BETWEEN:

UNITED STEEL WORKERS LOCAL 5890

("the Union")

- And –

EVRAZ INC.

("the Employer")

ARBITRATION DECISION

Counsel on behalf of the Union: Sonny Rioux
Employer: Larry LeBlanc, Q.C.

During the week of September 14, 2009 Evraz conducted a surprise search of more than 800 employee lockers at their facility in Regina, Saskatchewan. Their primary purpose was to locate certain items of missing clothing and their secondary purpose was to recover certain mis-stored tools and equipment. Over the course of the search Evraz recovered approximately 200 items of clothing and a number of tools and other company property that had been stored in employees' lockers contrary to Company Policy.

Evraz had retained an outside supplier, Canadian Linen, to supply clothing items. If there was a loss of clothing items Evraz would receive a bill from Canadian Linen for the lost items. They had recent received a significant invoice for many lost items.

Both the Employee and the Employer paid a portion of the cleaning cost of the items.

The actual workings of the clothing system is not critical to the outcome of this arbitration. Clothing would be assigned to various employees. Not every employee was involved in the clothing system. Essentially each employee involved would have some work clothing in their lockers. When is was soiled it would be placed in a bin. Canadian Linen would pick up the soiled clothing, clean it and return it to pick up bins for each employee. The employee would then move the clothing to their lockers.

Essentially, there is a fundamental dispute between the Union and the Company's view of the management's right to search employee lockers. Management takes the view that the provisions of the Collective Agreement authorize them to search employee's lockers on an unrestricted basis. There had been a history of searching all lockers. There is certainly an agreed history that specific searches could be taken of employee lockers.

The Union took the view that there is an essential right of dignity for its members that protected them from an unreasonable search. It was the Union's view that searches should only take place in the following circumstances:

1. With a member whose locker was subject to the search being present.
2. If requested, there be a union official present at the same time.

Management objected to any restrictions.

Evidence

The evidence is not in dispute.

Two witnesses were called on behalf of the Union. The first was Mr. Bill Edwards the President of the Union. Mr. Edwards has been employed at Evraz and its predecessor company for in excess of 25 years. To the best of his recollection this was the first time his locker had ever been searched. He was unaware of any other times that it had been searched. In his capacity as a Union official over the years he had been involved with the management searching of a number of employee lockers. However, in each case he indicated that there was some valid cause for the search. For example, a drug sniffing dog was taken through the facility at one time in the 1990s and identified four suspicious lockers. Searches took place of those lockers, apparently in the presence of the Union. There had been a number of other occasions where there were searches but again they were all limited in scope.

Mr. Edwards also testified that the system with respect to the clothing exchange did not work very effectively. A number of surplus items were found in his locker. Mr. Edwards' explanation was he had inability communicating with Canadian Linen and as a consequence, there were frequent mix-ups with is orders.

It should be noted that at no time was Management ever making any allegations of theft or other impropriety on the part of any employee.

A second witness, Mr. Tory Bank was called on behalf of the Union. He indicated that his locker was searched on the day in question. Some of his personal items were moved around.

Of interest was the fact that Mr. Bank was not part of the clothing program. He wore clothes from home as the part of the plant he was in did not require special clothing. Insofar as there was a need for special clothing, it was simply addressed at the site. As a consequence, there is no reason to believe whatsoever that Mr. Bank had any of the missing items in his locker.

The Company called two witnesses.

The first witness was Jeff Clark. Mr. Clark was the Manager of the program within the Company. He had been doing so for a number of years and in an attempt to make it work better, and had created forms to try to ensure the system moved effectively.

He testified that in the past they had attempted to recover missing items by using supervisors to approach specific employees. It had a 30% to 40% success rate. Another way of looking at was it had a 60% to 70% failure rate. That had been conducted a number of years before. He also testified that no attempt was made prior to the search to recover the missing clothing through other means. There was no attempt to publicize the issue or request the restocking of employee clothing items.

Ron Armstrong was called on behalf of Evraz as well. He occupies the senior position in human resources. He gave some evidence as to the history of searches under Evraz and its predecessor company. There is a history of the company searching employee lockers for a variety of causes. There is some evidence of searching of the entire lockers taking place in the past. However, the memories are vague on this issue has were the purposes and circumstances of those searches.

