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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

INTERNATIONAL ASSOCIATION OF)
UNITED WORKER'S UNION, et al.,)
Plaintiffs,)
vs.) CASE NO. 2:04-CV-901DB
UNITED MINE WORKERS OF)
AMERICA, et al.,)
Defendants.)
_____)

BEFORE THE HONORABLE DEE BENSON

February 17, 2006

Motion Hearing

A P P E A R A N C E S

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1 February 17, 2006

10:00 a.m.

2 P R O C E E D I N G S

3
4 THE COURT: Good morning.

5 We're here in International Association of United
6 Workers Union and others against United Mine Workers of America
7 and others. This is 04-CV-901. Could I ask those attorneys
8 who are here to state your name and who you represent so we'll
9 have it straight on the record.

10 Begin over here since there are fewer of you.

11 Mr. Hansen.

12 MR. HANSEN: Mark Hansen representing the I.A.U.W.A.
13 and its officers.

14 MR. KINGSTON: Carl Kingston representing C.W. Mining
15 Company and its officers.

16 MR. HANSEN: Also, Your Honor, for purposes of this
17 hearing Mr. Kingston has asked me to present arguments on
18 behalf of all of the plaintiffs.

19 THE COURT: Thank you.

20 MR. HUNT: Good morning, Your Honor. Jeff Hunt and
21 David Reymann on behalf of the Deseret Morning News.

22 THE COURT: Mr. Hunt and Mr. Reymann?

23 MR. REYMANN: Yes.

24 THE COURT: Great.

25 MR. O'BRIEN: Mike O'Brien on behalf of the Salt Lake

1 Tribune and its employees.

2 MR. DRYER: Randy Dryer and Mike Petrogeorge on
3 behalf of The Militant.

4 THE COURT: Mr. Petrogeorge's first name?

5 MR. PETROGEORGE: Mike.

6 THE COURT: Right.

7 MS. RIVLIN: Judith Rivlin representing the United
8 Mine Workers and a number of individual named officers and
9 employees of the union.

10 THE COURT: Judith --

11 MS. RIVLIN: Rivlin, R-i-v-l-i-n.

12 MR. ROSENBLATT: Richard Rosenblatt representing the
13 individual miner defendants.

14 MR. SANDACK: Your Honor, Arthur Sandack, local
15 counsel for the United Mine Workers and also for the individual
16 miners. I also represent them on a motion to quash from Local
17 8286.

18 THE COURT: Thank you.

19 MR. HATCH: Joseph Hatch representing Jobs With
20 Justice and their officer, George Neckel.

21 THE COURT: Why are you behind the bar there?

22 MR. HATCH: It is just too crowded. We felt a little
23 isolated way over there. It is better to see you from here.

24 THE COURT: You can sit up here, whichever is your
25 preference.

1 MR. HATCH: If you want us to. It your preference.
2 THE COURT: I don't care. My preference is your
3 preference. Your preference is my preference.
4 MR. SANDACK: We have a better view from here.
5 THE COURT: You like it there better. You can sit
6 over there with these guys.
7 MR. HATCH: No thanks.
8 THE COURT: Anyone else who wants to make an
9 appearance? No. All right.
10 I have a lot before me. Do you have some order that
11 you had in mind?
12 MR. HUNT: Your Honor, counsel for the defendants
13 have met and agreed upon what we believe to be an orderly
14 presentation, and that is because the newspaper defendants
15 present a set of discrete issues, to have the newspaper
16 defendants go first and then have the union and the workers and
17 then Jobs With Justice counsel go after us.
18 THE COURT: And as between the newspapers, do you
19 have an order?
20 MR. HUNT: We do.
21 THE COURT: Okay.
22 MR. HUNT: I will be proceeding first and splitting
23 my time with Mr. O'Brien, and we'll be covering the
24 consolidated motion to dismiss of the Deseret Morning News and
25 the Tribune, and Mr. Dryer will follow us representing The

1 Militant.

2 THE COURT: Okay.

3 MR. HUNT: May it please the Court and counsel, Your
4 Honor, this is the third time the plaintiffs have reframed
5 their pleadings in an attempt to state defamation claims
6 against the media defendants. After the last motion hearing
7 the Court allowed the plaintiffs to file a second amended
8 complaint that eliminated statements that were based on
9 attributed statements, and as to the remaining statements, to
10 explain why they are defamatory. In response, the plaintiffs
11 have abandoned the vast majority of the statements that they
12 previously relied upon in attempting to state claims for
13 defamation against both the Morning News and the Tribune.

