Gootnick #1

IN THE MATTER OF 'HIE ARBITRATION BETWEEN

Employer

AND

Union

HEARING: November 14. 1995
RECORD CLOSED: April 18, 1996
EXECUTIVE SESSION: April 18, 1996 (by telephone)

ISSUE

THE PARTIES WERE UNABLE TO AGREE TO A STIPULATED ISSUE.

The issue as framed by the Union is:

Is the Employee entitled to the real estate provisions for relocation under the agreement?

The issue as framed by the Employer is:

Whether the Employee has established his eligibility to participate in the benefits in 9(w)?

The issue as framed by the Neutral Chairperson is:

Did the Employer violate the agreement in Grievance 93-26-17? If so, what is the appropriate remedy?

BACKGROUND

In early 1993, the Employer informed the Union that it was closing its maintenance facility in City 1. It offered transfer to affected Union employees to the City 2 maintenance facility. The Employer also offered affected employees a Home Sale Relocation Assistance Program. The program was administered by Company 1. If the conditions of the program were satisfied, Company 1 was required to offer to purchase the home of a relocated employee at its appraised

value; The Company 1 Program had more favorable terms than the negotiated provisions of Article 9 Paragraph (w).

The Employee in this case was relocated to City 2. At the time of the System Board hearing, in this matter, he was assigned to the Inspection Department in City 2. He applied for assistance under the Company 1 Home Sale Relocation Assistance Program (Employer Exhibit 6).

The Program provided in pertinent part:

> 1. Only primary residential property currently owned and occupied by the employee in the area of the former domicile will be considered. Second homes, summer homes, farms, commercial property, unimproved property that is not completely constructed, cooperatives, or mobile homes are excluded from coverage.
>
> 4. The employee must be able to produce a clear and-marketable title to the properly and own a fee simple interest therein.

When the Employee applied for the program, he owned the property in question in this case. He owned it as joint tenant with his ex-wife, Person 1. They were divorced in 1986. Person 1 bought the lot where the house is located in January, 1985 in her own name, as sole owner. At that time she was married to the Employee. At the same time, the Employee executed a quit claim deed which transferred any interest he might otherwise have in the property (as a result of their marital relationship) to Person 1. In August 1989, Person 1 executed a quit claim deed from herself to herself and the Employee, as joint tenants. At that time they were no longer married.

Upon reviewing the two appraisal reports, by Company 2, appraisers selected by Employee from a list supplied by Company 1, Company 1 advised the Employer and the Employee that his property "did not meet the conditions of the Company 1 Real Estate Assistance Program", in that it was not fully constructed.

After the Employer advised the Employee that his property did not qualify for the program, he filed a grievance under Article 9 Paragraph (w) of the collective bargaining agreement, charging

the Employer with a breach of its contractual obligation to purchase his house. During the processing of the grievance, the Employer agreed, on a non-precedential basis, that it would process the Employee's application for the purchase of the property under Article 9 Paragraph (w) of the negotiated agreement instead of under the Company 1 Real Estate Assistance Program.

Subsequently, the Employer informed the Employee that "after careful review of submitted information, the property listed on your enrollment form does not adhere to eligibility stipulations under the contract. Due to your property being defined as unimproved and not in a marketable condition, you are no longer eligible to participate in the program." Under Article 9 Paragraph (w) of the agreement, the Employer is required to purchase residential property of affected transferred employees only under certain specific negotiated circumstances.

DISCUSSION

I. UNION CLAIMS

The major claims of the Union may be summarized as follows:

1. The Employee is entitled to the benefits of the provisions of Article 9 Paragraph (w). It provides that if you try to sell your house, and cannot sell it, the Employer will purchase it and sell it.

2. The Employee satisfied the provisions of Article 9 Paragraph (w). He listed his house, attempted to sell it, and is still trying to sell it at the fair market value.

3. The Employee did everything that Employer asked him to do.

4. Although it lacked "certain items", the Employer is incorrect in its claim that the house is unimproved property. The Employee lived in the house for three years. It was his primary

residence. His ex-wife lives in the house. He has a certificate of completion, a mortgage and title to the house. His ex-wife signed all of the papers to permit sale of the house.