Issues

The fundamental issue is whether Management has the right to search employee lockers without restriction because they are company facilities or whether the employees are entitled to a certain right of privacy with respect to their individual lockers. If they are, was this search justified?

Discussion

The right of privacy is probably the most fundamental of human rights and is key to an individual's dignity. Individuals have the right not to have their person or body searched for any reason except in very limited situations. People's home and personal items are free from search by anyone for any reason again except in very limited circumstances.

At the same time, it is clear that in this particular case the lockers searched were all owned by the Employer. They were part of its facility. The locks were owned by the Employer. It is also clear that there was a long standing policy in place that authorized searches.

The question is how the interests of the individual employees as represented the Union are balanced against the company's rights as the employer.

This is a difficult and fundamental question at the work place.

Certainly, an employee does not surrender all of their rights simply because they are employed by an employer. They maintain all of their normal rights and the onus upon Management to justify the derogation from the normal expectations an individual might have for their privacy.

The Collective Agreement

The Collective Agreement does not specifically address the issue of whether there is a right search employee lockers within the confines of the agreement. The company relies on the general management rights clause. The union asserts the right to human dignity as contained in the anti-harassment policy which forms part of the Collective Agreement.

The company further relies upon its "Work Rules and Regulations" manual which has been in effect for at least 25 years and predates the current collective agreement.

Positions of the Parties

The company takes the view that it has an unfettered right to search employee lockers at will without restriction. Alternatively, they suggest that this general search was justified based upon the problem of recovering the clothing.

The Union asserts that there is an inherent right of privacy. Management should only search for cause. As well, there should be advanced notice of searches had every employee should be present when their lockers searched. Essentially, the union was asking for a decision prohibiting general searches of lockers except in very limited circumstances.

The Problem

The system was in place whereby each employee was assigned a certain number of outfits for work. The employees had a choice as to how many. However, both the employees and management paid towards the cleaning of the garments. If garments are lost it was the responsibility of the employer to reimburse the supplier, Canadian Linen.

Each employee's clothing would be identified with a name tag and code sewn into the garment. They would pickup clean clothing from an individual clean clothes bin or locker. They would transfer it to their individual locker (the subject of the search) and when clothing was dirty the clothing would be put in dirty clothing bins and would be cleaned by Canadian Linen and returned to the employee's clean clothes bin.

Apparently there were many problems with the system. A number of years earlier management instituted a program to get return of missing items by having managers address the issue with their employees. This program had limited success. Canadian Linen eventually invoiced the employer for the lost items. This precipitated the search of the lockers.

Management did not want to give notice of the search as they were concerned that employees would simply move clothing items to different lockers or in some other way conceal them. At the same time, management indicated there were no allegations of theft or misconduct by union members.

This appears to be inherently contradictory. If there are no allegations of dishonesty or of employees taking items home, why they would feel the need to conceal a search is going to take place?

Management developed a plan to search the lockers. On the day that the lockers were searched they took the number of union members off the shop floor had them assist/supervise the inspections. One union member who was selected contacted the union president. Shortly thereafter the union members were pulled off the search at the request of the Union. Management left notes in the lockers indicated a search of taken place. Initially, the notes left the impression that the union had participated

in the search. Once the Union objections were made clear, the note was altered to delete reference to the Union.

Management claims the searches were successful as they turned up approximately 200 items of clothing and a number of tools valued at approximately $5,000. It should also be noted that no disciplinary steps were taken against any individual union member with respect to any items stored in lockers. Apparently, storing items such as tools in lockers was against company policy.

Searches in the Workplace

The question of searching employees in a workplace has been contentious matter for many years. It has been correctly pointed out that there are different types of searches and the degree of privacy and expectation of dignity vary with the intrusiveness of the search.

A number of cases were presented about the limits of searching the workplace. The cases indicate that it is a function largely of the collective agreement and whether the collective agreement prohibits searching.

The most intrusive searches are those that involve the employee's physical person. This would include requests for blood or urine samples for the actual physical searching of employees. There are a series of case that address this issue. Employers' rights to search are the most circumscribed.

Second-level searching are the "lunch bucket" cases which deal with searching of the employee belongings such as lunch buckets or purses. There is a lesser standard and expectation of privacy.

At the lowest level of expectation of privacy are locker searches. There are very few cases that address this issue. It should also be noted that the company policy had permitted wide-ranging searches of lockers for at least 25 years of the time of the search.

