

ABOUT THE WEEKLY SUMMARY

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[Index of Back Issues Online](#)

August 23, 2002

W-2857

[Evans Sheet Metal, et al.](#), Scranton and Throop, PA
[John W. Hancock, Jr., Inc.](#), Salem, VA
[PPG Industries, Inc.](#), Evansville, IN

OTHER CONTENTS

[List of Decisions of Administrative Law Judges](#)

Press Releases:

[\(R-2455\) Shelley Korch is Appointed an NLRB Assistant to the General Counsel](#)

[\(R-2456\) NLRB Announces \\$6.4 Million Settlement with Alwin Manufacturing Corporation](#)

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John W. Hancock, Jr., Inc. (11-CA-18716; 337 NLRB No. 183) Salem, VA Aug. 1, 2002. Chairman Hurtgen and Member Cowen affirmed the administrative law judge's finding that the Respondent (a) violated Section 8(a)(1) when it threatened to close part of its facility; (b) violated Section 8(a)(1) when it threatened to discharge employee Ray Preston Connor for engaging in union activity; and (c) violated Section 8(a)(3) and (1) when it discharged employees Larry Pugh and Paul Akers because it believed they were engaging in union activity. They reversed the judge's finding that Supervisor David Kelly's interrogation of Connor violated Section 8(a)(1). Member Liebman dissented to her colleagues' reversal of this finding.
[\[HTML\]](#) [\[PDF\]](#)

The judge, in finding Kelly's questioning of Connor unlawful, observed that Kelly was asking about the union activity of employees other than Connor, and then stated that "[a]n inquiry regarding the union sympathies of employees other than employees who have made their sympathies known is coercive and constitutes unlawful interrogation in violation of Section 8

(a)(1) of the Act." The majority held the judge's statement announces what amounts to a per se rule making it unlawful to question an employee about the union views of other employees who have not disclosed their views. Therefore, they rejected the judge's statement as inconsistent with the totality-of-the-circumstances test set forth in *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom. Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

Member Liebman would find that Kelly's interrogation of Connor violated Section 8(a)(1), considering the totality of the circumstances, consistent with *Rossmore House*. She said "the majority's analysis glosses over the question of Connor's own status with respect to support for the Union. That Connor was not an open supporter of the Union's 2000 organizational drive, a fact the majority acknowledges, is significant." In her view, the circumstances here are sufficient to establish an unlawful interrogation.

(Chairman Hurtgen and Members Liebman and Cowen participated.)

Charge filed by Steelworkers; complaint alleged violation of Section 8(a)(1) and (3). Hearing in Roanoke, Oct. 10, 11, and 12, 2000. Adm. Law Judge George Carson II issued his decision Dec. 8, 2000.

* * *

PPG Industries, Inc. (25-CA-25475; 337 NLRB No. 176) Evansville, IN Aug. 13, 2002. Members Cowen and Bartlett affirmed the administrative law judge's recommendations and dismissed the complaint allegations that the Respondent violated Section 8(a)(1) and (3) of the Act by issuing written discipline to and suspending employee John Sharber because of his union or other protected concerted activities and to discourage employees from engaging in these activities. They agreed with the judge's conclusions that the Respondent lawfully disciplined Sharber after employee Julie Meeks complained that Sharber had made vulgar, sexually explicit remarks to her on June 27, 1997. The Board majority found that both the analysis in *Felix Industries*, 331 NLRB 144 (2000), remanded 251 F.3d 1051 (D.C. Cir. 2001), and the analysis in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), support this conclusion. [\[HTML\]](#) [\[PDF\]](#)

In response to Farber's remark shouted to an allegedly underpaid female coworker, Member Liebman wrote: "[t]he remark can fairly be described as vulgar. But no reasonable person-no person of ordinary sensitivity, familiar with colloquial speech-would hear in the remark a sexual connotation, much less a connotation so strong as to constitute incipient sexual harassment." Unlike her colleagues, Member Liebman stated that she cannot conclude either that the male employee lost the protection of the Act (under the test of *Felix*) or that the Employer has established that its antiharassment policy supports the discipline imposed (under *Wright Line*). Accordingly, she dissented from the dismissal of the complaint.

(Members Liebman, Cowen, and Bartlett participated.)

Charge filed by Auto Workers (UAW); complaint alleged violation of Section 8(a)(1) and (3). Hearing at Evansville on Sept. 10, 1998. Adm. Law Judge Richard H. Beddow Jr. issued his decision Sept. 30, 1998 and supplemental decision Aug. 24, 1999.