5. The Employer does not have the right to determine that the house is "not up to its standards", or up to the appraiser's standards.

6. The Employee did not get two new appraisals, one FH.A. and one Conventional, because the Employer informed him that it would not purchase his house in its then current condition.

7. The Employer violated Article 9 Paragraph (w) when it eliminated the Employee from the real estate provisions of the agreement.

8. The Employer has the obligation to purchase Employee's house. The fair market value of the house is $575,000.

II. COMPANY 1 RELOCATION ASSISTANCE PROGRAM

The Employee was offered the opportunity and did enroll in the 1993 Relocation Assistance Program developed for Union employees affected by base closings. One of the benefits in the plan is a real estate purchase program.

It is not necessary to outline in detail the provisions of the relocation assistance program or the real estate purchase program. Nor is it necessary, or even appropriate, to reach the question of whether the Employee’s house was eligible for that program or whether he satisfied the procedural requirements of the program because the Employee requested, and was eventually permitted, to proceed under Article 9 Paragraph (w) of the Collective Bargaining Agreement.

III. EMPLOYEE PROCEEDS UNDER ARTICLE 9 PARAGRAPH (w) OF THE COLLECTIVE BARGAINING AGREEMENT

During the processing of this grievance, the Employer agreed to the Employee's request that his application for the purchase of his property be processed under the collective bargaining agreement provisions rather than under the provisions of the Company 1 Relocation Assistance Program. He may not, and does not, now claim that he is still eligible for the Company 1 Relocation Assistance Program.

> The specific requirements of Article 9 Paragraph (w) of the agreement provide as follows:
>
> Article 9 Paragraph (w)
>
> (w) When a Maintenance base is closed in is entirety, or a shop or department is geographically relocated, the Employer will purchase the home of an affected employee under the following provisions:
>
> 1. Two (2) appraisals will he obtained by the employee: one (1) F.H.A. and one Conventional, by Employer approved appraisers.
>
> 2. The average of these appraisals will constitute the fair market price of the home, provided there is less than a ten percent (10%) difference in the respective appraisals.
>
> 3. The employee must show proof to the Employer that he has listed his home at the fair market price within ninety (90) days of the scheduled closing or relocation, with a realtor from the list approved by the Employer, for a period of not less than sixty (60) days.
>
> 4. If after the home has been listed for the minimum sixty (60) days and has not been sold, the Employer for a period not to exceed six (6) months thereafter, will offer to purchase the home at the fair market price as established in 1 and 2 above, less the applicable realtor's commission.
>
> 5. 'These provisions will only apply to residential property occupied by the employee in the area of the base being closed or shop or department being relocated, and will not apply to commercial, farm or unimproved property.

IV. APPRAISALS AND FAIR MARKET VALUE

A. Company 1 Relocation Assistance Program

When the Employee originally proceeded under the Relocation Assistance Program, he was given the names of several appraisers. He was asked to select two of them and one alternate. The appraisals were made at the Employer's expense. The Employee's only role was to select the appraisers. One appraisal was made by Company 2. The appraisal was for $295,000.

The Company 2 report stated:

> This is newer home which is not completed on the interior. The exterior and basic construction is completed. The home lacks floor coverings in all rooms. The kitchen has inexpensive vinyl tile which is only a temporary floor covering, interior doors are unfinished, trim paint on the interior needed, the pantry is a bare room with no shelving, one upstairs bath has no floor coverings, the kitchen is designed for a commercial size stove and oven and none has been installed (estimated cost is $84,000), there are no window coverings. Estimated cost of floor coverings is $25,000 and finish work is estimated at $850,000. There is only a minimal amount of landscaping and ground cover for the hillsides, plus landscaping around the house is estimated at $20,000. Total estimated cost to complete the properly is $99,000.

The second appraisal was made by Company 3. It was for $375,000.

