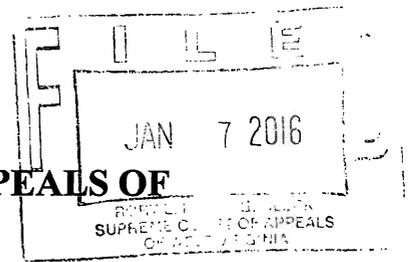


**IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA**



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

REPLY BRIEF

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I. INTRODUCTION

Although not a party to the United States District Court case from which the Certified Question was brought to this Honorable Court, the West Virginia Bankers Association, Inc. and Community Bankers of West Virginia have filed a Motion to file an *Amici Curiae* Brief in Support of the Respondents, L.A. Pipeline Construction Company, Inc. and United Bank, Inc. This Reply Brief is hereby filed for the purpose of responding briefly to certain arguments raised by the Bankers' *Amici Curiae* Brief.

II. ARGUMENT

1. **The Wage Payment and Collection Act's provisions regarding the termination of a bond do apply to standby letters of credit governed by the West Virginia Uniform Commercial Code.**

In spite of the arguments of the Respondents and the Bankers, the Petitioners are not asserting that all letters of credit used in the banking industry are perpetual and never expire. However, when an employer chooses to use a letter of credit as a wage bond, in order for the letter of credit to fulfill the purposes of the Wage Payment and Collection Act and to protect wages and benefits which have been earned by West Virginia workers, the letter of credit must be subject to the protections afforded by the Act. Otherwise, an employer such as the Respondent, L.A. Pipeline Construction Company, Inc., may deliberately avoid its responsibilities to its employees to pay them the wages and benefits that they have earned.

The Bankers have made the accusation that the Petitioners and DOL are attempting to "upend the cornerstone of the letter of credit" by equating it with a surety bond. However, the Petitioners submit that the equating of the letter of credit to a surety bond when used by an

employer to satisfy the requirements of the Wage and Payment Collection Act is exactly what the Respondent, United Bank, Inc., has acknowledged and agreed to by the “Perpetual Irrevocable Letter of Credit/Surety Bond.” (App., p. 79) In this regard, not only is the document which was signed by an authorized bank officer of the Respondent, United Bank, Inc., described as a Letter of Credit/Surety Bond, but the Market President for the Bank further agreed and acknowledged that the letter of credit was posted as a wage bond pursuant to West Virginia Code §21-5-14 and was subject to the provisions thereof and the laws of the State of West Virginia. More specifically, the Letter of Credit/Wage Bond which bears the signature of a president for the Respondent bank, states that the “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). As previously cited in the Petitioner’s Brief, those terms and conditions are:

“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.”

It is respectfully submitted to the Court that the fact that the Respondent, L.A. Pipeline Construction Company, Inc., has never met any of the conditions required in order for the Letter of Credit/Surety Bond to be terminated has not been disputed.

The position of the Bankers' Brief that a letter of credit is not a form of bond used for a wage bond is further contrary to the clear language used by the West Virginia legislature in drafting §21-5-14. In describing the forms of "bonds" which may be used as a wage bond, subsection (c) not only includes letters of credit as a form of bond which can be used by employers, but also requires the commissioner to specifically "accept an irrevocable letter of credit in lieu of any other bonding requirement." It is submitted by the language of this statute that the legislature considered the letter of credit to be a form of employer's bond for wages and benefits. It is further submitted that the statute does not distinguish between the various forms of "wage bonds" as to the application of the other provisions and requirements for the termination of the wage bond.

2. The basis for the holding of *Leary v. McDowell County National Bank*, 210 W.Va. 44, 552 S.E.2d 420 (2001) is still applicable to the certified question presented to the Court in the case at hand.

Although the Court in the Leary case found the current version (1996) of §46-5-106 to not be applicable because the letter of credit in that case predated that version of the statute, it is submitted that the underlying principle for the holding that the provisions of W.Va. Code §21-5-14 (the Wage Payment and Collection Act) are controlling with regard to the termination of an irrevocable letter of credit serving as a wage bond. More specifically the Court held 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.

Although the Court in the Leary case limited the holding to the 1963 version of §46-5-106, the Petitioners believe the holding is applicable to this case as well. As noted above, the letter of credit at issue was used by the Respondents as a wage bond under the provisions of W.Va. Code §21-5-14. Furthermore, the Respondent bank acknowledged on the face of the letter of credit itself that it was subject to the provisions of W.Va. Code §21-5-14 and even more specifically that “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).

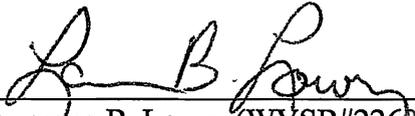
As previously described by the Court in the Leary decision, “... the Wage Payment and Collection Act was designed to protect working people and assist them in the collection of unpaid wages and benefits.” Leary v. McDowell County National Bank, 210 W. Va. 44, 51, 552 S.E.2d 420 (2001). In order to do so, the Act not only requires employers to post a wage bond, but also requires the Commissioner of the Division of Labor to make sure that wages and fringe benefits which have been earned by employees have all been paid prior to releasing the employer from the wage bond. In the case at hand, the Respondent, L.A. Pipeline Construction Company, Inc., agreed that they had not paid benefits owed to its employees by consenting to an agreed judgment for the amount of benefits owed. Obviously, they were unable to request the approval of the Commissioner of the Division of Labor to terminate their letter of credit/wage bond since they had not paid the benefits owed for their employees. However, in an attempt to circumvent the protection of the employees of the Respondent, L.A. Pipeline Construction Company, Inc.,

the Respondent is now asserting that contrary to the provisions of W.Va. Code §21-5-14, the Perpetual Irrevocable Letter of Credit/Wage Bond which they submitted to the Commissioner of the Division of Labor was not really a Wage Bond at all and was not subject to the provisions of W.Va. Code §21-5-14. It is again respectfully submitted that both the clear language of W.Va. Code §21-5-14 as well as the language on the face of the Letter of Credit/Wage Bond makes it clear that this is not the case. To accept the argument of the Respondents and Bankers would mean that an employer is not required to comply with W.Va. Code §21-5-14(g) in order to terminate the wage bond if they choose to use a letter of credit for the wage bond instead of a surety bond. Surely this was not the intent of the legislature in including letters of credit as a permissible instrument for a wage bond. Obviously, this would allow employers a “loophole” to escape the protection of employees afforded by the Wage and Payment Collection Act.

III. 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).

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By Counsel



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CERTIFICATE OF SERVICE

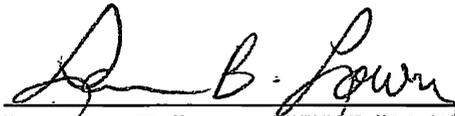
The undersigned hereby certifies that he has served a copy of the foregoing Petitioners' Reply Brief upon the following parties by first class United States Mail, postage prepaid, on this 7th day of January, 2016:

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