

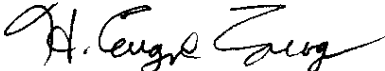
STATE ARBITRATION BOARD

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

SC015  
12-5-07  
MBW

+++ NOTICE +++

In the case of Gator Asphalt Company versus the Florida Department of Transportation on Project No. 17040-3518 in Sarasota County, Florida, both parties are advised that State Arbitration Board Order No. 2-92 has been properly filed on August 18, 1992.

  
H. Eugene Cowger, PE  
Chairman & Clerk, SAB

S.A.B. CLERK

AUG 18 1992

FILED

HEC/sfc

Copies of Order & Transcript to:

J.B. Lairscey, Jr., Director of Construction/FDOT  
Dan Mathews, Project Manager/Gator Asphalt Company

STATE ARBITRATION BOARD

ORDER NO. 2-92

RE: Request for Arbitration by  
Gator Asphalt Company on  
Job No. 17040-3518 in  
Sarasota County

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

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

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 1:30 p.m., on Thursday, June 4, 1992.

The Board Members, having fully considered the evidence presented at the hearing and supplemental information submitted later, now enter their order No. 2-92 in this cause.

ORDER

Fred Derr and Company, a subcontractor authorized to pursue a claim on behalf of the prime contractor, presented a claim for \$60,376.60 in additional compensation for the items Subsoil Excavation and Embankment. The Subcontractor contends that an error was made in the Department of Transportation survey from which the pay quantity for these items was determined.

The Subcontractor presented the following information in support of his claim:

1. A field survey to determine the depth to which subsoil was excavated on this project was accomplished jointly by Ken Yoder of our firm and O. A. Whitesel of the Department of Transportation (DOT). It was our understanding at the time that this survey would be used to calculate the pay quantities for Subsoil Excavation and Embankment. To the best of our knowledge this was the only survey made to determine the depth of subsoil (muck) excavated.
2. The difference between the quantity of Subsoil Excavation determined using the notes from the joint survey of muck

excavation and the quantity of Subsoil Excavation determined using the DOT notes covering of muck excavation was a normal variation except for the area right of Station 129+00 to Station 134+60.

3. Calculations based on the notes from the joint survey indicate that the pay quantity of Subsoil Excavation in the area of the project between Station 112+90 and Station 134+60 is 8,159 Cubic Yards greater than the pay quantity calculated by DOT from its field notes as contained in DOT Book Nos. 008414 and 008501. This difference also applies to the pay quantity for Embankment.

4. We contend that there is a substantial error in the DOT field notes right of Station 129+00 to Station 134+60. Within these limits, there is a consistent difference of 1.5' +/- between the elevations shown in the DOT notes and the elevations shown in the joint survey notes.

5. The divergence between our field notes and the DOT field notes begins at about the point where we shut down the job for six weeks because of uncertainty as to whether DOT would pay for overruns from plan quantities.

6. We contend from our knowledge of the field conditions that the muck increased in depth on the right side of the project eastward from Station 129+00 instead of decreasing in depth as shown in the DOT notes. The area of the project where the notes from the joint survey and the DOT survey vary substantially is covered by a single level setup in the DOT notes.

7. The DOT survey notes indicate that the muck excavation was surveyed in 300' to 600' sections. Since the muck was excavated at a rate of approximately 100' per day and an excavated area was generally backfilled the next day, we question how the DOT survey was conducted in that way.

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

1. We accurately calculated the pay quantities for Subsoil Excavation and Embankment from official DOT survey records.

These notes were obtained using proper surveying methods.

2. The survey notes submitted by the Subcontractor indicate cross sections being taken at 100' intervals. This interval is not frequent enough to assure the accuracy of pay quantities.

3. We do not accept the Subcontractor's statement that the survey reflected by the Subcontractors notes was a joint survey.

4. At Station 134+50 the elevations determined at 28' right varied by only 0.1" between the DOT notes and the Subcontractor notes. This indicates that there is not a consistent difference of 1.5' +/- between the DOT survey and the Subcontractor survey between Station 129+00 and Station 134+60 as contended by the Subcontractor.

It was apparent at the conclusion of the hearing that the key point in this dispute is the accuracy of the DOT field survey to determine the depth to which muck was excavated right of Station 129+00 to Station 134+60. During the hearing, neither party submitted direct testimony in regard to the accuracy of this survey. Subsequent to the hearing, the Subcontractor submitted a signed statement from his grading foreman on the project in which it was stated:

1. The DOT Inspector and I agreed to jointly cross section the demucking operation as work progressed so that back filling could be completed each day.
2. This was the only survey of demucking because the excavated area was backfilled every afternoon.
3. To my knowledge, cross sections were not taken at 25' intervals as reflected by the DOT survey notes.

The Board advised the Department of Transportation of its intent to consider this supplemental information and offered them the opportunity to rebut. They responded that the Board should not accept the supplemental information and elected to not provide a factual rebuttal.

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

significance:

1. The Department of Transportation stated that they have carefully reviewed the field notes in question here and found no errors, but did not provide testimony on the validity of the field survey. In particular, no information was presented to explain how subsoil excavation cross sections could have been taken at 25' intervals.

2. The DOT cross section notes indicate that subsoil excavation was cross sectioned in sections ranging in length from 300' to 500'. The Department of Transportation did not explain how this was accomplished when muck was excavated and backfilled in approximate 100' sections.

3. The DOT survey notes establishing the temporary bench marks used in cross sectioning muck excavation right of Station 114+00 to Station 134+60 are dated after the date of the muck excavation cross sections. (June 20, 1989 and July 25, 1989 vs April 13, 1989)

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

The Department of Transportation is ordered to compensate the Contractor the amount of \$35,000.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$ 206.00 for Court Reporting Costs.

