

PANEL REPORT

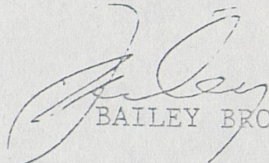
DATE: Wednesday, October 14, 1981 Ctrm 1 1:30 p.m.

PANEL: ENGEL, BROWN & UNTHANK, JJ.

81-1158 In Re: The Kuhlman Electric Company - UAW Retirement Plan
Pension Benefit Guaranty Corp. v. Roth, et al
(E.D. Mich. Harvey, J.)

In lieu of a panel report there is attached hereto for the special attention of Judges Engel and Unthank a proposed order in the captioned case.

Your comments and suggestions are invited.


BAILEY BROWN

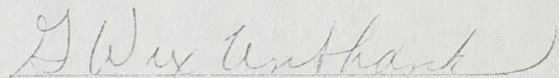
BB:asw
Enc.

CC: All Judges

October 15, 1981

Dear Judge Brown:

I concur.


G. WIX UNTHANK
JUDGE

continued to make contributions to the Plan as required by contract until September 4, 1976. The Plan continued to pay out benefits until the Plan's assets were exhausted. On December 10, 1979, the Pension Benefit Guaranty Corporation (PBGC) filed an application in the District Court for the Eastern District of Michigan for an order terminating the Kuhlman Plan as of September 4, 1976, and appointing the PBGC as statutory trustee of the Plan pursuant to Section 4042 of ERISA (29 U.S.C. § 1342 (1976)). The district court granted the PBGC's motion for summary judgment on January 13, 1981. Kuhlman and two of the members of the Plan's Joint Administrative Committee have appealed the district court's ruling. The union and the other two members of the Joint Administrative Committee support the position taken by the PBGC.

Kuhlman contends that it was improper for the district court to grant the motion for summary judgment when it had not completed discovery in the case. Kuhlman was seeking to discover evidence proving that the parties to the original collective bargaining agreement did not intend that the Kuhlman Plan be such a Plan as would make it covered under Title IV of ERISA. However, the district court determined that regardless of any such intent of the parties, under the criteria established in Connolly v. Pension Benefit Guaranty Corp., 581 F.2d 729, 733 (9th Cir. 1978), cert. denied, 440 U.S. 935 (1979), the Kuhlman Plan was covered, since by the express terms of the Plan it clearly did not qualify for an exemption from ERISA

coverage, as contended by Kuhlman, as an individual account plan. Therefore, as a matter of law the Kuhlman Plan was held by the district court to be a defined benefit plan covered by the provisions of ERISA.

Subsequent decisions by this court confirm the accuracy of the district court's determination. This court has endorsed Connolly, supra, concluding that an exemption from the coverage of Title IV of ERISA as an individual account plan can only occur when the plan has created separate accounts for each participant and measures the participant's benefits solely by the amount of funds in his account. Concord Control, Inc. v. UAW, 647 F.2d 311, 704-05 (6th Cir. 1981); Matter of Defoe Shipbuilding Co., 639 F.2d 311, 313 (6th Cir. 1981). Plans which provide, as here, for employer contributions to a pooled pension fund based on a fixed rate per employee per working hour and which pay benefits according to years of service are considered to be defined benefit plans under 29 U.S.C. § 1321(a) and not individual account plans. This is true even though the liability of the employer is expressly limited under the Plan to contributions based on hours worked by the employees. Concord Control, supra; Matter of Defoe Shipbuilding Co., supra; A-T-O, Inc. v. Pension Benefit Guaranty Corp., 634 F.2d 1013, 1018 n. 9 (6th Cir. 1980). Upon consideration, this court concludes that the district court's determination that the Kuhlman Plan was covered as a matter of law by Title IV of ERISA was correct, and therefore the district court

was authorized to establish a termination date for the plan and appoint the PBGC as trustee of the Plan.

It appears that Kuhlman's real concern centers on its fear that in any future litigation seeking to hold Kuhlman liable to PBGC to reimburse it for payments made by PBGC to the participants of the terminated Kuhlman Plan, that liability, in the light of the district court's instant decision, will be held to be res judicata. The position of PBGC and UAW is that even though Kuhlman's liability will turn on the same facts as those that are determinative in the present litigation and even though the issues adjudicated in this litigation will be a subject of collateral estoppel, Kuhlman's liability for such contributions would not be determined by application of res judicata. PBGC and UAW contend that this is true because Congress has authorized the PBGC to "split its cause of action" in litigation involving termination of pension plans, and therefore the instant litigation and the succeeding litigation would not be the "same cause of action." We agree that Kuhlman's liability under 29 U.S.C. § 1362(b) to reimburse PBGC for payments to the participants of the terminated Kuhlman Plan would not be a matter of res judicata based on the adjudication made in the instant litigation.

It is therefore ORDERED that judgment of the district

court terminating the Kuhlman Plan and appointing the PBGC as statutory trustee be and the same is hereby AFFIRMED.

It is further ORDERED that appellee's motion to recover fees and expenses on the ground that this appeal is frivolous is denied.

ENTERED BY ORDER OF THE COURT

Clerk

United States Court of Appeals
For the Sixth Circuit
Ohio—Michigan—Kentucky—Tennessee

October 22, 1981

Chambers of
Bailey Brown, Circuit Judge
Suite 630
Commerce Union Square Building
2670 Union Extended
Memphis, Tennessee 38112

HAND DELIVERED

Mr. John P. Hehman, Clerk
United States Court of Appeals
for the Sixth Circuit
516 U.S.P.O. & Courthouse Bldg.
Cincinnati, Ohio 45202

RE: October 14, 1981 (Wednesday) ENGEL/BROWN/UNTHANK
Courtroom #1 at 1:30 P.M.

Dear Mr. Hehman:

Enclosed herewith for your signature and entry are
orders in the following cases:

#80-1506 Joe C. Wood v. Secretary of H.E.W.

#81-1158 The Kuhlman Electric Co. - UAW Retirement Plan
Pension Benefit Guaranty Corp. v. Roth et al

Judges Engel and Unthank have concurred.

Sincerely yours,

Bailey Brown
BAILEY BROWN *cbm*

BB:cbm
Enclosures
cc: Judge Engel
Judge Unthank

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81-1158
(Case No.)

Courtroom # 1

10/14/81 PM
(Date)

Style of Case:

Counsel

IN RE: KUHLMAN ELECTRIC CO.
UAW RETIREMENT INCOME PLAN

NORBERT C. ROTH, ET AL.,

CHARLES T. HARRIS
ALAN V. REUTHER

RESPONDENTS-APPELLANTS

v.

PENSION BENEFIT
GUARANTY CORP.

STEPHEN D. SCHREIBER

APPLICANT-APPELLEE

*Alan Reuther
Res. Administrator - U.A.W.*

15 MIN. PER SIDE
(Time Allocation)

*Rocks Crossing Creek
and Guaranty*

PANEL REPORT

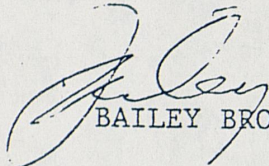
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BAILEY BROWN

BB:asw
Enc.

CC: All Judges

October 20, 1981

RECEIVED

OCT 15 1981

ALBERT J. ENGEL
Circuit Judge

*idea Judge Brown
& Conrad
Albert J. Engel
G. Judge Unthank ✓*