they did hit the base during the
24 milling operation. But we had no way of knowing that we're
25 going to have this sort of excavation involved in this.

1 That price was priced on March the 15th. And that was to
2 involve patching behind the milling operation and a normal
3 preparation of that patch area.

4 It was not intended to be into the subsoil
5 excavation, for which there was no pay item. We should
6 have been paid to remove existing pavement pay item for
7 taking the old asphalt off and disposing of it. Nobody has
8 bothered explaining how they want to pay us for the RAP,
9 our RAP material that went into these hole, but we're
10 supposed to anticipate that we're going to give them our
11 RAP material to fill in these holes just like we're
12 supposed to anticipate the excavation and disposal of all
13 the bad material in that \$115 a ton for patching. That's
14 the most insane thing I have ever heard in my life.

15 MR. COWGER: Okay. Let's not go any deeper into
16 that. DOT, have you completed your rebuttal or not? I'm a
17 little confused.

18 MR. BENAK: We're talking about section three?

19 MR. ROEBUCK: Yes.

20 MR. COWGER: Section three.

21 MR. BENAK: Section three. I think we just got
22 started in, I think, the first portion talking about the
23 supplemental agreements. Our contention is that you have a
24 full and final agreement, you know, in hand. And really,
25 for the issues that he brought up on the patching and the

1 ARMI -- what were the other issues that were in there?
2 This is the revised summary? Okay.

3 MR. SWIATEK: We're saying that 3A is included in the
4 \$115 a ton. We're saying that section 3B, which is the RAP
5 to fill the holes, would be included in the \$115 a ton. Or
6 3C would also be included in \$115 a ton. 3D, I believe he
7 guess into the ARMI.

8 MR. CUMMINGS: Gene, you're going to have to get --
9 they didn't do this negotiation. They didn't do the
10 supplemental agreement. The only person who can tell you
11 what was included is the guy who did it. I offered to
12 bring him over unless you think you don't need him.

13 MR. COWGER: I don't think we do.

14 MR. CUMMINGS: The rest of it is just, I guess I'm
15 too much of a lawyer, because that would not be
16 admissible. It's just speculation.

17 MR. DARNELL: To make sure I understand, Stan, did
18 you say, did I hear the department say that the RAP
19 material used to fill the holes was supposed to be included
20 in that \$115 a ton?

21 MR. SWIATEK: Well, we shouldn't have been putting
22 RAP in there anyway. It's not approved road base
23 material. But yeah.

24 MR. DARNELL: It wasn't included so why are we
25 supposed to presume that our excavation and disposal and

1 all the other work was supposed to be included? We didn't
2 anticipate RAP, giving you 400 or 500 tons of RAP.

3 (Discussion off the record)

4 MR. COWGER: Gentlemen, I'm going to ask that we
5 direct our attention for a moment to part 3D of the claim,
6 and then we're going to leave this pretty quickly. In part
7 3D, in addition to inefficiency of the paving crew during
8 the time the subgrade repairs and patching were being done,
9 there's also a mention of that that also includes some loss
10 of efficiency. I think the contractor called it limitation
11 of rate of placing of Type S due to the ARMI layer being
12 added.

13 Now, I think the contractor has already talked about
14 it, because he talked about the subcontractor having to be
15 brought in rather suddenly. There were problems in getting
16 the ARMI placed, which, as I understand it, in 1994 was a
17 relatively new process for crack relief or whatever other
18 purpose it might have been put on there.

19 So the contractor is claiming at that point that part
20 of that \$28,198 item is due to a limitation on the rate at
21 which he could place the structural course due to being
22 delayed by this ARMI layer. Is that a pretty good
23 statement? Because I want them to answer is what I want.

24 MR. DARNELL: Yes. Some of the inefficiency that we
25 talk about was due to that because we could not control

1 that because we couldn't even give a subcontract.

2 MR. COWGER: We understand. We've heard all of
3 that. Let's let DOT respond to that because I think we
4 need something in the record to cover that.