Tallahassee, Florida

Dated: 18 August 1992

Certified Copy:

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

18 August 1992  
Date

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

K. N. Morefield  
K. N. Morefield, P. E.  
Member

John P. Roebuck  
John P. Roebuck  
Member

S.A.B. CLERK

AUG 18 1992

FILED

STATE ARBITRATION BOARD  
STATE OF FLORIDA

S.A.B. CLERK

AUG 18 1992

**FILED**

GATOR ASPHALT COMPANY )  
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DEPARTMENT OF TRANSPORTATION )  

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PROJECT NO. 17040-3518

LOCATION: Sarasota County,  
Florida

ORIGINAL

RE: Arbitration In The Above Matter

DATE: Thursday, June 4, 1992

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

TIME: Commenced at 1:30 p.m.  
Concluded at 2:40 p.m.

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

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

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

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

APPEARING ON BEHALF OF THE GATOR ASPHALT COMPANY:

Mr. Frederick M. Derr  
Mr. W. D. Bartlett

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Marshall Dougherty  
Mr. Ken Blanchard  
Mr. A. R. Davison

\* \* \*

I N D E X

EXHIBITS	PAGE
Exhibit Nos. 1 and 2 in evidence	4

CERTIFICATE OF REPORTER	40
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P R O C E E D I N G S

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

5 Mr. Ken Morefield was appointed as a member of  
6 the Board by the Secretary of the Department of  
7 Transportation.

8 Mr. John Roebuck was elected by the construction  
9 companies under contract to the Department of  
10 Transportation.

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

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

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

19 (Whereupon, all witnesses were duly sworn.)

20 CHAIRMAN COWGER: The documents which put this  
21 arbitration hearing into being are hereby introduced  
22 as Exhibit 1. That is the request for arbitration  
23 submitted by the contractor and the exhibits that were  
24 attached to that request.

25 Does either party have any other information it



1 wishes to put into the record as an exhibit?

2 (Discussion off the record)

3 CHAIRMAN COWGER: While we were off the record,  
4 the DOT presented an exhibit entitled Fred Derr and  
5 Company, FDOT claims analysis, the package of  
6 information which we have identified as Exhibit 2. The  
7 Board members and the contractor had been furnished a  
8 copy.

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

11 MR. DERR: We don't.

12 MR. DOUGHERTY: We don't, no, sir.

13 (Whereupon, Exhibit Nos. 1 and 2 were received in  
14 evidence.)

15 CHAIRMAN COWGER: During this hearing the parties  
16 may offer such evidence and testimony as is pertinent  
17 and material to the controversy and shall produce such  
18 additional evidence as the Board may deem necessary to  
19 an understanding and determination of the matter before  
20 it. The Board shall be the sole judge of the relevance  
21 and materiality of the evidence offered.

22 The hearing will be conducted in an informal  
23 manner. The contractor will elaborate on their claim,  
24 and then the DOT will offer rebuttal. Either party may  
25 interrupt to bring out a point by coming through the

1 chairman. However, for the sake of order, I must  
2 instruct that only one person speak at a time.

3 Also, so that our court reporter will be able to  
4 produce an accurate record of this hearing, please  
5 introduce yourself the first time you speak.

6 It's appropriate at this point now for the  
7 contractor to begin his submittal. I need to clarify  
8 the amount that's being claimed in dollars and also the  
9 items that are related to that amount at this point.

10 Also, as we understand it, the sole dispute here  
11 is over the pay quantity for subsoil excavation and the  
12 corresponding pay quantity for embankment, is that  
13 correct?

14 MR. DERR: That's correct.

15 CHAIRMAN COWGER: Proceed, sir.

16 MR. DERR: I'm Fred Derr, Frederick Derr and  
17 Company. The amount of the claim is \$60,376.60.  
18 That's made up of contract items 120-4, subsoil  
19 excavation and 120-6, embankment.

20 We have also included our calculations as to the  
21 actual number of cubic yards that we feel we have not  
22 been paid for that we should be paid for based on the  
23 cross sections that we have taken.

24 In a nutshell, I will start by being brief and  
25 then working our way into the detail, which is probably

1 the best way to go about this.

2 When we constructed this job, at one point we  
3 were required -- it was our determination, I should  
4 say, to be technically correct, at one point in the  
5 job we made the determination that it was in our best  
6 interest to stop the job.

7 This had to do with a new provision that was  
8 promulgated at that time about supplemental agreements.  
9 I know Marshall remembers it well. Their attorney --  
10 it just so happens at about that time we had one of our  
11 district meetings in Sarasota. One of the subjects at  
12 that meeting was how to handle supplemental agreements.

13 The lady whose name I forget, who was the counsel  
14 for the district office, told us in no uncertain terms  
15 that you had better not take on to do any additional  
16 work unless you had authorization both as to funding  
17 and the documentation for a supplemental agreement.  
18 She was very specific about that. We had quite a  
19 discussion on that.

20 Shortly thereafter we ran into this situation  
21 where we got into an overrun on subsoil excavation. We  
22 through the district office and through the resident  
23 engineer's office made a request for a supplemental  
24 agreement to cover the overrun.

25 We then got bogged down in the procedures through

1 no fault of anybody's. I guess it was just the system  
2 was changing at that time. To make a long story short,  
3 we couldn't get an immediate decision.

4 I guess Marshall and I spoke on the phone every  
5 day, how is it coming, and Marshall would say we're  
6 going to try to do this by electronic transferring of  
7 the funding and so on.

8 I even remember at one point the funding was tied  
9 up because the Governor had to authorize a change in  
10 budget line item to cover this. And the whole process  
11 I think took about six weeks, when realistically  
12 something like this should have been within the  
13 authority of the resident engineer, saying,  
14 "Mr. Contractor, you have an overrun. We have not  
15 agreed on the quantity yet, but we will have a  
16 supplemental agreement to cover some overrun, and you  
17 should continue working."

18 Well, Marshall and Dave Davison and I guess  
19 Doug Moore at the time, who was the resident engineer,  
20 didn't have the authorization to do that. We were told  
21 if you want to continue working proceed at your own  
22 risk.

23 Of course the prudent thing for us to do was  
24 stop. What I'm doing here is laying the foundation for  
25 why I feel an error was made in the field notebooks and

1           why we have a divergence and a disagreement as to the  
2           quantity of subsoil.

