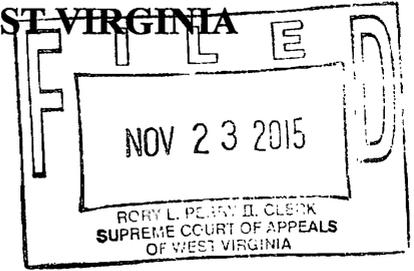


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



International Union of Operating Engineers,  
Local Union No. 132 Health and Welfare Fund, et al.,  
Plaintiffs Below, Petitioners

vs.)

No. 15-0898

(Certified by USDC So. Dist. of WV  
Civil Action No. 3:13-cv-00537)

L.A. Pipeline Construction Company, Inc.,  
Defendant Below; and  
United Bank, Inc.,  
Intervenor Below,  
Respondents

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**PETITIONERS' BRIEF**

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### Case Law

*Leary v. McDowell County National Bank*,  
210 W.Va. 44, 552 S.E.2d 420 (2001).

### Statutes

W.Va. Code §21-5-14 (1989)

W.Va. Code §46-5-106 (1996)

**I. CERTIFIED QUESTION**

Does “[a] letter of credit that states that it is perpetual expire five years after its stated date of issuance, or if none is stated, after the date on which it is issued” as provided by the 1996 version of West Virginia Code § 46-5-106(d), or does such letter remain in effect outside the five-year time period until “terminated” by the Commissioner of the Division of Labor pursuant to West Virginia Code § 21-5-14(g)?

**II. STATEMENT OF THE CASE**

On January 13, 2009, the Defendant Below and Respondent, L.A. Pipeline Construction Company, Inc., an Ohio corporation located in Belpre, Ohio, (hereinafter referred to as “L.A. Pipeline”) was issued a “Perpetual Irrevocable Letter of Credit/Wage Bond” in the amount of \$500,000.00 by United Bank, Inc., Intervenor Below and Respondent (hereinafter referred to as “United Bank”). (App., p. 56) The Letter of Credit/Wage Bond listed as “Beneficiary” the “State of West Virginia - Division of Labor” and specifically provided:

“This perpetual irrevocable letter of credit is posted as a wage bond pursuant to West Virginia Code §21-5-14, and is subject to the provisions thereof, and the laws of the State of West Virginia. As a wage bond, it may be drawn against by the Division of Labor at any time for wages and/or fringe benefits which came due during the effective dates thereof, unless earlier released in writing by the Commissioner pursuant to West Virginia Code §21-5-14. This perpetual irrevocable letter of credit/wage bond may only be terminated with the approval of the Commissioner of the West Virginia Division of Labor pursuant to the terms and conditions of West Virginia Code §21-5-14(g).”

The Letter of Credit/Wage Bond was signed on behalf of United Bank by Charles J. Mildren, Market President.

In approximately July, 2010, L.A. Pipeline began employing operating engineers represented by the Petitioner, the International Union of Operating Engineers, Local Union No. 132, AFL-CIO, (hereinafter referred to as Local 132) on a pipeline job for Caiman Energy located in Marshall County, West Virginia. In accordance with the National Pipeline Agreement with the International Union of Operating Engineers to which L.A. Pipeline was a party (App., pp. 10, 12-13,15), L.A. Pipeline began reporting and paying contributions for fringe benefits, and, administrative union dues, which were deducted from the paychecks of employees, to the Fund Office for the Petitioner trust funds in August of 2010. Contributions were received for work done by employees up to the month of March, 2011, but L.A. Pipeline did not pay the contributions for fringe benefits for work done by employees during the month of April, 2011. (App., pp. 10, 13, 15) Thereafter, the work by employees represented by Local 132 ceased, and, as far as the Petitioners are aware, the Respondent has not done further work in the State of West Virginia utilizing operating engineers since April, 2011. Furthermore, according to the Complaint filed by Counsel for the Defendant Below in the Court of Common Pleas in Washington County, Ohio, L.A. Pipeline is effectively insolvent. (App., p. 52)

In June of 2011, L.A. Pipeline was notified by the Petitioner trust funds of the delinquent contributions owed on behalf of its employees represented by Local 132. In September of 2011, the Division of Labor was notified of L.A. Pipeline's nonpayment of fringe benefits owed on behalf of its employees who were members of Local 132. However, the Division of Labor

subsequently advised the Petitioners to obtain a court judgment in order to obtain payment by means of the Letter of Credit/Wage Bond held by the Division of Labor.