On the facts of this case is also clear there is no suggestion management searched any personal goods of any employee and was simply looking for the missing clothing.

Law

The first issue to address is whether Management rights to search the lockers are unfettered. The right to do so in the work Rules and Regulations. Paragraphs 10 and 11 of those Rules provide as follows:

> 10. The company may require inspection of vehicles, lunch boxes, whether or an individual Employee or a group of Employees, upon request.
>
> 11. Lockers and locks are company property. A locker or locks may be opened and inspected by the company at any time without notice to the employee or employees concerned.

Management says this is a natural extension of their "management rights" as set forth in Section 3 of the Collective Agreement and that there has been a long history of inspections to this point.

The Union counters that reference needs to be made to Article 1.01 of the Collective Agreement concerning discrimination and harassment and by reference Appendix G of the Collective Agreement, the first paragraph of which provides as follows:

> The Company and the Union in keeping with the provisions of Article 1.01 will promote a work environment that is free from harassment and discrimination where all employees are treated with respect and dignity. ...

Privacy is a core value in society. It always has been. Early labour cases make reference to rights of privacy for employees. There is an inherent right of privacy and it can only be taken away through clear language in the Collective Agreement or in some other clear form. The company says that the work Regulations do exactly that. At the same time, the contract and practices need to be interpreted in accordance with the general law and in accordance with other provisions of the Collective Agreement. As well, rights can evolve over time. Privacy, for example, seems to be an increasingly important aspect of society. They are explicitly recognized by different pieces of legislation including *The Privacy Act* (RSS P-24, Section 2), many pieces of legislation which protects different kinds and forms and information both at the Federal and Provincial level including acts such as *The Personal Information Protection and Electronic Documents Act*, Stat. Can. 2000, c. 5 (PIPEDA). In addition, both Federal and Provincial Governments have created privacy commissioners to ensure that the privacy rights of individuals are respected.

As well, the Collective Agreement explicitly protects the right of employees to be treated "with respect and dignity". Inherent to dignity and respect is some recognition of and employee's privacy.

It is within this context that the work Rules and Regulations need to be interpreted. This, therefore, makes it impossible to hold that a company has an inherent and unfettered right to search employee lockers.

I find that management's claim to an unfettered right to search lockers at any time to not be well grounded. The evidence was that management searched lockers all but always for a specific reason or cause. For example, searching for lost keys or special nametags that had not been returned was one use for the searches. These searches would obviously be limited to specific employee lockers.

The evidence about general searches of all of the lockers is vague and the specifics behind those searches were not put into evidence. They may have been justified by the particular reasons for the search, the events leading up to it, how the search was conducted, and the like. I cannot draw the conclusion that there was a clear history of general locker searches.

The lockers are private space for employees. At the same time, employees are well aware they are on company property and the company may have many legitimate reasons to search the space. If management rights are not unfettered, what limits are there?

Two facts need to be noted. First, management did respect the individual employee's privacy in the search by not looking any further than for clothing and tools. At the same time, the issue was a fairly simple one did not involve any fundamental problems for the employer such as theft or employee misconduct.

Although employees are aware management's right to search their lockers, essentially to this point it had been largely based on some form of specific need to look in the lockers. There was ascertainable cause and often the entry was done without notice.

In *University Hospital v. London & District Service Workers' Union, Local 220*, [1981] O.L.A.A. No. 1 28 L.A.C. 92d) 294, the arbitration panel dealt with a similar situation. In that case, counsel for the employer conceded that a similar clause which held "the hospital reserves the right to inspect lockers at any time" was subject to "reasonableness". See also *Re Goodyear Canada Inc. And U..R.W., Local 189*,

[1994] O.L.A.A. No. 704 in which Management exercised a number of steps prior to executing searches of employee lockers.

In addition, the evidence is quite spotty. There is a history of the search of lockers in a general way. No specifics could be provided nor circumstances explained as to why previous searches had taken place. Indeed, two of the employees had no recollection that searches had taken place at all.

It also needs to be noted that the issue here was not a serious matter like employee theft or some other kind of employee misconduct. The issue was the non-return of clothing and a system which did not appear to be working very effectively with respect to the re-circulation of clean clothing. Although costly to Management, the issue appeared to be a breakdown in a system of the company. This gives less reason for locker searches than something as serious as allegations of theft. Again, the Company specifically acknowledges that there are no allegations of theft or serious employee misconduct.

