



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

April 22, 1975

Opinion No. 75- 175

Mr. Max Bickford, Executive Officer
Board of Regents - State of Kansas
Suite 1416-Merchants National Bank Tower
Topeka, Kansas 66612

Dear Mr. Bickford:

You ask whether the replacement of an elevator jack assembly would be included in the services to be provided under a maintenance service agreement entered into by Kansas State College of Pittsburg and the Dover Elevator Company.

The Kansas State College of Pittsburg entered into a maintenance service contract with the Dover Elevator Company. (A copy of that contract is attached to this opinion). By the terms of that contract, the Dover Elevator Company agreed to service and maintain the elevators and dumbwaiters. Dover agreed to supply all material, labor, tools, and equipment necessary. The contract was to have commenced on August 1, 1974, and terminate July 31, 1975.

In March, 1975, a hydraulic elevator had difficulties and an inspection by the Dover Elevator Company determined that a new elevator jack was needed. The Dover Company maintains that this replacement is outside the terms of their service contract and therefore, they are not responsible for making the repairs unless a separate contract was entered into by the college. The college was of the opinion that this repair was within the scope of the regular maintenance contract and felt that the Dover Company should replace the parts without additional compensation from the college.

In part 12(b) of the contract, the extent of the work to be performed by the Dover Company was defined thus:

"Supplying, repairing and replacing of all parts of every description made necessary by wear and tear. The refinishing, repairs to, and, or, replacement of

Mr. Bickford
Page Two
April 22, 1975

elevator car enclosures, hoistway enclosures, hoistway door panels, door frames and door sills are excluded. Materials to be used shall be genuine parts of the same material and chemical compositions, and manufactured by the company furnishing the elevators or appliances. The contractor shall have and maintain on hand, locally, a supply of spare parts sufficient for the normal maintenance and repair of the elevators and dumbwaiters."

Part 12(h) of the contract describes the exceptions to the services required of Dover thus:

"The contractor shall not be required to make renewals or repairs necessitated by reason of negligence or misuse of the equipment by persons other than the contractor, his representatives and employees, or by reason of any other cause beyond the control of the contractor, except ordinary wear and tear. The contractor shall not be required, under this agreement, to install new attachments as may be recommended or directed by the insurance companies, or by Federal, State, Municipal, or Governmental authorities. Contractor shall not schedule any repairs without clearing with the Physical Plant department or the Director of Housing, so as to control down time during busy school activities."

Both sections require that the Dover Company make repairs necessitated by "ordinary wear and tear." However, part 12(h) clearly exempts work necessitated by conditions outside the control of Dover except "ordinary wear and tear."

The elevator jack in question was buried in the ground and eventually became non-functional due to corrosive elements in the soil. Such a situation is clearly outside the control of the Dover Company. There was no means of maintenance or inspection short of digging up the entire assembly. Damage caused by such conditions is considered "ordinary wear and tear," in my opinion.

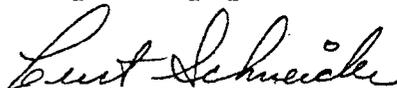
I could find no case in Kansas where the term "ordinary wear and tear" has been defined. However, many other jurisdictions have judicially defined the term. The consensus of these decisions is that it is the depreciation in the usefulness of property that is caused by using the property in its intended manner. The important element appears to be damage caused by use. The damage in this particular instance was not caused through the use of the equipment. The elevator jack would have needed repair regardless of the amount the elevator was used. The damage was caused by the soil and was totally independent of actual usage of the equipment.

Mr. Bickford
Page Three
April 22, 1975

In prosecuting a claim against Dover, the burden would be on the state to bring the jack assembly within the terms of the maintenance contract, and thus to show that the repair was necessitated by a reason which was not beyond the control of the contractor, except ordinary wear and tear. A review of the documents enclosed in this file does not suggest that this showing could practicably be made in this case, for the repairs appear to have been necessitated by corrosive elements in the soil, and perhaps a deficiency in the protective covering on the buried jack assembly, which, of course, are both beyond the control of the contractor.

Thus, on the basis of the information we presently have, it is our recommendation that no further claim be pressed against Dover on the basis of the described facts, for the reasons set out above. If there is further information which would support an argument to bring this repair within the terms of the contract, please let us know, and we will consider the matter further.

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS/PAH/ksn

Enclosure