On January 10, 2013, a complaint was filed by the Petitioners against L.A. Pipeline for the unpaid contributions owed on behalf of members of Local 132 for the work performed in April of 2011. (App., pp.8-11). Although L.A. Pipeline admitted that it had failed to timely report and pay contributions that were due for work performed by Local 132 members in April of 2011, they asserted defenses for not paying the contributions. (App., pp.12-14)

In April of 2014, the Petitioners and L.A. Pipeline agreed to a settlement amount of \$129,273.90 and requested the District Court to enter an Agreed Judgment Order for that amount. On April 8, 2014, the Agreed Judgment Order was entered by the District Court. (App., pp. 15-16)

On March 12, 2015, a Writ of Suggestion was issued by the United States District Court Clerk which was served upon the West Virginia Division of Labor. (App., pp.24-25) On April 2, 2015, the West Virginia Division of Labor filed an answer to the suggestion (App., pp.26-29) wherein the Division responded *inter alia*:

1. L.A. Pipeline had posted a Perpetual Irrevocable Letter of Credit/Wage Bond issued on January 13, 2009 in the amount of \$500,000.00 by United Bank.

2. That the sum of \$117,500.00 to the West Virginia Laborers' Pension Fund, et al., was paid out from the Letter of Credit/Wage Bond pursuant to a prior order of the USDC, leaving the wage bond with a balance of \$382,500.00.

3. That pursuant to W. Va. Code §21-5-14(g), the Perpetual Irrevocable Letter of Credit/Wage Bond has not been approved for termination by the Commissioner of the Division of Labor and therefore remains in effect.

4. “To the extent that W. Va. Code §46-5-106(1963) conflicts with W. Va. Code § 21-5-14 (1989), the provisions of the latter are controlling with regard to the termination of an irrevocable letter of credit serving as a wage bond. In other words, an irrevocable letter of credit serving as a wage bond pursuant to W. Va. Code §21-5-14 (1989) can only be terminated with the approval of the Commissioner of the Division of Labor.” Syl. Pt. 6, Leary v. McDowell County National Bank, 210 W. Va. 44, 552 S.E.2d 420 (2001).

5. Accordingly, the Division has determined that the Plaintiffs’ suggested amount of \$129,273.90 against the Defendant’s Wage Bond is eligible for release upon further order from the Court, as long as the suggested amount is for “unpaid wages; unpaid fringe benefits; or damages or expenses incurred or arising out of actual injury.” W. Va. Code §21-5-14a.

On April 7, 2015, the Defendant Below, L.A. Pipeline filed a Motion to Quash the Suggestion Served by the Petitioners upon the Division of Labor asserting that the Letter of Credit had expired and was no longer legally enforceable. (App., pp. 31-38) The Petitioners filed an objection to the Motion to Quash citing the Leary case and W. Va. Code §21-5-14 of the West Virginia Wage and Payment Act as authority that a Letter of Credit serving as a wage bond pursuant to the Wage and Payment Act can only be terminated with the approval of the Commissioner of Labor. (App., pp.39-42)

A reply memorandum was filed with the USDC by L.A. Pipeline on May 14, 2015 (App., 43-47) and then a complaint was filed for declaratory judgment relief in the Court of Common

Pleas, Washington County, Ohio, by West Rental Service, L.L.C. against the Petitioners and United Bank, alleging that West Rental is the real party in interest with respect to the cash funds securing the reimbursement obligation of L.A. Pipeline under the United Bank letter of credit. (App., pp.50-62) This case was stayed on September 25, 2015 by the Honorable Ed Lane, Judge of the Common Pleas Court of Washington, County, Ohio pending the decisions to be entered in accordance with the certified question submitted to the Supreme Court of Appeals of West Virginia and the United States District Court.

On June 8, 2015, United Bank filed a Motion to Intervene and Memorandum in Support of Motion to Intervene in the United States District Court case (App., pp.63-65; 79-89) as well as a Reply to the Plaintiffs' Suggestion and the West Virginia Division of Labor's Answer to Plaintiffs' Suggestion. (App., pp.66-78) Upon consideration of the Motion to Quash the Suggestion and the responses thereto, the United States District Court then issued the Certification Order to this Honorable Court on September 17, 2015. (App., pp.1-7)