3           Ironically, if you look in the claim that we  
4           sent, the divergence occurs at about the point where we  
5           shut the job down for six weeks and then picked it back  
6           up. Then all of a sudden the sections that we took on  
7           the subsoil -- and I remember standing out there on the  
8           job and looking down the grade at the subsoil and also  
9           looking up at the rain clouds and saying oh, my God,  
10          we've got to get this done.

11          Anyway, the subsoil, its natural strata continued  
12          to go downgrade. That's what our section showed.

13          Ironically the DOT section showed the same thing,  
14          but there was this little blip when we started again.  
15          And this blip from their elevations and their notes  
16          went up like this and then it almost exactly paralleled  
17          our cross section volume, almost exactly.

18          I contend based on that that there was an error  
19          made in the field notes somehow because everything else  
20          just seems to tie in except for that little blip.

21          I feel very strongly that our quantities are  
22          correct. And furthermore, there was an inspector out  
23          there by the name of O. A. He worked with our foreman.  
24          They took turns with the rod and the instrument taking  
25          the shots.

1 I felt comfortable with that because we felt the  
2 DOT was part of it. I was flabbergasted when the  
3 quantities didn't agree. That's kind of an overview of  
4 what happened without getting into the nitty-gritty.

5 CHAIRMAN COWGER: Do you want to let the DOT  
6 rebut a little bit?

7 MR. DERR: Oh, sure.

8 CHAIRMAN COWGER: Let me ask you a couple of  
9 questions, having looked over the submittal package.  
10 I see where an employee of the contractor was running  
11 an instrument and the DOT employee was holding the rod.

12 MR. DERR: That's exactly what was happening.

13 CHAIRMAN COWGER: Was this a survey being made  
14 for the contractor or was this a joint survey being  
15 made by the contractor and the DOT?

16 MR. DERR: We thought it was a joint survey.  
17 That's the way we felt about it.

18 CHAIRMAN COWGER: Okay.

19 MR. DERR: I assume that's where the notes that  
20 the DOT has in their field book came from. I felt like  
21 we were doing it together.

22 CHAIRMAN COWGER: As I understand it, you were  
23 using a self-reading level rod, the contractor was?

24 MR. DERR: I can't speak to that because I didn't  
25 actually observe that myself.

1           CHAIRMAN COWGER: Let me let you come back and  
2           rebut that in a minute. Let me ask one other question,  
3           and then we will let the DOT come back and testify on  
4           that.

5           The sequence of work here was to come in and  
6           excavate the muck and then backfill it with the  
7           embankment material?

8           MR. DERR: True.

9           CHAIRMAN COWGER: How much time elapsed between  
10          the excavation and the backfilling beginning? Was it  
11          something that was done pretty promptly or was the area  
12          left open a while?

13          MR. DERR: Some of the area was left open. We  
14          had started the muck excavation, and we had started the  
15          backfilling almost completely behind it as soon as the  
16          sections were taken.

17          That's one of the reasons we worked this out with  
18          the DOT inspector to speed up the process. He was as  
19          anxious to get it backfilled as we were. We felt if we  
20          did it together we wouldn't have to wait around for  
21          somebody else to show up to do these sections and  
22          readings.

23          We did that up to a point. And this is the  
24          point, I don't remember the station where we shut the  
25          job down. We had a pretty good system going. We

1 excavated about one or two days ahead on the subsoil,  
2 then came back as quickly as we could and replaced it  
3 with the embankment, then we stopped everything.

4 When we stopped, there was an area that was  
5 excavated and was open and should have been filled, but  
6 I elected not to take the risk with the DOT policy and  
7 go ahead and do it and then have them come back and say  
8 you did it on your own, we're not going to pay you for  
9 it.

10 MR. BARTLETT: Excuse me, Fred. It was partially  
11 filed. That's where we ran into the problem with the  
12 funding. The bottom of the subgrade was probably 90  
13 percent covered.

14 We followed up immediately on the very day or the  
15 next day with that part. That was just because,  
16 naturally, that was the area we were filling,  
17 compacting as we brought the lifts up. It happened to  
18 be caught there.

19 The muck being left open any degree of time,  
20 I can't imagine it was left open for more than a day is  
21 my recollection.

22 CHAIRMAN COWGER: I noticed you gave us in the  
23 contractor's submittal some notes here that I assume,  
24 the ones at 100-foot intervals, station intervals, on  
25 the notes that were kept by Mr. Yoder, who was an



1 employee of Fred Derr and Company. Do you have any  
2 idea of when the date of these was done?

3 MR. BARTLETT: From the looks of this piece of  
4 paper I would say it was done over the course of the  
5 work. This is pretty ragged. In other words, he was  
6 keeping it -- as they would take the shots, he would  
7 enter those shots on the piece of paper. It's not a  
8 one-day type thing.

9 MR. ROEBUCK: And the DOT was privy to these  
10 notes and took them?

11 MR. BARTLETT: They had these.

12 CHAIRMAN COWGER: I think at this point there are  
13 some other things we will need to discuss a little  
14 later, but I think we ought to let DOT come back now  
15 and offer rebuttal for what has been said that they  
16 would like to.

17 MR. DOUGHERTY: Well, I'm Marshall Dougherty,  
18 DOT. In the form of rebuttal, I really don't have much  
19 that we can say other than the notes themselves were  
20 taken, and using the proper surveying methods that we  
21 have. They have been checked, rechecked by my field  
22 people, and we come up with a volume different than  
23 what Fred and his people do.

24 I myself personally have not gone through and  
25 checked the notes. My field people have several times,

1 and again they say they are correct, they feel they are  
2 correct. I have no reason to not agree that they  
3 aren't. So if that's a rebuttal, that's a rebuttal.

4 MR. DERR: Mr. Chairman, could I make a comment?

5 CHAIRMAN COWGER: Sure.

6 MR. DERR: I think Marshall is correct. I think  
7 his calculations of the information that he has in his  
8 field notes are correct. I think the problem is there  
9 is an error in the field notes, and naturally it's  
10 generated through the correct process but an incorrect  
11 volume.