The second appraisal stated:

> The subject does not have floor coverings throughout the home. The concrete slab cud wood sub-flooring upstairs is exposed. The owner was waiting to finish after completing some interior finish work himself. Minor work remains to complete some electrical switches and to finish interior trim. The kitchen has a vinyl floor covering that needs replacement to improve the marketability of the home. There is no range and oven present, and there is a cut-out for installation of a sub-zero freezer. The subject is unlandscaped. The FAU heating units are fitted for central air conditioning and only lack the compressors. It is recommended that a home of this size would need to be completed prior to marketing. The estimated cost to complete will he estimated by the appraiser. It is recommended that our client obtain a contractor's estimate to confirm the cost to complete. Floor coverings- $515,000; Draperies-$10,000; Appliances- $5,000; Interior Finish- $5, 000; Air Conditioning Compressors-$5,000; Landscaping- $10,000 Total: $50,000.

B. Collective Bargaining Agreement

Under Article 9 Paragraph (w) employees must, among other things:

> 1. obtain two appraisals, one F.H.A., one Conventional, from Employer-approved appraisers.
>
> 2. provide proof to the Employer of listing of the residential property at the fair market value. This must he done within 90 days of the scheduled base closing with an Employer approved realtor for a period of not less than sixty (60) days. Fair market value is contractually defined as the average of the two appraisals, provided that there is less than a 10% difference in the two appraisals.

The Employee did not obtain the two appraisals required by Article 9 Paragraph (w). I am not persuaded that the provisions of Article 9 Paragraph (w) are waived by Employee's excuse for not getting the two appraisals required by the Collective Bargaining Agreement. His excuse was that, once he received notice from the Employer that it was not going to purchase his house, there was no reason to get the appraisals. The Employee claimed that it would have been foolish to get two appraisals after the Employer stated that it was not going to buy his house because it believed that the house was unfinished.

Even if the Employer had accepted the two appraisals from Company 2 and Company 3, made for the non - contractual Company 1 Relocation Assistance Program, as satisfaction of Article 9 Paragraph (w), the agreement also requires that the house be listed at the fair market value. Fair market value under Article 9 Paragraph (w) is defined as the average of two appraisals provided that there is less than a ten percent difference in the appraisals.

The Union failed to establish that the agreement was being satisfied with respect to the two appraisals and the listing at fair market value.

The Employee listed the property for $575,000. This is not the fair market value or within 10% of the fair market value even as appraised by Company 2 and Company 3. The Employee did not

secure the two appraisals required by Article 9 Paragraph (w) (1). Even assuming, again, that the Employer had accepted the Company 2 and Company 3 appraisals in satisfaction of the provisions of the agreement, those appraisals, performed by the certified appraisers chosen, failed to satisfy Article 9 Paragraph (w) (1) (2) and (3).

The above finding is not changed by the fact that a third appraisal under the Company 1 Program was not made part of the record, as requested by the Union. A third appraisal has no standing under the negotiated provisions of Article 9 Paragraph (w).

The Union provided insufficient proof to support its claim that a real estate salesperson will not list a home if the price is "extremely out of range," because there is no chance of selling it, or to support its claim that $575,000 was then the fair market value of the house. I am unconvinced that the Employer is bound by Employee's claim that the current fair market value of the property was arrived at:

> "Based on some of the information, that we had gotten from the real estate, and that -- it was mainly from comparing some of the houses in the area, property versus square footage. And based on that, was, along with the input of the listing with the real estate company, that's how we came up with it."

The Union alleged, but failed to establish or to present sufficient evidence to convince me, that there are comparable home in that range in the same area. Even assuming that the Union is correct in this claim, the provisions of Article 9 Paragraph (w) are unambiguous and were not satisfied.

The Employee chose Company 2 and Company 3. Especially in the absence of securing two appraisals, as required by the Collective Bargaining Agreement, he cannot now successfully challenge the appraisers findings on the fair market value of his house.