### **III. SUMMARY OF ARGUMENT**

The previous holding of the Court in the case of of Leary v. McDowell County National Bank, 210 W. Va. 44, 552 S.E.2d 420 (2001) that "an irrevocable letter of credit serving as a wage bond pursuant to W.Va. Code § 21-5-14 can only be terminated with the approval of the Commissioner of the Division of Labor" is also applicable to letters of credit governed by W. Va. Code §46-5-106 (1996). In addition to the application of the Leary case to letters of credit covered by W. Va. Code §46-5-106 (1996), the specific terms of the letter of credit control the amendment, cancellation, and duration of the letter of credit. Accordingly, the issuer of a letter

of credit is contractually bound by its acknowledgment of the specific terms as set forth in the letter of credit. The assertion that the application of W.Va. Code § 21-5-14(g) to a letter of credit does not mean that a letter of credit/wage bond lasts forever or never expires.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioners respectfully request that this case be scheduled for oral argument pursuant to Rule 19(a)(4) for the reason that the case involves a narrow issue of law consisting of a certified question from the United States District Court which is believed by the Petitioners to significantly effect the present and future use of letters of credit by the West Virginia Division of Labor to protect the wages and fringe benefits of working people in the State of West Virginia.

#### **V. ARGUMENT**

##### **A. THE HOLDING OF LEARY V. MCDOWELL COUNTY NATIONAL BANK, 210 W. Va. 44, 552 S.E.2d 420 (2001) IS APPLICABLE TO LETTERS OF CREDIT UNDER W. VA. CODE § 46-5-106 (1996)**

Although considering an earlier UCC statute regarding Letters of Credit, this Court dealt with the same issue as presented by the Certified Question in this case in the previous case of Leary v. McDowell County National Bank, 210 W. Va. 44, 552 S.E.2d 420 (2001). That case likewise pertained to a letter of credit posted as a wage bond with the Commissioner of the West Virginia Division of Labor pursuant to W. Va. Code §21-5-14. In that case, the letter of credit/wage bond had a stated expiration date of June 30, 1992, but neither the bank nor the company for which the letter of credit/wage bond was issued had ever requested termination of the letter credit/wage bond in accordance with W. Va. Code §21-5-14(g) which states:

“Termination of bond - The bond may be terminated with the approval of the commissioner, after an employer submits a statement, under oath or affirmation lawfully administered, to the commissioner that the following has occurred: The employer has ceased doing business and all wages and fringe benefits have been paid, or the employer has ceased doing business and all wages and fringe benefits have been paid, or the employer has been doing business in this state for at least five consecutive years and has paid all wages and fringe benefits. The approval of the commissioner will be granted only after the commissioner has determined that the wages and fringe benefits of all employees have been paid. The bond may be terminated upon a determination by the commissioner that an employer is of sufficient financial responsibility to pay wages and fringe benefits.”

In spite of the letter of credit/wage bond having a stated expiration date which had expired, the Court stated and held:

“Secondly, such a result would be contrary to the Wage Payment and Collection Act which was designed to protect working people and assisting them in the collection of unpaid wages and benefits. Thus, we hold that to the extent that W. Va. Code §46-5-106 (1963) conflicts with W. Va. Code §21-5-14, the provisions of the latter are controlling with regard to the termination of an irrevocable letter of credit serving as a wage bond. In other words, an irrevocable letter of credit serving as a wage bond pursuant to W. Va. Code §21-5-14 can only be terminated with the approval of the Commissioner of the Division of Labor.” Leary v. McDowell County National Bank, 210 W. Va. 44, 51.

**B. W. VA. CODE § 46-5-106 (1996) CLEARLY INDICATES THAT CANCELLATION AND TERMINATION OF A LETTER OF CREDIT IS GOVERNED BY ITS TERMS**

The present statutory language related to Letters of Credit is set forth in W. Va. Code §46-5-106 (1996) which is headed “**Issuance, amendment, cancellation and duration**”. It is submitted that this language which is applicable to the case at hand clearly falls within the same interpretation as made by the Court in the Leary case. W. Va. Code §46-5-106(a) provides: “A letter of credit is issued and becomes enforceable according to its terms against the insurer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary.” (Emphasis added) This language makes it clear that the particular terms of a letter of credit for a

specific purpose or use must be followed or adhered to by the applicant and issuer as well as the beneficiary.