14 Although the claims are now shorter, they are no less
15 meritorious. The Tribune and the Deseret Morning News have
16 renewed their motion to dismiss on the same six legal grounds
17 that we asserted in our first motion, and I'm going to address
18 two of those and Mr. O'Brien will address the remaining issues.

19 The areas that I'm going to cover, Your Honor, are
20 lack of defamatory meaning and protected opinion. I'm going to
21 do that in the context of the news publications themselves. As
22 to defamatory meaning, I'm not going to recite the law in this
23 area because it is in the briefs and we covered it at the last
24 hearing, but, simply stated, whether a statement is capable of
25 sustaining a defamatory meaning is a question of law for this

1 Court and is a threshold hurdle that the plaintiffs need to
2 overcome to state a claim. The context is very important when
3 you're looking at defamatory meaning. To be actionable the
4 statement must be capable of defamatory meaning, and the
5 context of the specific article that is alleged to contain the
6 defamatory statement, and then also in the broader social
7 context of the dispute.

8 Here the broader social context is a contentious
9 labor dispute at the Co-op Mine. In the Linn case and in the
10 other cases the United States Supreme Court and other courts
11 have recognized that when you're dealing with a contentious
12 labor dispute or a political debate, they frequently contain
13 contentious and inflammatory accusations, hyperbole, rhetoric
14 and conflicting characterizations of the same event. That is
15 what we have here, Your Honor.

16 Your Honor, the remaining claims in this case against
17 the Morning News and the Tribune have been whittled down to
18 nine Tribune publications and five Morning News publications.
19 Just to give the Court some idea of how those fall in terms of
20 opinions and news articles, of the nine Tribune publications,
21 seven are news articles, one is an opinion column, one is an
22 editorial. Of the five Deseret Morning News publications,
23 three are articles, news articles, one is an opinion column and
24 one is an editorial.

25 Now, as to the Tribune's news articles, the seven

1 news articles, one of those news articles is a story. It is
2 identified as T-2 or Tribune 2 in the plaintiff's second
3 amended complaint. That is a publication I think you can take
4 off the deck here this morning because it is an attributed
5 statement, a statement that is alleged to have been defamatory
6 in T-2, which is an October 12th, 2003 article by Mike Burrell
7 of the Salt Lake Tribune. The statement that is alleged to be
8 defamatory is a quote from Corey Hilton. The quote is, it kind
9 of makes you mad that somebody could abuse people that badly.
10 That is what the plaintiff's second amended complaint alleges
11 to be defamatory in that article. It is attributed to Corey
12 Hilton, who in the second amended complaint is identified as a
13 Salt Lake Tribune reporter. He is not a Salt Lake Tribune
14 reporter, he is chairman of the Building and Trades Organizing
15 Project and is identified as so in the article. So it is a
16 misidentification of the alleged defamer and it is a
17 mis-attributed statement and the plaintiffs have abandoned
18 their claims for attributed statements.

19 Your Honor, as to the remaining articles, we don't
20 have the time and there are a lot of counsel that need to speak
21 here this morning, so what I would like to do is focus on the
22 primary statements relied on by the plaintiffs to state a claim
23 for defamation, and give the Court a couple of examples that
24 illustrate the lack of defamatory meaning and the protected
25 opinion status of those statements in the context of the

1 articles themselves.

2 I think we should start out with the primary
3 statement that the plaintiffs rely on to state claims against
4 the Morning News and the Tribune, and that is that the miners
5 were fired and locked out. That appears repeatedly in the
6 stories and in the editorials and in the opinion columns and in
7 the allegations. First, there are three problems with that
8 statement being capable of sustaining defamatory meaning. One,
9 plaintiffs never explained how reporting that an employer fired
10 someone defames the employer. It might be possible to defame
11 an employee by falsely reporting that the employee was fired,
12 but that is not the claim here. The claim here is that we have
13 defamed the employer by saying that the employer has fired or
14 locked out these miners. That meaning is not the same.