5 MR. BENAK: We've got a supplemental agreement number
6 four, I think we've already answered this, which is
7 executed after the work was completed with, you know, full
8 and final settlement language contained in the document.
9 You know, for the ARMI, that inefficiency is taken care of
10 in this document. It's a supplemental agreement for
11 \$278,000, a little over that. As far as we're concerned,
12 we've paid him for the inefficiencies that have occurred.

13 MR. DARNELL: I would offer that it's kind of strange
14 they want to unring the bell on the patching supplemental
15 agreement and say we signed it, but it's not a final
16 settlement and we're not going to pay it, but on this one,
17 they say, well, it's final, you've signed it, and you've
18 got to live with it. I mean, we're trying to apply two
19 different standards here to one issue regarding a
20 supplemental agreement being a final and complete
21 settlement.

22 But I would tell you that if the department would go
23 back and look at the letter we sent them, it would include,
24 in addition, that we want to be paid for all our delays in
25 addition to the unit prices that we gave them for the ARMI

1 layer. And I don't have a copy of that, but that was very
2 clearly spelled out, that in addition to that we want
3 compensation.

4 MR. COWGER: I understand that. I think what
5 Mr. Darnell just replied, just referred to was an April
6 11th, 1994, letter that's in DOT's package under the tab
7 supplemental agreement -- I mean rebuttal three
8 attachment. That's ten or 15 pages back in there. I don't
9 think we need to discuss it anymore. I just wanted to get
10 it into the record. I think that's what he was referring
11 to.

12 MR. SWIATEK: Which one again is that, Mr. Cowger?

13 MR. COWGER: Page 5 of 7. Attachment three, page 5
14 of 7. We have page numbers. We might as well use them.

15 MR. DARNELL: Yeah, it helps.

16 MR. SWIATEK: Those delays are different delays than
17 what he seems to be asking for, though. Those delays are
18 before the ARMI layer is put down, not subsequent to it
19 being shot by a subcontractor. It's a different delay that
20 he's addressing in that letter altogether.

21 And also I'd like to ask Mr. Cowger if you could ask
22 Mr. Darnell to tell us if he recouped any of this cost from
23 Anderson Columbia, because he discussed with me one time
24 backcharging Anderson Columbia for some of his delays.
25 I didn't see that in this presentation there.

1 MR. COWGER: You could ask him that question.

2 MR. DARNELL: I really don't know whether we did or
3 not as far as directly for these delays. This is part of
4 the problem. When we got ready to do this, we had to crack
5 stone on the job for our work. He had to bring in a
6 different stone. We wound up, he took more of our stone
7 than he brought for the job, and he wound up reducing the
8 price to some extent for the reducing of that quantity, the
9 stone that he took away from us. So as far as collecting
10 for any delays he caused us, I'm not sure that we did.

11 MR. SWIATEK: Okay.

12 MR. DARNELL: I'd like to read this to you in that
13 letter, Gene, referred to of April 11th. In addition to
14 the unit prices, we're to be fully compensated for all
15 costs due to this change in scope and nature of work
16 including but not limited to the idle time of the plant,
17 components, equipment, labor and labor burden.

18 I mean, I don't think it can be any more clear that
19 we were putting the department on notice that we wanted to
20 try to get claim, we wanted to try to get paid for these
21 delays that we wound up incurring but had no way to protect
22 ourselves from. And that may be a small part of the big
23 picture anyway, but it's part of it.

24 MR. SWIATEK: Further in the paragraph it say these
25 costs will be begin accruing on April 13th and continue

1 until the added items has begun. Once they begin, those
2 delay costs aren't included in this letter. That's what
3 I said previously. He's talking about delay costs as the
4 ARMI was being placed. They're different delays.

5 MR. DARNELL: That's what I'm talking about. The
6 delays were while it was being placed, and you're saying it
7 has to be before it's being placed.

