

1980

Schocker Construction Company v. State of Utah : Reply Brief of Plaintiff-Appellant

Utah Supreme Court

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Recommended Citation

Reply Brief, *Schocker Construction v. Utah*, No. 16670 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

SCHOCKER CONSTRUCTION COMPANY,)	
Plaintiff- Appellant,)	
vs.)	Case No. 16670
)	
STATE OF UTAH,)	
Defendant-Respondent.)	

REPLY BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD
DISTRICT COURT FOR SALT LAKE COUNTY,
THE HONORABLE ERNEST F. BALDWIN, DISTRICT JUDGE.

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REPLY BRIEF OF PLAINTIFF-APPELLANT

INTRODUCTION

Respondent State of Utah's brief ignores both the lower court's Findings and the evidence establishing Schocker's position that its loss occurred in 1975 in the Grassy Hill area, and that the construction problems were caused by State procedures and requirements.

DISCUSSION

The major thrust of the State's brief is that Schocker's claimed damages for the excessive surface course

excavation and replacement were spread over the entire project and not concentrated in the Grassy Hill area and were caused by Schocker's alleged inefficiency. The State's position is not supported by the facts. The project was completed within the contract term during the construction seasons of 1975 and 1976. While it is true that Schocker has particular difficulty meeting the smoothness specification in the Grassy Hill area during the 1975 construction season, the difficulty was later determined to be caused by the excessively deep excavation and the requirements that the surface course asphalt be replaced in a single lift and in a uniform transverse grade not built into the original road surface. Schocker's 1975 surface course work in the Grassy Hill area was less than one-fourth of the total project length.

After the construction season in 1975, Schocker's representatives met with representatives of the State on a number of occasions during the winter months to discuss the cause of the apparent inability to meet the specification. As a result of the last of those meetings on March 17, 1976, Schocker proposed a solution to the problem, submitted that proposal to the State in March, 1976 (Exhibit P-13), which stated that because of the deep excavation and replacement requirements, the State's specification could not be met,

and requested permission to lay a leveling course when needed during the 1976 construction season. The State acknowledged Schocker's proposed solution in its memorandum of April 19, 1976 (Exhibit P-54), in which the State recited the need for a change in the project agreement. Schocker then proceeded with the remainder of the project as proposed in P-13 and replaced over three-fourths of the surface course paving for the project in 1976. (R. 722) With the change in construction method in 1976, Schocker did not have the problems that had occurred in 1975. (See R. 283-84, 309) The two exhibits above mentioned (copies of which are attached hereto) and the testimony of Robert Charlesworth, (R. 523-30) the State's assistant project engineer assigned to the project for the 1976 construction season, completely refute the State's present contention. Mr. Charlesworth testified that if the single lift and uniform transverse grade requirements had been adhered to in 1976 it would have been impossible to comply with the smoothness specification. (See R. 524-27)

Moreover, the State's present argument is clearly contrary to the Findings of Fact Nos. 9, 10, 11 and 12 and Conclusion of Law No. 2 which determine that Schocker's damages occurred in 1975 in the area of excessive excavation which was over Grassy Hill. The lower court's Findings and Conclusions cited above are as follows:

FINDINGS OF FACT

9. That the deepest removal areas were in the vicinity of the area generally referred to as Grassy Hill.

10. That the evidence, while somewhat conflicting as to the extent of the oil-rich condition, appeared to indicate that approximately sixteen percent (16%) of the work area was involved with excessive removal.

11. That the contract plans and specifications provided for the material removed to be replaced as well as the required overlay of bituminous surface course to be placed in a "single lift."

12. That in areas of excessive removal the plaintiff was allowed on occasion in 1975, to place asphalt in more than one lift on occasion but on other occasions was required to comply with the single lift requirement by defendant's project engineer.

CONCLUSIONS OF LAW

2. That plaintiff is entitled to sixteen percent (16%) of its claimed damages in connection with the overrun in bituminous surface course including specifically those alleged problems involved with excessive removal of existing asphalt which amounts to sixteen percent (16%) of \$323,196.00 or \$51,711.36. The Court further concludes the plaintiff is excused from the requirement to notify defendant of its intent to claim additional compensation in 1975, under the circumstances which existed.