The Employee conceded in his own testimony, at page 64 lines 1-13 of the transcript, that he has not satisfied the provisions of Article 9 Paragraph (w):

> Q: Go back to paragraph (w)(2) and tell me what the fair market value of your house is under the contract.
>
> A: Under this (indicating) contract? Okay. I understand what you're saying now. I did not obtain two appraisals according to our contract, so consequently, at this point; we don't have a fair market value, that's true.
>
> Q: So let's go down to paragraph 3. Do you have your house listed currently, or have you had your house listed at any time period in question, at the contractually defined fair market value?
>
> A: In regard to the Union book contract, no. (Emphasis added)

V. OWNERSHIP

The Union claims that the Employee has a mortgage, and therefore has title to the house, although he and his ex-wife are co-owners as joint tenants. The Union further claims that although the property and the road are in joint ownership, this does not change the Employee's rights under the Collective Bargaining Agreement; especially since Person 1 signed all of the appropriate documents to permit the sale. The real estate assistance program covers only "residential property currently owned and occupied by the employee in the area of the former domicile." It is not, however, necessary to reach the question of whether Article 9 Paragraph (w) requires ownership or sole ownership since this grievance is denied on other grounds, for the reasons discussed in section IV above. Even assuming, for the purpose of argument, that Employee satisfied the ownership provisions of Article 9 Paragraph (w), at a minimum he failed to satisfy the requirements of (1), (2) and (3) of Article 9 Paragraph (w).

VI. OCCUPANCY

Article 9 Paragraph (w) provides that:

> 5. These provisions will only apply to residential property occupied by the employee in the area of the base being closed of-shop or department being relocated and will not apply to commercial, farm or unimproved property. (Emphasis added)

The Union claims that the Employee did occupy the house as his primary residence for three years, despite the fact that there were items that were totally not completed. It is not necessary to reach the question of whether the house was Employee's primary residential property, or whether he occupied it since, again, this grievance is denied on other grounds for the reasons discussed in Section IV above. Even assuming, for the purpose of argument, that the Employee did occupy the house and that it was residential property, at a minimum he failed to satisfy the requirements of Article 9 Paragraph (w) (1), (2) and (3).

VII. UNFINISHED ITEMS

It is again not necessary to reach the question of whether the Employee's house met all of the other standards and requirements of Article 9 Paragraph (w) and if the house was "unimproved property", or if the matters stated in the letter (U Exhibit 3) indicate that the house did not fall within the benefits of Article 9 Paragraph (w).

It is unnecessary and inappropriate to reach these issues since, again, this grievance is denied based on the reasons discussed in Section IV above. Even again, assuming for the purpose of argument, that the Employee did satisfy the requirement that the house was improved property as required by Article 9 Paragraph (w) (5), he failed to satisfy the requirements of Article 9 Paragraph (w) (1), (2) and (3) regarding appraisals, fair market value and listing.

VIII. EMPLOYEE FAILED TO COMPLY WITH THE PROVISIONS OF ARTICLE 9 PARAGRAPH (w) (1), (2) AND (3)

The Employer is correct in its claim that although the Employee requested, and the Employer agreed, to process his application for real estate assistance under the negotiated agreement, rather than under the more favorable Company 1 Relocation Assistance Program, he failed to comply with these express provisions of Article 9 Paragraph (w),

a. Employee did not obtain two appraisals, one FHA and one conventional, as required by Article 9 Paragraph (w) (1). The only existing appraisals were obtained by the Employer under the Company 1 Relocation Assistance Program.

b. Even assuming, without finding, that the Employer accepted, or was required to accept, the appraisals by Company 2 and Company 3, under Article 9 Paragraph (w) (2) those appraisals did not constitute the fair market price of the home. Article 9 Paragraph (w) provides that the appraisals will constitute the fair market value of the home, provided that there is less than a 10% difference in the respective approvals. In this case, the Company 2 and Company 3 appraisals were more than 10% apart. The Employee therefore failed to satisfy Article 9 Paragraph (w). Accordingly, the Employer was not obligated to purchase his house. (Emphasis added)

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Based on the collective bargaining agreement, the entire record and the facts and circumstances of this case, the System Board makes the following **AWARD**:

1. The Union failed to establish that the Employee satisfied the provisions of Article 9 Paragraph (w) (1), (2) and (3). Therefore it failed to establish that he was entitled to the real estate provisions for relocation tinder the agreement. The grievance is denied.