15 Second, Your Honor, in the context of this labor
16 dispute the question of whether these miners were fired or quit
17 for protesting unsafe working conditions is so typical in labor
18 disputes that it can't contain defamatory meaning as a matter
19 of law. That is the kind of thing that is at issue here. The
20 miners claim that they were fired and the owners claim they
21 quit. They have a difference of opinion about that. When read
22 in the context of the stories that we'll get to in a minute, it
23 is clear that what is being reported is both the miners'
24 version of that event and the owner's version of that event.

25 So when read in context, that statement to a

1 reasonable reader reading that would not convey a defamatory
2 meaning, because they would say, well, this is a labor dispute
3 and the miners say they are fired and the owners say they
4 walked out.

5 Now, what the plaintiffs say in response to that is,
6 well, you need to read those statements as implying defamatory
7 facts, that the owners fired the mine workers for illegally
8 engaging in protected union activity, and they claim that that
9 is what is really defamatory. Well, those defamatory facts are
10 never spelled out in the complaint or in the articles
11 themselves. It is clear when you read the articles, Your
12 Honor, and I'm going to give you two example here in a minute,
13 it is clear that when you read it in context that is an
14 implication, and the implication that the plaintiffs want you
15 to draw, is not the one that the newspapers are implying. The
16 newspapers are not the ones implying that these workers were
17 fired for engaging in protected union activity. Rather, when
18 we report that information, that is the assertion and the
19 allegation being made by the mine workers that that is what is
20 going on here.

21 Just to give you two examples of that -- if I could
22 approach?

23 THE COURT: Yes.

24 MR. HUNT: This is what we're talking about. If you
25 look at these two news articles from the Deseret Morning News

1 and one from the Tribune, they are talking about the miners
2 planning to return to their jobs. If you look at the Deseret
3 News article first, Your Honor, the highlighted language, the
4 language that is highlighted in yellow is what the plaintiffs
5 claim in their second amended complaint is defamatory. That is
6 the same with the Tribune. The red is what I have underlined,
7 and that provides the context.

8 If you look at this, the highlighted language that is
9 alleged to have been defamatory is that the miners are
10 returning to their jobs after being fired. Essentially that is
11 what that language says. What the plaintiffs do not say in
12 their second amended complaint is the context. They omit the
13 language that appears immediately following, which attributes
14 the statements. If you read at the beginning there of the
15 underlined portion, they were fired after contacting the United
16 Mine Workers about getting a union organized at the mine,
17 comma, said Alyson Kennedy, a member of the strikers leadership
18 community. We want safer working conditions, better pay and
19 benefits. In my opinion, no coal miner should have to work for
20 minimum wage, Kennedy said.

21 Now, that makes it clear that this is the contention
22 of the mine workers, that they were fired. To just pluck out,
23 as they have done repeatedly in these stories, and say this is
24 defamatory because you said they were fired when they actually
25 quit, that is not what the law requires the Court to do, and

1 that is not the kind of analysis that is required. You need to
2 read the article as a whole.

3 Just as a matter of fairness, and my colleague
4 Mr. O'Brien will get to this, but if you look at the bottom of
5 the page where it says John Kingston, and that is the Deseret
6 Morning News reporting the Kingstons' version of what happened
7 here. It says, John Kingston has said previously that the 74
8 miners fired last September staged an illegal lockout. A phone
9 call to the Kingstons went unanswered. That is the type of
10 reporting that is replete throughout these articles.

11 There are other examples. The Tribune July 3rd, 2004
12 article is the same sort of thing. You can look at it right
13 there. That is the other article that I have handed to the
14 Court. The highlighted language says that the miners were
15 fired, but then you go right there to the underlined language,
16 which is not included in the second amended complaint, and it
17 is the attribution to Bill Estrada, the miner who claims they
18 were fired. He, Bill Estrada, said that the settlement reached
19 Thursday through the National Labor Relations Board validated
20 what the miners had been saying all long, colon, that the
21 Kingstons fired them illegally. That is attributed to one of
22 the miners.