Turning specifically to the “Perpetual Irrevocable Letter of Credit/Wage Bond” which is the subject of this case, the document clearly identifies the purpose of the letter of credit as a wage bond pursuant to West Virginia Code §21-5-14 and states that the letter of credit is subject to the provisions thereof and the laws of the State of West Virginia. As to its use as a wage bond, the document further specifies that it may be drawn against by the Division of Labor at any time for wages and/or fringe benefits which came due during the effective dates thereof, unless earlier released in writing by the Commissioner pursuant to West Virginia Code §21-5-14. Therefore, not only does the Wage Bond/Letter of Credit reference the Wage Payment and Collection Act, but it also states clearly that it may be drawn against by the Division of Labor at any time for wages and fringe benefits that came due during the effective dates thereof, unless earlier released in writing by the Commissioner. (Emphasis added)

**C. UNITED BANK, INC., THE ISSUER OF THE LETTER OF CREDIT/WAGE BOND WAS CONTRACTUALLY BOUND TO THE CONDITIONS SET FORTH IN W.VA. CODE §21-5-14**

As previously noted in the Statement of the Case, the Letter of Credit/Wage Bond was signed on behalf of the Intervenor/Respondent, United Bank, Inc. by its Market President. Therefore, the United Bank, as issuer of the Letter of Credit/Wage Bond, was aware and agreed to the terms of the Letter of Credit. Those terms generally provided that the Letter of Credit was subject to the provisions of West Virginia Code § 21-5-14 and the laws of the State of West Virginia. More specifically, United Bank agreed that the Division of Labor could draw against

the letter of credit at any time for unpaid wages and fringe benefits which came due during the effective dates of the Letter of Credit and that the letter of credit/wage bond could only be terminated with the approval of the Commissioner of the West Virginia Division of Labor pursuant to the terms and conditions of West Virginia Code § 21-5-14(g). These very specific terms and conditions were acknowledged by the sworn signature of Charles J. Mildren, Market President of United Bank, Inc. (App., p. 56)

**D. THE APPLICATION OF W.VA. CODE § 21-5-14(g) DOES NOT MAKE THE LETTER OF CREDIT NEVER EXPIRE AND/OR LAST FOREVER**

The Respondents have heretofore asserted that the application of W. Va. Code § 21-5-14(g) to Letters of Credit used as wage bonds under W. Va. Code § 21-5-14 would result in those letter of credit never expiring and/or lasting forever. (App., p. 46) It is respectfully submitted that this is not the position of the Petitioners. As noted above, the Wage and Payment Collection Act, specifically W. Va. Code § 21-5-14(g) clearly provides for the termination of a wage bond including those secured by a letter of credit once the purpose of the wage bond (to secure the payment of wages and fringe benefits to employees) is accomplished. All that is required of the issuer (bank) or employer is to submit an affidavit from the employer stating that the employer has ceased doing business and all wages and fringe benefits have been paid or that the employer has been doing business in the state of West Virginia for at least five consecutive years and all wages and fringe benefits have been paid. In addition, the bond may be terminated upon a determination by the commissioner that an employer is of sufficient financial responsibility to pay wages and fringe benefits.

In addition to the statute providing for the termination of a wage bond, this argument was previously considered and rejected by the Court in the Leary case. As stated in footnote 8:

“Although the Commissioner must consent to the termination of the wage bond, the financial institution or bonding company will not be committed and obligated to the letter of credit for an indefinite period of time as asserted by the Bank in this case. Pursuant to W.Va.Code § 21-5-14, an employer is not required to post a wage bond after five consecutive years of doing business in this State.” Footnote 8, Leary v. McDowell County National Bank, 210 W. Va. 44, 51.

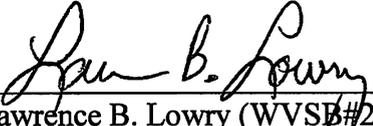
In addition to providing for the termination of a wage bond, the language used by the Commissioner in the Letter of Credit/Wage Bond in this case further acknowledges that the letter of credit does not indefinitely secure the payment of wages and fringe benefits beyond its effective dates. As provided in the language of the Letter of Credit/Wage Bond, although the Division of Labor may draw upon the Letter of Credit at any time, it may only be used to for payment of wages and fringe benefits which can due during the effective dates of the letter of credit/wage bond. (App., p. 56)

## VI. CONCLUSION

For all the foregoing reasons and authorities, it is respectfully submitted that the answer to the certified question submitted by the United States District Court is that the letter of credit/wage bond remains in effect for the payment of wages and fringe benefits which came due during the effective dates of the letter of credit until the letter of credit/wage bond is terminated by the Commissioner of Labor pursuant to W.Va. Code §21-5-14(g).

International Union of Operating Engineers,  
Local Union No. 132 Health and Welfare Fund, et al.,  
Plaintiffs Below, Petitioners

By Counsel

  
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L.A. Pipeline Construction Company, Inc.,  
Defendant Below; and  
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Intervenor Below,  
Respondents

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he has served a copy of the foregoing Petitioners' Brief upon the following parties by first class United States Mail, postage prepaid, on this 23<sup>rd</sup> day of November, 2015:

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