12 MR. MOREFIELD: Is it station 130 we're talking  
13 about?

14 MR. BARTLETT: It's 129 and 130.

15 MR. MOREFIELD: Looks like 130 is where the  
16 plotting went haywire, as you said in your  
17 presentation.

18 MR. DERR: It made a blip and then followed on.

19 MR. MOREFIELD: DOT, did you all investigate that  
20 specific station as it relates to --

21 MR. DOUGHERTY: This is my project engineer here.

22 MR. DAVISON: The only thing we did when they  
23 felt like they had a bust of about two foot, we called  
24 for all the books back from Tallahassee. We went  
25 through all our notes to make sure we had the right

1 benchmarks and rod readings and found no error in our  
2 notes at all.

3 MR. MOREFIELD: Everything was too laid out in  
4 the field to verify anything?

5 MR. DAVISON: Yes, sir.

6 CHAIRMAN COWGER: Was there any attempt made at  
7 any point in time to try to core down there and find  
8 the bottom of the -- you couldn't have done that  
9 I don't suppose. It would have been pretty hard to  
10 distinguish where the bottom of the muck was.

11 MR. DERR: We thought about doing that and gave  
12 up, it was a bad idea.

13 CHAIRMAN COWGER: I agree it's a bad idea, wish  
14 I hadn't brought it up.

15 MR. DOUGHERTY: Mr. Chairman, the survey that  
16 Fred's people did, the O. A. they keep referring to is  
17 O. A. Whitesel. He is an inspector who was working for  
18 us in the Sarasota office and has since retired.

19 I'm not sure just from a point of trying to help  
20 them out and determining what was going on, he was  
21 lending a hand as far as running the survey crew they  
22 had put together. By no means was that intended to  
23 be -- a question was asked if this was a formal survey  
24 being done between the joint -- between the two.  
25 I would say not really.

1           MR. DERR: Technically I would agree with you,  
2           but in fact, it probably was. Officially you can't do  
3           that and I understand that.

4           MR. DOUGHERTY: There was a difference of  
5           opinion, and in trying to figure out where the  
6           difference occurred, we took part in that. If you want  
7           to call that an early partnering effort, I'm sure  
8           that's what it was. My people were not convinced the  
9           conclusions were correct so we did what we did.

10          MR. BARTLETT: May I say something, Mr. Chairman.  
11          In the interest of continuing the job, that was -- if  
12          what you say is true, if what both of you say is true,  
13          it was a cooperative effort and it worked fine  
14          throughout the left roadway, which was done six months  
15          earlier, and it worked fine until we got to this one  
16          station.

17                 I know of no survey other than the survey  
18                 performed by Yoder and O. A. or previous on the left  
19                 side of the roadway -- this was a divided job, we did  
20                 two sides of the roadway. The survey was done by DOT  
21                 forces on the left roadway and some of our people.

22                 On the right roadway, which is the roadway in  
23                 question, I know of no other survey attempt by anyone  
24                 other than these notes that we took with the DOT in  
25                 cooperation.

1           MR. ROEBUCK: Could there be an error in maybe  
2 they were trying to transfer that left roadway survey  
3 to the right?

4           MR. BARTLETT: We believe it's an error in the  
5 instruments. It could be a benchmark error.

6           MR. DERR: This comment here from the DOT in the  
7 rebuttal about the types of rods that are authorized  
8 makes me suspicious. Direct elevating on grade, that  
9 will not be used --

10          MR. DOUGHERTY: The problem the Department has  
11 with the direct reading rod, the linker rod it's  
12 generically called, is that it is a direct reading rod.  
13 It can't be adjusted and it can slide and slip, instead  
14 of reading correct elevations you're actually off.

15           You cannot determine by going back and try to  
16 reconstruct from notes where you are off. That's why  
17 DOT goes through the process of doing the standard rod  
18 reading where you have to reduce it to field notes  
19 along with the instruments.

20          MR. ROEBUCK: How do you answer Mr. Derr's  
21 question concerning the apparent lack of a survey on  
22 this critical area by the DOT after the one that you  
23 jointly did?

24          MR. DAVISON: As far as -- O. A. might have been  
25 helping them out with the survey, but as far as our

1 original final cross sections, they were taken by DOT  
2 personnel using our equipment. That's what is in these  
3 original final cross sections.

4 CHAIRMAN COWGER: Let me ask a question, if we  
5 could. The dispute lies between station 112 and 134  
6 plus or minus on the right-hand side only?

7 MR. BARTLETT: Correct.

8 CHAIRMAN COWGER: And I picked 112 because of  
9 this part of your exhibit. I know it doesn't start  
10 quite that early, but I just want to say that it's the  
11 right roadway somewhere within those limits.

12 Now --

13 MR. BARTLETT: It's 114 to 134.

14 CHAIRMAN COWGER: All right, 114, yes, that looks  
15 better. Looking at Exhibit 2 which is about 20 or so  
16 pages, maybe it's a little more than that, we run into  
17 a sheet that looks like one of the sheets that the  
18 contractor submitted from the DOT's notes that's  
19 entitled muck excavation, right centerline of survey.

20 Could we get everybody to that point just a  
21 minute? It's in those survey notes.

22 MR. DERR: DOT's exhibit?

23 CHAIRMAN COWGER: Right. That's Exhibit 2. The  
24 page I'm looking for in the upper right-hand corner has  
25 got the identification of the crew and the date,

1 4-13-89, I believe that is. Is everybody there?

2 MR. DERR: No.

3 CHAIRMAN COWGER: Marshall, you have one of  
4 these?

5 MR. DOUGHERTY: I'm trying to find out which book  
6 it's in.

7 CHAIRMAN COWGER: Back about three-eighths of an  
8 inch.

9 MR. BARTLETT: Does it have a station on it?

10 MR. MOREFIELD: I think it's in the second one.

11 CHAIRMAN COWGER: It's in book number two. In  
12 the upper right-hand corner there is a crew identified  
13 and the date 4-13-89 appears.

14 MR. DOUGHERTY: Page one on book two. Go to page  
15 one.

16 MR. DERR: Okay.

17 CHAIRMAN COWGER: All I want to get us to the  
18 point that these are the survey notes that are in  
19 question by the contractor.