8 MR. SWIATEK: You're talking about the time it took,
9 because we were making some quick decisions there and the
10 time it took, you know, you were ready to pave and put down
11 the original --

12 MR. DARNELL: I was ready to do my job and we got
13 delayed.

14 MR. SWIATEK: There was a delay in there and that's
15 what we're talking about in the letter, not subsequent
16 delays during the operations.

17 MR. COWGER: I don't think we need to argue that
18 point any further. DOT, what else in regard to part
19 three? I know you've got to get on down to a couple other
20 items, but is there anything else you want to talk about in
21 part three? I think we've heard pretty good arguments on
22 both sides, frankly.

23 Why don't you say we leave part three, then.
24 I assume we need to go down now and look, direct this thing
25 just a little bit so we can get through. The only thing

1 remaining that I would think DOT might want to address is
2 the part about the job overhead to the tune of \$18,000 plus
3 and the extended office overhead under the Eichleay formula
4 of \$36,940.

5 MR. DARNELL: Can I address that first, Gene?

6 MR. COWGER: Sure.

7 MR. DARNELL: To explain the document itself. What
8 we've done here, we've said, okay, for the job overhead,
9 only on items three and four, and this isn't clear, but
10 that's only on items three and four. If you add the three
11 and four, and it's supposed to be items three and four,
12 that's the two percent job overhead and 13 percent profit
13 for those two items. And then you get into the extended
14 home office overhead.

15 MR. COWGER: I think we understand that. Why don't
16 we let DOT, because the contractor has submitted in this
17 Exhibit Number 2 his revised summary of claim. He
18 submitted dollar amounts and he submitted a backup document
19 as to how the extended home office overhead was calculated
20 in accordance with the Eichleay formula. So I think it
21 would be appropriate to let DOT address both the job
22 overhead and the extended home office overhead if they
23 desire.

24 MR. BENAK: Okay. Let's see. The home office
25 overhead, we don't recognize the Eichleay formula. To

1 determine that, we'd have to do an audit and figure out
2 what projects they had ongoing at the time and figure that
3 based on -- this is based on numbers that we contend we've
4 already paid for everything on supplemental agreements full
5 and finally with all overheads included. So we already
6 have documents that limit our exposure to the amount of the
7 money.

8 Now, what has happened is we haven't paid those
9 because of ongoing investigations. And that's where we're
10 at. We don't know how much of these documents to pay. And
11 that's on the RAP. We've paid for the ARMI, right?

12 MR. SWIATEK: Uh-huh.

13 MR. BENAK: And the patching, those are the only two
14 in question right now, two supplemental agreements. So
15 these numbers are based on, I guess, amounts that have been
16 fluffed up due to extraneous reasons. And we don't know
17 just exactly how to determine that amount. So that's why,
18 you know, when I first had asked you all to not rule on
19 these issues due to the uncertainty that we have.

20 MR. COWGER: Okay. I think we fully understand what
21 you're saying, Steve. Do you have anything further to say
22 on those two items?

23 MR. SWIATEK: Well, again, the supplemental
24 agreements are signed and, you know, the delay damages and
25 everything, that's included on paragraph 4. It wouldn't

1 substantiate either of those to be charged. And they were
2 both signed after the fact with full knowledge of what was
3 done on the project and there was no exception taken.

4 MR. COWGER: In essence, what you're saying is that
5 if the board should accept your argument that there's no
6 additional payment due under parts three and four, then
7 both the job overhead and the extended overhead, extended
8 home office overhead fall out.

9 MR. SWIATEK: (Nodding head affirmatively)

10 MR. BENAK: Yes.

11 MR. COWGER: I'm just restating what he said. That's
12 all I'm doing.

13 MR. DARNELL: Regarding the extended office overhead
14 a minute, Steve said they don't accept the Eichleay
15 formula. I mean, that's pretty much standard in federal
16 contracting, although I realize this is not directly a
17 federal contract.