23 So a reasonable reader reading this language that has
24 been plucked out in an isolated form in the second amended
25 complaint would understand that the Kingstons say they walked

1 out and the miners say that they were fired for engaging in
2 protected activity.

3 I have also underlined the other language there
4 because I think it shows the balance that has been shown in
5 these articles. It says there that the miners say that the
6 I.A.U.W. is a yellow dog or company run union. But Benson said
7 that the N.L.R.B. did not gather sufficient evidence to support
8 that allegation. The calls to the mining company Friday were
9 not immediately returned, but the company has maintained
10 Estrada was fired for insubordination after having been caught
11 falsifying a safety inspection record. They are reporting both
12 sides of the debate.

13 The second ground that I will speak to, Your Honor,
14 is opinion. That is the other ground that we believe that most
15 of these allegedly defamatory statements are protected. To
16 state a claim for defamation you have to have a statement of
17 fact. Statements of fact are objectively verifiable.
18 Expressions of opinion are not. This requirement derives not
19 only from the common law but from the Utah State Constitution,
20 Article One, and the United States Constitution, the First
21 Amendment.

22 THE COURT: Tell me as a matter of procedure why this
23 is appropriate under a 12(b)(6) motion. Aren't you asking me
24 to engage in a whole lot of fact-finding here, and reading the
25 underlying statements and deciding whether they are capable of

1 containing defamatory content? You're requiring me to read
2 every article and put it in context, and now you're saying
3 secondly that you have got to look at these at this stage of
4 things and decide whether it is an opinion or not? 12(b)(6) is
5 a simple statement, a failure to state a claim upon which
6 relief can be granted, and is this appropriate at this stage?
7 Shouldn't we wait? Why are you fighting so hard to dismiss the
8 claim as opposed to moving for something like judgment on the
9 pleadings or something?

10 MR. HUNT: There are two reasons, Your Honor. One is
11 that we have to deal with the complaint that has been drafted,
12 and originally it was a shotgun approach and we have gone
13 through three iterations now. We have narrowed it down to not
14 that many statements, five news articles for the Deseret News
15 and nine for the Tribune, so I think it is a manageable number
16 of statements.

17 THE COURT: Tell me procedurally why.

18 MR. HUNT: Procedurally --

19 THE COURT: If someone accused you of negligence, you
20 would start at the first of the process and say, well, with
21 bare bones pleading they have accused you of negligence, and as
22 soon as you started asking the Court to analyze the facts
23 underlying that claim of negligence, you would be beyond the
24 pleadings and you would be into some new ground, whether we
25 analyze it after full blown what we call now discovery, or

1 right at the outset, and I'm just wondering because
2 procedurally this does not make perfect sense to me. It does
3 not.

4 MR. HUNT: It may be because of the First Amendment
5 interests that are at issue here. We have cited the Court to
6 cases --

7 THE COURT: Well, there is no First Amendment right
8 to defame.

9 MR. HUNT: There is not.

10 THE COURT: No. So I don't know that I see --

11 MR. HUNT: But courts have --

12 THE COURT: Does the First Amendment change the Rules
13 of Civil Procedure?

14 MR. HUNT: No, but courts have said that claims that
15 implicate the First Amendment should be given very close
16 scrutiny at the pleading stage. If the plaintiffs can't meet
17 the simple burden of coming forward and showing facts, pleading
18 facts that state a claim for defamation, then the Court should
19 dismiss it. We are seeking nothing more than that. We are
20 just asking that --

21 THE COURT: Well, they say that they have stated a
22 claim. They say this has defamed them by holding them up to
23 public ridicule and that it is focused precisely on the kinds
24 of things that defamation cases focus on. It has effected
25 their there reputation, it exposes them to public hatred and

1 contempt or ridicule by what you said.

2 You're now saying, Judge, we want you to analyze
3 everything that they complain about, and we're going to have
4 you analyze it critically and carefully in context, and that
5 does not seem like a pleading stage sort of -- it does not
6 procedurally strike me as being appropriate under 12(b)(6).