Therefore, Work Rules and Regulations provision allowing for searches is subject to an overriding reasonableness issue.

The question then becomes whether the employer acted reasonably in all of the circumstances.

In *Algoma Steel Corp. V. United Steelworkers, Local 2251*, [1984] O.L.A.A. No. 1, 17 L.A.C. (3d) 172, the arbitration panel commented at paragraph 12 and 13 of its decision:

> 12. We take it as now well established in the arbitral jurisprudence that employers have no absolute right to search the person or personal effects of employees: see Re: U.A.W. Local 386 and Comco Metal Products Ltd. (1972), 23 L.A.C. 390 (Brown); Re University Hospital and London & District Service Workers' Union, Local 220 (1981), 289 L.A.C. (2d) 294 (Picher). That statement of principle is subject to exception in those cases where there exists an express or implied term or condition of employment permitting such search. Further as was said in the unreported case of Denison Mines Limited, January 20, 1984, and on which the union relied:
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> > There are, however, a line of recent cases dealing with searches which suggests the approach is not so much an application of the general law of arrest and search as it is an application of the employer's right to invoke reasonable work rules and practices. These cases balance the legitimate business interests of the employer in the light of the alternatives available to it against the concern of employees to privacy and to be free from unreasonable search or surveillance: see Re Inco Metals Co. And U.S.W. (1978), 18 L.A.C. (2d) 420 (Weatherill), dealing with the lunch-pails; Re University Hospital and London & District Service Workers' Union, Local 220 (1981), 28 L.A.C. (2d) 294 (Pilcher) dealing with the search of employees lockers: and Re Johnson Matthey & Mallory Ltd.

And Precious Metal workers' Union, Federal Local 24739 CLC (1975), 10 L.A.C. (2d) 354 (Brown), dealing with electronic scanning devices.

In that balancing operation, the employer must establish adequate cause to justify the search, including the exhausting of available alternatives, and to take reasonable steps to inform employees and then to proceed in the conduct of the search in a systematic and non-discriminatory manner.

13. In applying that balancing of interests approach in the instant case, it must be concluded that the circumstances fail to establish an overriding business interest of a magnitude justifying the forcible search without the employees' consent. There is no suggestion that the company property sought to be repossessed had come into the possession of employees in any unauthorized manner or, that the possession of company tools by employees was having a present adverse effect on the company's production capabilities. Indeed, the system which resulted in these tools being in possession of employees was designed to improve efficiency by the elimination of down time. From the evidence, it must be concluded that the sole reason for the company wishing to repossess its tools was to establish an alternate method of issuance and control to that which it had previously established. In our view, this was neither of such immediacy or of such seriousness to the company as would be a reasonable justification for a search, nor are we convinced that there were no alternative methods available to the company to accomplishing its objective without instituting a search. No prior announcement was made to employees of the company's intention to implement the new system of control in this department, and no request that tools be available for return and no prior indication of an impending search. No attempt was made by the company to secure employees' consent to or co-operation in a search and instead employee tool boxes were forcibly entered, ignoring completely the concern of the employee for privacy and for freedom from a unreasonable search and surveillance. We conclude, on all evidence, that the company acted unreasonably and without justification in its search for the grievor's tool box on April 15, 1983.

Similarly, in *University Hospital, (supra),* the panel commented on a proper process under paragraph 18:

18. Counsel for the hospital conceded that the hospital's discretion to inspect lockers would have to be exercised reasonably. The board is fully satisfied that with respect to the inspection of lockers alone and apart from the search of personal effects the hospital has met the standard of reasonableness. Unlike the situation in the Chrysler and Amalgamated Electric Corp. cases, supra, the hospital in this case had a pilferage problem. It had discussed the problem with the employees and sought to resolve it without a search. When those measures failed the hospital resorted to a search of lockers. As the hospital had notified the employees of the problem and unsuccessfully tried to resolve it through informal means, the board is satisfied that the hospital had reasonable cause to conduct an inspection. Even though the lockers are the property of the hospital, employees are provided with keys and use the lockers for keeping personal belongings. Before an employer can be justified in requiring that a locker be open to inspection, fairness and respect for privacy would dictate that an employer first have adequate cause. In the board's view, the circumstances in this case constitute adequate cause, particularly where prior measures had been exhausted without resolving the problem of pilferage.