18 There is a proposal out by the DOT, which I do not
19 have with me, which, unless I'm mistaken, it takes the
20 mobilization amount, or some amount, I think it's
21 mobilization, or there's an amount that's divided by the
22 number of days and then there's seven percent of that and
23 it comes up with so much per day. And I don't have a way
24 of calculating that.

25 But the Eichleay formula is really accepted in most

1 courts of law that we've ever played in. And Alan, of
2 course, is more familiar. But I want you to understand
3 that in this process we have deducted, and this Eichleay
4 formula document is a little complicated, but we have
5 deducted that portion of overhead out of the total for
6 those that we have signed supplemental agreements on. And
7 that's explained.

8 And this is a soundly-reasoned and calculated
9 document based on our records as far as our revenues and
10 our overheads. And this is fair and reasonable for a 200
11 plus, well, almost 300-day overrun after you subtract out
12 the supplemental agreement portions.

13 MR. SWIATEK: Did you take weather days into that?

14 MR. DARNELL: No. There was 473 contract days
15 charged, okay? Now, that excludes your weather and
16 holidays. That's the charge to days. There were 210
17 contract days in the contract. So you have 263 days there
18 of which that is part of this. But really what we've done
19 is 204 less that percentage of the supplemental agreements
20 that we allocated to seven percent for overhead and
21 subtracted. Calculating \$88,000, we subtracted \$51,000 to
22 get to the \$36,000. And that extended home office overhead
23 does not directly relate to any other issues. It has to do
24 with how long this job drug out due to these delays and the
25 related costs. Are you ready for me to finish up?

1 MR. COWGER: Stan, you made a comment that did not
2 get recorded because she couldn't hear you just a minute
3 ago.

4 MR. SWIATEK: I just asked if the number of days of
5 overrun included weather days. Weather days are not
6 compensable.

7 MR. DARNELL: No. The total calendar days from start
8 to finish, according to the information I have, is 522
9 calendar days. There were 473 contract days when the job
10 was accepted.

11 MR. BENAK: We didn't charge 263 days of liquidated
12 damages. We had time extensions and supplemental agreement
13 time added to the contract. So on each one of those we
14 would have areas where the contractor would agree to sign
15 off and not file a claim based on that. I didn't see any
16 documentation --

17 MR. DARNELL: Well, I've just explained, Steve --

18 MR. BENAK: We weren't aware of this or we could have
19 done some work on this.

20 MR. DARNELL: I understand.

21 MR. BENAK: And another thing, it's a different claim
22 than what was submitted at the beginning of arbitration.

23 MR. COWGER: To deal with that issue right now, DOT,
24 you were offered the opportunity at the beginning, and,
25 again, we'll repeat it, if you want to make a written

1 submittal to the department on the extended home office
2 overhead claim which you have never seen before, you need
3 to make that to the board in writing with a copy to the
4 contractor by no later than June the 10th.

5 MR. SWIATEK: Is this the only backup for that?

6 MR. COWGER: It's the only thing we've received.

7 MR. SWIATEK: That's it? Is that it, is this paper?

8 MR. DARNELL: That's all I have with me.

9 MR. SWIATEK: One page backup?

10 MR. COWGER: You all just go ahead and make whatever
11 comments you want to make on that.

12 MR. SWIATEK: I just want to know if there was more,
13 because that's a lot of money for a one-page paper.

14 MR. COWGER: The answer is no.

15 MR. SWIATEK: Okay. Thank you.

16 MR. COWGER: I think we're very close to the end.

17 Mr. Darnell wanted to make a closing statement. And, of
18 course, we'll offer DOT the opportunity to do that. But
19 we've heard a lot of testimony today. Try to keep them
20 brief if you can so we can get done.

21 MR. DARNELL: Basically, I think we need to
22 understand that this was a partnering project, and the
23 people on the job were charged with trying to resolve the
24 problems. The routes they chose, the methods they used may
25 or may not have been strictly in accordance with what we

1 might call normal procedure. There were horrible plans.
2 They were differing site conditions. The department, for
3 whatever reason, had not done a very good job in evaluating
4 existing conditions either in its materials or the
5 thickness of the asphalt.