20 MR. DOUGHERTY: Yes, sir.

21 CHAIRMAN COWGER: Because they correspond with  
22 the ones that are on this single page and it starts at  
23 114, the same place these notes essentially start.

24 I notice that the notes are dated 4-13-89, and as  
25 I thumb on back through, clear to the end of the right

1 roadway survey, which I can't read the numbers, but  
2 I think it must be up there around 134 somewhere, I see  
3 no more identification of a crew or a date. I guess we  
4 are to assume that that ten pages or so of notes were  
5 all taken by the same crew on 4-13-89. Does that seem  
6 to make sense?

7 MR. BARTLETT: You mean they were taking those  
8 notes that day?

9 CHAIRMAN COWGER: That's what the notes indicate.  
10 All I'm saying is that's what these notes indicate is  
11 that --

12 MR. BARTLETT: On the work from --

13 CHAIRMAN COWGER: Between 113+90 and whatever  
14 that station is I can't read on the last page.

15 MR. BARTLETT: The work from station 128 on out  
16 was done after we came back to work in June.

17 CHAIRMAN COWGER: Again, what I'm saying is  
18 merely that these notes indicate that all these cross  
19 sections were taken on 4-13-89.

20 MR. DERR: I don't think that's possible.

21 MR. BARTLETT: The whole grade was never opened.

22 MR. DERR: That's 2,000 feet, and 114 and 134 is  
23 2,000 feet. Never at any time did we have 2,000 feet  
24 of that road open just laying there for somebody to  
25 cross section.



1           CHAIRMAN COWGER: All I'm trying to do is get at  
2 the facts here. I'm glancing through and I'm merely  
3 asking the question. The notes are -- the copies  
4 aren't real, real clear. There could be something else  
5 that indicates some other dates that the survey was  
6 done, but I don't see anything here.

7           Apparently the left roadway then was done at an  
8 entirely different period of time because I notice the  
9 next page we're down into September. But that's  
10 apparently logical. Okay.

11           MR. BARTLETT: We built the left roadway first.

12           MR. DERR: That would have been about six months  
13 prior to that.

14           MR. DOUGHERTY: Mr. Chairman, looking at these  
15 notes, and I've got my copy, it looks like they ran  
16 from about 114 to 134. That is 2,000 feet. Checking  
17 with the project engineer, there was never 2,000 feet  
18 of that open at any time. The 4-13 date may have been  
19 the first date they were out there to work, and then  
20 subsequent days were added to this same portion of the  
21 book.

22           MR. DERR: We would never have 2,000 feet of road  
23 open.

24           CHAIRMAN COWGER: Where are the original notes?  
25 Are they back in the estimates office?

1           MR. DOUGHERTY: I believe they are. They might  
2 still be in my office. These notes were just copied  
3 not long ago.

4           CHAIRMAN COWGER: That was my question.

5           Let me ask you another question if I could. In  
6 the contractor's exhibit is this little profile plot,  
7 I would call it, that's plotted at 28 feet right of the  
8 centerline. It compares the DOT's elevations from  
9 their notes to the Fred Derr and Company notes.

10          It appears like the substantial differences in  
11 elevations at the bottom of the muck begin really at  
12 station 129. Because prior to that station, at least  
13 at 28 feet right, we're only talking about a tenth or  
14 two difference. Then at station 130 it dives off into  
15 a foot and a half, about a foot and a half difference,  
16 all the way through. Do we agree to that?

17          MR. DERR: That's what the notes indicate, both  
18 our notes and these (indicating). It's interesting, up  
19 at the top, station 129+50 in the DOT notebook, there  
20 is a number that says negative 1.57. Isn't it strange  
21 that's just about the difference.

22          MR. ROEBUCK: Just about it. Do you see that,  
23 Gene?

24          CHAIRMAN COWGER: I can't.

25          MR. DERR: Right here, station 129+50, minus --

1 I don't know what that mean, but there it is in the  
2 notes.

3 CHAIRMAN COWGER: Let's go off the record for a  
4 moment.

5 (Discussion off the record)

6 CHAIRMAN COWGER: Let's go back on the record and  
7 let Mr. Dougherty make his statement.

8 MR. DOUGHERTY: Utilizing the field books that we  
9 presented a copy of on page -- in field book two where  
10 we were talking about running, temporary benchmark 22  
11 was run the last sections from approximately station  
12 129+50 ahead to the end. I think that was one of the  
13 points maybe in question was maybe that's where the  
14 error occurred.

15 The interesting thing to me is yes, we're off  
16 about a foot and a half and we run consistent with  
17 Mr. Derr's computation, yet that last turn was used to  
18 set the last elevation point. Yet we're only a tenth  
19 of a foot off from their survey at that last survey  
20 point.

21 If we were off -- if it were our survey  
22 instruments that were off or height of instrument were  
23 in error, we would have retained that foot and a half  
24 even at the last closing point and been a foot and a  
25 half high. We are not. That to me strengthens our

1           indication that maybe there was an error made on their  
2           part.

3           MR. MOREFIELD: But theirs closes, too, so why  
4           wouldn't that same logic go for their survey?

5           MR. DOUGHERTY: Because they didn't say it.

6           MR. MOREFIELD: Point noted.

7           MR. DOUGHERTY: Again, using the direct reading  
8           rod, it's kind of hard to determine where an error  
9           could have been made. That's the reason we go through  
10          the survey computations we go through.

11          MR. BARTLETT: May I ask why we were using a  
12          direct reading rod?

13          MR. DOUGHERTY: May I answer? I don't know.

14          MR. BARTLETT: I don't believe we were using a  
15          fiberglass multi-section rod.

16          MR. DOUGHERTY: Our information was it was a  
17          linker.

18          MR. BARTLETT: I don't know. That's why I was  
19          asking. I never asked what kind of rod they used. At  
20          those elevations, it would be almost impossible to use  
21          a linker because he was at least 14 feet above the  
22          bottom of the muck. The linker rod is usually only  
23          about eight or nine feet.