See also *Goodyear Canada Inc., (supra).*

In this case, Management had not taken any steps to alleviate the problem using other less intrusive means in a long period of time. As suggested by the Union, attempts perhaps should have been made to have the clothing items returned. One suggestion was that something be posted on each locker. Perhaps at the beginning or close of a shift, all employees could have been instructed when the shift change took place to unload from their locker any items that were not theirs or were no longer useful. For example, Mr. Edwards' complaint was that he was given a bunch of redundant items. It does not seem contested that there were problems with the system. Mr. Edwards seems to complain that the clothing he did not want (which was either the wrong clothing or did not fit), was like a bad penny. It kept coming back to him again and again. None of that is disputed.

Similar efforts could have been made with respect to the tools and the like. Again, the suggestion was that there was more than $5,000.00 of tools returned including small items like welding strikers. It should be noted that there are some 900 employees. The amount of goods kept in the lockers seems of minimal value compared to the number of employees. It is likely that a handful of employees made up the vast majority of the items there were improperly stored. Again, it seems hard to justify such a broad search.

In my view for such a broad search could take place, management should have exhausted whatever other reasonable steps they could have taken. The mere fact that a few years earlier a program to gather outstanding garments had resulted in disappointing returns was not enough. One union suggestion was that they could have posted on each locker a request for return of the items. Another option would have been to have an employee or manager be present during shift changes an attempt to recover items by specific requests. It is quite possible the steps would have been successful. Is quite possible they could have failed. Nonetheless, it would have been an inexpensive and nonintrusive way to obtain return of missing items.

In this case the Company needs to demonstrate that it had taken reasonable steps to address the problem in another way. Again, this was an operational issue and not an employee misconduct question. It would seem that there are several possible solutions any one of which could have been attempted. None were. The only evidence of prior attempts to resolve issue was a point in the past where the results had been unsatisfactory. As indicated above there are a number of different

approaches which Management may have wished to consider. They may have wanted to consult with the Union about the matter as well.

Secondly, the search could easily have been limited. It is clear there was no justification of any kind to search Tory Sand's locker. He was not part of the clothing program. There was simply no reason to believe that any of the missing items could be found in his locker. One assumes there are other employees in the same position as Mr. Sand. Management insofar as it was going to conduct a general search of employee's lockers should only search those where there is some reason to believe they would be able to find the missing garments.

Management did take steps through the creation of new forms a number of years prior to the search to try to resolve some of the difficulties. Obviously, that had limited success as well. There was simply no evidence that Management a reasonable time prior to the search had taken steps to try to resolve the matter. What made the matter urgent was the bill from Canadian Linen. However, there was no emergency and there was time to take the necessary steps.

As a consequence, I hold that the search by the Employer was unreasonable and violated the Collective Agreement.

Remedy

The Union has asked for several specific items in its request for a remedy. It suggested that the ruling should also prohibit Management from conducting any general searches and direct that the individual employee had to be present for the inspection for their locker. I am simply unwilling to make any further declaration than has happened already. There may or may not be a general right to be present at all searches. Trying to arrange that as a part of a general search might be very difficult to do. A ruling needs to await the appropriate case.

As well, the Union wants a ruling that will require Management to advise the employees in advance of the search and give them the right to have a Union representative present during such search.

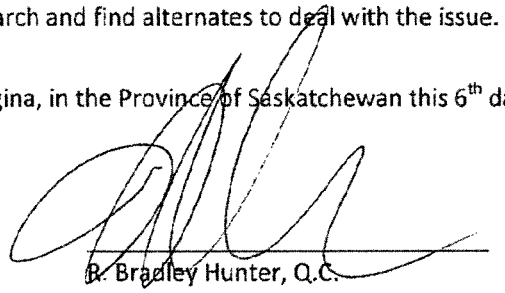
Given the facts of this case, there is simply no way to justify extending the ruling that far.

It should be noted that there is no suggestion by Management of any misconduct by the employees. It should also be noted that the Union concedes the Management has a right to search employee lockers and other items.

As well, it should be noted that Management in conducting the searches did not violate the specific privacy of anyone and did conduct the search in a limited way simply looking for clothing and tools.

The extent of this ruling is that Management violated the Collective Agreement by failing to take reasonable steps prior to the search and find alternates to deal with the issue.

DATED at the City of Regina, in the Province of Saskatchewan this 6th day of January, 2011.



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