6 We encountered numerous delays. The department, on
7 the other hand, and the public, got what they needed with
8 tremendous dollar savings by substituting material for
9 which we haven't been paid and work we haven't been paid
10 for. This was totally unforeseen work. It was not
11 included in any supplemental agreements. The department
12 has sat here and based on alleged allegations and
13 speculations and opinions and interpretations. I haven't
14 seen many facts. We've given you affidavits. We've given
15 you facts. We've given you pictures. We've given you
16 information to make a sound judgment and a reasonable
17 decision.

18 We were, from minute one, on this job when we were
19 directed to do the ARMI business, we were part of the
20 solution, not part of the problem. And we're not perfect
21 by any means, but you could not find anybody that
22 cooperated more fully to try to get a job quickly done and
23 safely done. And we still took forever. And those are
24 conditions that the department did not create. At least
25 this administration of the department did not create the

1 subsoil conditions that we had to deal with. And they did
2 not know. I'm sure that Steve and Stan did not know of
3 those conditions, but they existed and we had to solve them
4 and we haven't been paid.

5 And we want a fair payment. We want a fair interest,
6 and we want to get our fair extended overhead. That's all
7 we're looking for. And that hasn't been the case.

8 As Stan said to me the other day, I hope we're still
9 friends when this is over and I do hope. And this has been
10 an exacerbating situation for all of us, but that's where
11 we are. And that's all I have.

12 MR. COWGER: DOT?

13 MR. BENAK: One thing I want to say is, you know, as
14 a partnering project, I agree with that. There are
15 legitimate ways to pay for things. We had contingency
16 supplemental agreements we would have paid from, work
17 orders could have been entered into, or supplemental
18 agreements could have been entered into legitimately.

19 There's a lot of things that cloud these issues that
20 just puts us in a quandary on what to do. And that is our
21 whole problem. We know there was some work done. It's
22 clouded by these other issues that overshadow everything in
23 this job. And, you know, that's where we're coming from.

24 We want to pay for work that is done. We feel that
25 we have entered into supplemental agreements that clearly

1 pay for that work. I hate it for you because you all may
2 have to determine how much. We haven't been able to do
3 that. And we've studied it. So, really, I am done unless
4 Stan or Dennis want to add anything to it.

5 MR. SWIATEK: I agree with everything Steve said.
6 The point I wanted to make if I had a chance to speak was
7 the fact that we did have legitimate ways to pay for this.
8 There are affidavits floating around where there is
9 admittance of fraudulent tickets. We can't dismiss some of
10 the backup to section two in regards to sections one and
11 three of the arbitration just because it was taken out of
12 this. I think you need to look at it because they are
13 related and they're intimate to each other.

14 And, again, because of an ongoing investigation, this
15 investigation has been going on for a couple years. So you
16 have to put yourselves in our position which is what do we
17 do. We don't want to make the situation worse. So we did
18 what sound logical reasoning would say based on the things
19 that were presented to us through the investigation teams
20 and just review of standard normal operating procedures.

21 There were definitely things done outside of the
22 realms of normal operating procedures by department and
23 contractor people. And I wouldn't want to be in anybody's
24 shoes to decide which is right and which is wrong. So good
25 luck.

1 MR. DEYO: Appreciate your concern.

2 MR. COWGER: Mr. Roebuck, do you have any further
3 questions?

4 MR. ROEBUCK: No, I think not.

5 MR. COWGER: Mr. Deyo?

6 MR. DEYO: No, sir.

7 MR. COWGER: This hearing is hereby closed. The
8 board will meet to deliberate on this claim within the next
9 six weeks. And you'll have our final order shortly
10 thereafter.

11 (Whereupon, the hearing was concluded at 12:36 p.m.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF LEON)

I, MINDY MARTIN, Registered Professional Reporter, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

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 attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 6th day of June, 1997.


Notary Public, State of Florida



Mindy Martin
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December 3, 2000
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