24          MR. DOUGHERTY: I don't know.

25          MR. BARTLETT: Good point. I don't know either.

1           MR. DERR: Isn't it also true that we kept a  
2           daily tally sheet on the truck yardage, and didn't our  
3           truck yardage convert into cross sections and come out  
4           pretty close?

5           MR. BARTLETT: Pretty close to what we expected.

6           MR. DERR: That's standard operating procedure  
7           for our foremen. They keep daily load counts. That's  
8           a matter of policy with our company.

9           MR. BARTLETT: Conversion is the weak play, two  
10          or three points could make the difference here.

11          CHAIRMAN COWGER: Let me ask you another question  
12          about these notes. We were talking a minute ago about  
13          the dates they were taken and how much open excavation  
14          was there at any one point in time.

15          It's pretty obvious from looking at these notes  
16          that they begin at 113+90. And the next turn that we  
17          see in the little notes -- I'll take back what I was  
18          going to say. I thought there was a --

19          MR. DERR: The only turn I see is 119+25.

20          CHAIRMAN COWGER: I suppose that conceivably  
21          could constitute the beginning of a new day's work or  
22          the ending of a day's work.

23          MR. DOUGHERTY: If you look through, just trying  
24          to verify his point, if you look through the notes, it  
25          appears they did 400 or 500 downs every time they made

1 a turn. That was probably a day's end work.

2 MR. BARTLETT: Do you recall how much it was,  
3 about 100 feet a day? It took us five days to finish  
4 that last 500 feet when we went back to work? Does  
5 that sound right, about 100 feet a day?

6 MR. DAVISON: I don't recall that.

7 MR. BARTLETT: It's been a while.

8 CHAIRMAN COWGER: I've asked all the questions  
9 I can think of to ask about the notes. The issue just  
10 comes down to there's a contention by the contractor  
11 that the DOT's notes, field notes between station 114  
12 and 134, and in particular between 129 and 134 are in  
13 error. Isn't that the basic dispute?

14 MR. DOUGHERTY: Yes, sir.

15 MR. DERR: Yes, sir.

16 MR. BARTLETT: I think item 6 of our letter  
17 covers pretty much what you just said, the notes which  
18 we have, I just don't agree with those stations.

19 MR. DERR: And my recollection from being on the  
20 job out there, it doesn't fit either. That strata and  
21 muck kept getting deeper towards the end, and that's  
22 what our notes show. Except for that little blip,  
23 yours kind of showed at 2. There's that space between  
24 the profiles.

25 MR. BARTLETT: We mentioned here we developed the

1 adjoining property. It was true there. We have --  
2 that was five years previous perhaps or six years  
3 previous to that. I speak of adjoining property,  
4 I mean right along the right-of-way, within 20 feet of  
5 this.

6 MR. DERR: An industrial park.

7 MR. BARTLETT: It was consistent there. I was on  
8 that job there myself. It consistently got deeper the  
9 further you went east until about station 134 where it  
10 ran out. There was an actual watershed or low point  
11 there.

12 Some other things that added to the confusion, of  
13 course, we had our notes and we have a digitizer in the  
14 office and set of plans, then six months later or three  
15 months later or whatever the time lapse is we get the  
16 DOT's notes.

17 One of the things we immediately did was plot the  
18 DOT's notes. We proved those notes were correct at  
19 least as far as our digitizer was concerned, the DOT  
20 made a correct assumption in their quantity because our  
21 digitizer said so. We didn't disprove the DOT in that  
22 respect.

23 We tried to find any number of ways to see why  
24 our -- everything we had, our truck counts, notes from  
25 the field, everything that the company had said we had

1 X yards and the DOT was lower. The time frame played a  
2 big part in it, of course.

3 CHAIRMAN COWGER: Just so I can understand for  
4 sure now, the muck excavation that was done on the left  
5 side of the project, the opposite side from what we're  
6 talking about, was done at a completely different time  
7 frame, it was done on the opposite side of the existing  
8 road. So there's really no connection between the left  
9 and the right side?

10 MR. BARTLETT: It's a divided roadway and we had  
11 to build it that way. These two may have met in the  
12 middle somewhere as we built the road.

13 CHAIRMAN COWGER: This sheet in the Fred Derr  
14 Company exhibit, or Exhibit No. 1, where we -- I can't  
15 see a title on it, but it lists station numbers, shows  
16 DOT volume, W. K. Company volume, over, parentheses,  
17 under, and then the difference between W. K. and DOT  
18 volumes.

19 This I assume is from the right side. It was  
20 done on the digitizer, the volumes were done on your  
21 digitizer?

22 MR. BARTLETT: Correct.

23 CHAIRMAN COWGER: And what you did was you took  
24 DOT's notes, ran them through your digitizer for these  
25 limits, and then you took the Fred Derr notes and did



1 the same thing.

2 And the second, third columns represent the  
3 volumes from the previous station.

4 MR. BARTLETT: These are volumes overall.

5 MR. DOUGHERTY: Excuse me, is it that sheet  
6 (indicating)?

7 CHAIRMAN COWGER: Yes, that's it. Volumes  
8 overall, I don't understand.

9 MR. BARTLETT: This is a plot -- all the DOT  
10 notes on the left and right roadway because it's a  
11 grand total, 46,775, and the DOT, we're within -- the  
12 DOT's numbers, 38,616. Correct? That's the total  
13 amount that the DOT said they're going to pay us for  
14 subsoil excavation on the complete job.

15 MR. DERR: We plotted 39,649 and used their notes  
16 and they actually ended up with a plot of 38,616, which  
17 is about a thousand yards difference.

18 MR. BARTLETT: That's the DOT's notes plotted on  
19 a set of plans, the total roadway. We had plotted the  
20 original information we had received on the left  
21 roadway earlier, and we agreed.

22 Then we received the rest of the information at  
23 six or seven months later after we completed the right  
24 roadway. We completed the plot across the entire  
25 roadway on the set of plans and then redid it. We had

1 this answer considerably before we got the information  
2 back from the DOT because it came up for calculations.