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Robert E. Evans d/b/a Evans Sheet Metal, et al. (4-CA-27272; 337 NLRB No. 182) Scranton and Throop, PA Aug. 1, 2002. Chairman Hurtgen and Member Liebman affirmed the administrative law judge's conclusion that the Respondents violated Section 8(a)(5) and (1) of the Act by failing to adhere, since June 1998, to the terms and conditions of a collective-bargaining agreement with Sheet Metal Workers Local 44 (CBA) by failing to employ union members, failing to pay union wages, and failing to make payments into union benefit funds. Member Cowen, dissenting, would dismiss the complaint. [\[HTML\]](#) [\[PDF\]](#)

Evans & Evans, Inc. (E&E, Inc.) was the only respondent represented at the Board hearing and that has filed exceptions. The term "Respondent" in the singular will designate E&E, Inc. The judge rejected the Respondent's assertion that the CBA terminated in 1993, finding that the Respondent was collaterally estopped from relitigating the continuing existence of the CBA by a prior court judgment and, reaching the merits, that the CBA continued in existence. The majority affirmed the

judge's finding, on the merits, that Respondent was bound to the contract and therefore found it unnecessary to pass on the issue of collateral estoppel.

Member Cowen noted that under current Board law, court judgments are not given collateral-estoppel effect in Board proceedings. See *Field Bridge Associates*, 306 NLRB 322 (1992), *enfd.* 982 F.2d 845 (2d Cir. 1993). He pointed out that the judge ignored *Field Bridge* and gave collateral-estoppel effect to a court judgment. The Board should address this error, either by reversing the judge or overruling *Field Bridge*, Member Cowen said, adding: "Furthermore, contrary to my colleagues, it is necessary to pass on collateral estoppel. We cannot sidestep the issue and proceed to the merits because to reach the merits is to permit relitigation, and to permit relitigation is to reject collateral estoppel."

Member Cowen would overrule *Field Bridge* and establish the following framework for Board proceedings where a party asserts collateral estoppel based on a prior court judgment. First, the Board must determine whether the issue previously decided by the court falls within the Board's primary jurisdiction. If it does, the Board is entitled to redecide that issue. If it does not, the Board should then determine whether collateral estoppel applies under settled issue preclusion doctrine. Applying that framework to this case, Member Cowen would affirm the judge's finding that Respondent E&E, Inc. is collaterally estopped from relitigating the existence of the CBA. Since his colleagues will not join his approach, he also found on the merits that the CBA terminated on April 30, 1993 and accordingly would dismiss the complaint.

The majority wrote, in explaining its reasoning for not passing on the issue of collateral estoppel: "[E]ven if Respondent is not collaterally estopped from raising the merits, it does not prevail on the merits. Further, by expressly saying that we do not reach the issue of collateral estoppel, we obviously are not, by implication or otherwise, resolving that issue."

(Chairman Hurtgen and Members Liebman and Cowen participated.)

Charge filed by Sheet Metal Workers Local 44; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Philadelphia on Sept. 1, 1999. Adm. Law Judge C. Richard Miserendino issued his decision Jan. 7, 2000.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Pro-Tec Fire Services Ltd., a subsidiary of JJ Protective Services, Inc. (Fire Fighters Local 3694) Oklahoma City, OK August 1, 2002. 17-CA-21310, 21486; JD(SF)-57-02, Judge Lana Parke.

Krystal Enterprises Inc. (Food & Commercial Workers Local 324) Brea, CA August 1, 2002. 21-CA-34553, 34875; JD(SF)-56-02, Judge John J. McCarrick.

Beverly California Corp. (Service Employees Local 250) Monterey, CA July 31, 2002. 32-CA-11950-1 (formerly 6-CA-22084-15); JD(SF)-54-02, Judge Clifford H. Anderson.

Nations Rent, Inc. (Operating Engineers Local 150) South Bend, IN August 12, 2002. 25-CA-27257-1, et al.; JD-81-02, Judge Margaret M. Kern.

Rescare of West Virginia d/b/a Voca Corp. of West Virginia (SEIU District 1199) Charleston, WV August 9, 2002. 9-CA-38751; JD-60-02, Judge Paul Buxbaum.

VCI Mechanical, Inc. (Sheet Metal Workers Local 2) Kansas City, KS August 8, 2002. 17-CA-21274; JD(SF)-60-02, Judge Thomas Michael Patton.

Nathan Katz Realty, LLC, et al. (Service Employees Local 32B-32J) Elmhurst, NY August 12, 2002. 29-CA-23280; JD(NY)-49-02, Judge Steven Fish.

The Dow Chemical Co. and Steelworkers Local 12075 (Steelworkers Local 12075 and The Dow Chemical Co.) Midland, MI

August 14, 2002. 7-CA-43257, et al., 7-CB-12626; JD-86-02, Judge Martin J. Linsky.

T. C. Broome Construction Co., Inc. (Electrical Workers [IBEW] Local 903) Pascagoula, MS August 14, 2002. 15-CA-16185, et al.; JD(ATL)-43-02, Judge Pargen Robertson.

Van De Voorde Electric, LLC (Electrical Workers [IBEW] Local 429) Cookeville, TN August 15, 2002. 26-CA-20495-1; JD(ATL)-45-02, Judge Margaret G. Brakebusch.

Blue Chip Casino, LLC (an Individual) Michigan City, MI August 16, 2002. 25-CA-27856-1; JD-85-02, Judge William G. Kocol.

Adelphia Communications Corp. (an Individual) Cleveland, OH August 16, 2002. 8-CA-32775; JD-87-02, Judge Bruce D. Rosenstein.