The State's claim of Schocker's inefficiency is not supported by the facts, and the State never quantified such claimed inefficiency. Schocker testified that the "downtime" did not exceed the normal amount expected and allowed for in Schocker's original bid. (R. 359, 420, 449,


885) Bob Schocker also testified that Schocker did not experience the difficulties in 1976 because the single lift requirement was eliminated, a leveling course was allowed where needed, and a uniform transverse grade was not required where the prior road surface had not contained such grade. (R. 283-84, 308-09)

In awarding damages in this case, the lower court followed the case of Thorn Construction Company, Inc. v. Utah Department of Transportation, 598 P.2d 365 (Utah 1979), in which the problem (underrun of material) was not identified until after the project was completed. This Court approved an award in Thorn according to the "force account" provision of Section 104.02 of the General Specifications. In the instant case, the lower court properly followed the law of Thorn in regard to liability, but improperly calculated Schocker's damages when it prorated them over the entire project length.

CONCLUSION

Schocker is entitled to be awarded its damages set forth in Schocker's original brief in this matter.

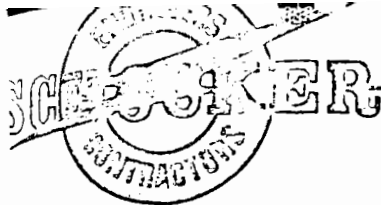
RESPECTFULLY submitted this 30th day of July, 1980.


WALTER P. FABER, JR.
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606 Newhouse Building
Salt Lake City, Utah 84111
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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Reply Brief of Appellant to Leland D. Ford, Assistant Attorney General, 115 State Capitol Building, Salt Lake City, Utah 84114, postage prepaid, this 30th day of July, 1980.

Michael G. Neider



SCHOCKER CONSTRUCTION CO.

154 East Gordon Lane

MURRAY, UTAH 84107

Phone (801) 265-8846



March 25, 1976

Received
3-25-76

Mr. Don Wright
 Resident Engineer
 Utah State Highway Dept.
 2410 West 2100 South
 Salt Lake City, Utah 84118



Dear Mr. Wright:

Re: #1-RFI-80-2(20)40
 Knolls to Low, Utah

On March 17, 1976 representatives of Schocker Construction Company, together with representatives of paving machine manufacturers and from the Asphalt Institute met with representatives of the State Department of Transportation in regard to questions concerning asphalt paving on the above-mentioned project. It was discussed at length whether transverse and longitudinal smoothness requirements could possibly be met if the single lift asphalt depth as required by the plans was followed. As was discussed during the course of the meeting, it was the opinion of all persons we contacted that it would be impossible on this job where a leveling course was not allowed that the desired smoothness could be achieved with a single lift. Attached for your information are copies of letters from the Asphalt Institute, Blaw-Knox and Barber-Greene which support the above determination.

After discussing the situation at length, Mr. Hurley suggested that a short section of the project be prepared with a leveling course prior to laying the surface course, and that if such proves to be the proper procedure, then the plans and specifications would need to be adjusted to allow for such procedure for the completion of the project. Accordingly, we propose that as soon as feasible, we will lay a leveling course of the specified material over a short section of the project and then lay a uniform depth surface course. We believe that such will prove to be the proper approach.

Yours truly,

SCHOCKER CONSTRUCTION COMPANY

Brent Foulson
 Assistant General Manager

BP:pj
 Enclosures

Memorandum

UTAH DEPARTMENT OF TRANSPORTATION

DATE: April 19, 1976

TO : Don Wright, Project Engineer

FROM : C. J. Reaveley, P.E., District Construction Engineer

SUBJECT: Project 1-RF1-80-2(20)40
From Knolls to Low
Schocker Construction Company, Contractor

This office has reviewed the correspondence that you submitted from Schocker Construction Company by your letter dated March 29, 1976. As was indicated in Schocker Construction Company's letter, Mr. Hurley did suggest that a short section of the project be prepared with a leveling course prior to laying the surface course in order that there can be a trial section to see if this will improve upon the smoothness obtained by the contractor. If this short section proves to be the proper way to go, then in my opinion, it will take a supplemental agreement to allow the bituminous surface course to be placed in more than one lift rather than the single lift as now specified.

CJReaveley/ad

cc: J. B. Skewes
W. D. Hurley
District File

AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

Geniel Johnson, being first duly sworn, says: That she is employed by the law firm of Hansen & Thompson, Attorneys for Plaintiff/Respondent, that she personally delivered a copy of the foregoing Respondent's Brief to the following:

RAYMOND M. BERRY
BRUCE H. JENSEN
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant-Appellant
700 Continental Bank Building
Salt Lake City, Utah 84101

on the 30th day of January, 1980.

Geniel Johnson

SUBSCRIBED AND SWORN to before me this 30th day of January, 1980.

Martha J. Brinkerhoff
NOTARY PUBLIC

MY COMMISSION EXPIRES:

9-14-82

RESIDING AT:

Salt Lake County, Utah