3 We were holding -- we thought we would be  
4 somewhere around 46,000 yards, then the final estimate  
5 came in and it was 38,000.

6 MR. DERR: 38,616.

7 CHAIRMAN COWGER: That 38,616 is the final pay  
8 quantity on the job, left and right.

9 MR. DERR: That's right.

10 CHAIRMAN COWGER: The DOT doesn't have anybody  
11 here that was present when these notes were taken, do  
12 they?

13 MR. DOUGHERTY: No, sir.

14 CHAIRMAN COWGER: Neither does the contractor,  
15 when your notes were taken?

16 MR. BARTLETT: No, sir.

17 MR. ROEBUCK: Wouldn't it have to be customary  
18 for the DOT, for their final estimates, the survey work  
19 would have to be done when you were excavating that  
20 muck?

21 MR. DERR: That's the only way you can do it.  
22 The standard operating procedure is we don't backfill  
23 until they take a section. The way they chose to do it  
24 was have O. A. work with our guy to expedite things.  
25 That's where the information came from.

1           MR. ROEBUCK: Your daily logs or anything didn't  
2 indicate there was another DOT survey crew there doing  
3 work simultaneously?

4           MR. DERR: No. And we don't know how they  
5 could have come back later to do it because it was  
6 backfilled.

7           MR. ROEBUCK: You were only there two days. It's  
8 a mystery.

9           MR. DAVISON: To answer your question, our notes  
10 show there were two DOT personnel taking the cross  
11 sections as they were doing it per day, both the people  
12 in the cross section book are DOT personnel with our  
13 own equipment.

14          MR. ROEBUCK: So they had to be there at the same  
15 time you were getting your information.

16          MR. DERR: Yes. Sure couldn't do it after the  
17 fact.

18          CHAIRMAN COWGER: What did you say O. A.'s last  
19 name was?

20          MR. DOUGHERTY: Whitsel, W-h-i-t-s-e-l.

21          CHAIRMAN COWGER: Looks like on 4-13-89 where  
22 they list the crew, looks like he was a member of that  
23 crew. But these notes were taken at a different time  
24 than the ones the contractor has represented.

25          MR. ROEBUCK: They couldn't be. To get the

1 information, it had to be within a day or two of the  
2 same time.

3 MR. DOUGHERTY: Time is relative. In other  
4 words, within the same -- they could have been taken  
5 within the same day just the beginning of the day  
6 versus the end of the day. But within the same  
7 relative time, yes. Within the year, yes. Both taken  
8 at the same time.

9 CHAIRMAN COWGER: Even though they were only a  
10 couple of hours apart, for instance, the notes that the  
11 contractor has submitted were taken at one point in  
12 time and these notes that DOT has in their records were  
13 taken at a different point in time, even though there  
14 may have been only a separation of two or three hours  
15 or it could have been a day or two.

16 MR. DOUGHERTY: Correct.

17 CHAIRMAN COWGER: What was the purpose of this  
18 joint survey?

19 MR. MOREFIELD: I thought I understood him to say  
20 just to expedite it.

21 CHAIRMAN COWGER: The contractor thought it was  
22 the final survey?

23 MR. BARTLETT: We needed to get an eight-foot  
24 hole backfilled in the middle of a very busy roadway.

25 MR. DOUGHERTY: I would like to offer an opinion

1           on this because I worked with Fred on this. During  
2           this time we were very, very, and I say we, he more  
3           than us, were very concerned that they didn't do more  
4           work than they had funds authorized to do because they  
5           were under the assumption that had they, they wouldn't  
6           get paid for that extra work.

7                     They were running sections frequently, more so  
8           probably than we would normally do on a job just to  
9           make sure they were staying within the bounds of their  
10          encumbered supplemental agreement funding.

11                    MR. DERR: At one point we did get a supplemental  
12          to cover some of the subsoil, but it didn't cover all  
13          of it.

14                    MR. DOUGHERTY: And I remember you were very,  
15          very concerned that you did not overshadow that. That  
16          probably is one reason there were two surveys done out  
17          there during that time. Jan McDonald, that's the  
18          attorney's name.

19                    MR. DERR: Is she still there?

20                    MR. DOUGHERTY: For the record, that's the  
21          attorney's name that Fred could not remember earlier.  
22          She's no longer there.

23                    CHAIRMAN COWGER: What it comes down to, though,  
24          is during that period of time not only could the  
25          contractor not begin work on a supplemental agreement,

1 he couldn't overrun a quantity without putting himself  
2 in jeopardy? That's really what we're talking about  
3 here.

4 MR. DOUGHERTY: At that particular time with  
5 the legal input and the legal opinions we had in our  
6 district, you could not overrun a quantity without an  
7 executed supplemental -- without an encumbered funding  
8 associated with an impending supplemental agreement.

9 MR. DERR: The scuttlebutt in the field at that  
10 time was the comptroller and the attorneys are running  
11 the field.

12 MR. DOUGHERTY: It was a very harried time.

13 MR. ROEBUCK: I don't think you were the only  
14 contractors at that time shutting down work during that  
15 confusion.

16 MR. DOUGHERTY: He was the only contractor in  
17 District 4 to shut down because of that confusion.

18 MR. DERR: I think that was probably the major  
19 project going on at that time in the district. It was  
20 my understanding they had similar problems in other  
21 districts throughout the state.

22 CHAIRMAN COWGER: DOT, why is it that these cross  
23 sections on the muck are taken at 25-foot intervals?

24 MR. DOUGHERTY: Sir, all I can tell you is to try  
25 to get an accurate interpretation of where the muck

1 line is.

2 CHAIRMAN COWGER: My question was is that in some  
3 DOT rule, procedure, internal operating procedure that  
4 muck cross sections will be taken at 25-foot intervals  
5 because normally you see cross sections taken at  
6 100-foot intervals on everything else.

7 MR. DOUGHERTY: From my personal recollection  
8 I cannot say that is procedure. That was probably just  
9 being done in an effort to more finitely determine  
10 quantities.

11 MR. MOREFIELD: That would be seen as being more  
12 accurate as opposed to less accurate if you went  
13 higher?

14 MR. DOUGHERTY: That is correct, sir.

15 CHAIRMAN COWGER: I'm out of questions. Has  
16 anybody got any other testimony? Any of the Board  
17 members have any questions?

18 MR. MOREFIELD: I was just looking, and again  
19 I don't know, maybe Marshall does, but are there any  
20 specifications that govern when there's a disputed --  
21 there's got to be some in there that I'm familiar with.

22 The cross sections that you take were for  
23 verification of pay. I would assume that those are,  
24 the majority of the time, fairly close to the  
25 contractor, except in this case where you have both of

1           them closing back on the same point. Obviously one  
2           survey is right, one is wrong.

3           MR. DERR: I don't think this has ever happened.  
4           We've always worked so closely with the DOT, we have  
5           been right on the quantities. This is a real  
6           aberration. I couldn't believe it when it showed up.

7           MR. MOREFIELD: Unless like you said the timing  
8           of the survey, something happened in that hole between  
9           the time the first survey was done and the second one  
10          was done, which would cause you to still close on the  
11          same point but where you took that -- where you put  
12          that pole down, the dirt changed the elevation between  
13          the time of the first survey and the second one.

14          MR. DOUGHERTY: From my standpoint I know why I'm  
15          here. I'm here because we have got official records  
16          taken by the Department that indicate a finite or  
17          calculable quantity that is represented by whatever  
18          that final number was, and we have some contractor  
19          records that indicate the difference.

20          I cannot, you know -- I cannot say where, who,  
21          what, when, whatever is wrong or whatever. I'm not --  
22          I can't go into a settlement with this claim, if you  
23          want to go that route, and be able to justify this  
24          thing to anybody that would come through. That's  
25          probably one reason why we're here in front of this



1 Board.

2 MR. MOREFIELD: Did I hear or did I not hear, did  
3 we ever decide if we could determine which survey was  
4 done first?

5 MR. BARTLETT: The Yoder survey would have been  
6 done immediately after the hole was opened up. That's  
7 the foreman on the job.

8 MR. ROEBUCK: That's yours.

9 MR. BARTLETT: Now when the DOT did theirs, we  
10 don't know.

11 MR. MOREFIELD: Could have been done at the same  
12 time, before or after is what you're saying.

13 MR. DOUGHERTY: There are a lot of variables here  
14 that are a puzzlement to me. Without my inspector  
15 here -- you know, O. A. obviously ran the rod when he  
16 was doing their survey. Did he run the rod when doing  
17 our survey, and did he stick the rod in the same spot  
18 each time? That I don't know. No one knows.

19 MR. MOREFIELD: That's why I'm saying the only  
20 way you could have two accurate surveys that tie back  
21 in is at station 130, wherever they put that rod down,  
22 the dirt, it was different, or he set it down in a  
23 different place, or he thought he had it in the same  
24 place or whatever.

25 That's all I can -- it could be an accurate

1 reading from where he put the rod down. That's how you  
2 would explain both of them tying back at the same point  
3 or the dirt was moved.

4 MR. ROEBUCK: Or the embankment washed in. You  
5 said you saw clouds.

6 CHAIRMAN COWGER: Let me go back to this printout  
7 here where we're comparing DOT volumes to contractor  
8 volumes. Is everybody with me? There are several of  
9 them, but it's the one at the right-hand side of the  
10 page.

11 MR. BARTLETT: Titled S-T-A S-T-A, station to  
12 station, top left?

13 CHAIRMAN COWGER: Right. The next to the last  
14 column is entitled over, under. I just want to make a  
15 point that the over or under or the difference jumps  
16 significantly at station 129. Prior to that time it  
17 had jumped around some, but there it goes from 55 to  
18 251, 557, then larger numbers yet.

19 So it seems like the biggest part of the  
20 discrepancy is in that area. If you look over at the  
21 right-hand side, whoever did this thing also picked up  
22 the fact that there is a substantial difference because  
23 they say through station 128 error in percentage 8.53,  
24 and then drop down and you see station 129 to 134,  
25 error in percent, 23.82.

1 I just think it's significant that we're zeroing  
2 in on that one area. That's the area that the  
3 contractor has basically talked about. That's not what  
4 his claim is based on. His claim is based on a little  
5 larger area than that. That also is within the  
6 framework of one set of level notes and the DOT's  
7 notes, between two turns in the DOT's notes, in that  
8 same general area.

9 MR. DERR: Basically you're right. We're almost  
10 in agreement up to 129. It's within the margin of  
11 error that two survey crews will make. From 129 on it  
12 just goes apart.

13 CHAIRMAN COWGER: You have to remember you're  
14 cross sectioning muck. You're not sitting on a piece  
15 of concrete. You're probably not sure exactly how far  
16 you are out from the centerline.

17 Okay. Does anybody else have anything they want  
18 to testify to?

19 MR. MOREFIELD: I don't have anything.

20 CHAIRMAN COWGER: Mr. Morefield, any questions?

21 MR. MOREFIELD: No.

22 CHAIRMAN COWGER: Mr. Roebuck?

23 MR. ROEBUCK: No. Kind of a mystery.

24 CHAIRMAN COWGER: This hearing will be closed.  
25 The Board will meet on July 14 to deliberate on this

1 claim. You will have our final order shortly  
2 thereafter.

3 (Whereupon, the hearing was concluded at 2:40 p.m.)  
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STATE OF FLORIDA )

COUNTY OF LEON )

I CATHERINE WILKINSON, Certified Shorthand Reporter  
and Notary Public in and for the State of Florida at Large:

DO HEREBY CERTIFY that the foregoing proceedings were  
taken before me at the time and place therein designated;  
that my shorthand notes were thereafter reduced to  
typewriting under my supervision; and the foregoing pages  
numbered 1 through 39 are a true and correct record of the  
aforesaid proceedings.

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

WITNESS MY HAND AND SEAL this, the 23<sup>rd</sup> day of June,  
A.D., 1992, IN THE CITY OF TALLAHASSEE, COUNTY OF LEON,  
STATE OF FLORIDA.



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

My Commission Expires June 27, 1994