7 The last time we were here the problem was, in my
8 view, and as I ordered, a complaint that was so imprecise and
9 overly done and overly broad that it didn't give you a clear
10 understanding, I thought, of what you were being sued for. So
11 many items were listed that it was a shotgun approach. Now
12 they have distilled it and you still want it thrown out for
13 failure to state a claim. Well, they have stated a claim. The
14 claim is defamation. You want to say, well, because of some
15 First Amendment considerations we are supposed to sort this all
16 out now at the 12(b)(6) stage of things.

17 I don't know that it would go up on appeal, but I am
18 wondering what an appellate court would say. You have to reach
19 these issues sooner or later in the process. I am just
20 wondering if you are not putting the cart before the horse, so
21 to speak, and why you want to do it this way. Why do you want
22 to push so hard it get it thrown out on this procedural ground?

23 MR. HUNT: We want to push this way because we
24 believe they have not stated a claim for defamation.

25 THE COURT: Only by examining the underlying

1 statements, and by underlying statements, statements from which
2 they claim the defamatory meaning comes. The only way that you
3 can have me do that is by reading all the surrounding articles
4 and to get it in what you call the context and then argue that
5 it is opinion versus fact. That is requiring quite a bit of
6 the Court beyond just looking at the pleadings and saying, oh,
7 no, this is what we typically do in 12(b)(6) matters.

8 MR. HUNT: But, Your Honor, the pleadings incorporate
9 the articles and you can't escape from looking at the articles.
10 They pull words out of the articles and say this is defamatory.
11 So to understand whether those words are capable of sustaining
12 a defamatory meaning, which is the standard, you need to look
13 at what is in front of them and what is behind them. That is
14 all I am asking the Court to do.

15 THE COURT: Well, if you can tell me how you so
16 nicely slice that line, and we are into examining facts and
17 making some kind of a determination that is a mixture of fact
18 and law. Is it capable of defaming? That is not what we
19 usually think of when we look at a complaint and a claim in a
20 complaint and ask whether it is capable of sustaining
21 litigation to go forward. I don't see how anyone could argue
22 that this is a mixed issue.

23 MR. HUNT: It is not a --

24 THE COURT: By the very argument that this is
25 incapable of sustaining a defamatory meaning is asking the

1 Court to do an analysis of the underlying cause of action.
2 Somebody smarter than me can figure out, I guess, whether
3 something didn't defame as opposed to not being capable of
4 carrying defamatory meaning, and I am sure there is a
5 difference, but it is slight.

6 MR. HUNT: Your Honor, I respectfully disagree that
7 the issue of whether the statements is capable of sustaining
8 defamatory meaning is a mixed question of law and fact. It is
9 not. It is clearly a question of law. We have cited numerous
10 cases in our briefs that make that abundantly clear.

11 THE COURT: Well, I don't know that you need to
12 disagree with me. They may say it is a question of law,
13 meaning it is a question for the Court, but is it appropriate
14 to be considered at a procedural stage like this?

15 MR. HUNT: Yes.

16 THE COURT: If anyone tells me that there is not a
17 mixture of fact in what this is being called, I disagree with.
18 It is impossible to call it purely legal. It is only by
19 assessing the facts and the factual context that you can decide
20 an issue such as whether something is capable of carrying
21 defamatory meaning. I will never buy that one, that it is
22 purely some legal issue.

23 It is an examination of facts. Fine, that the courts
24 want to call it a question of law, it is really only saying it
25 is a matter for the Court, and I am happy with that, but it

1 almost begs my initial question. Why then do we do that under
2 a Rule 12(b)(6) proceeding as opposed to saying, okay, well,
3 they filed their complaint, now let's dismiss it, and your
4 argument would be that it should be dismissed on the basis that
5 what they have sued us for is not capable of carrying
6 defamatory meaning. We are not on a procedural issue of
7 failure to state a claim, we are into a consideration of the
8 underlying articles. I'm really asking a procedural question.
9 It is their first line of defense as against your motion to
10 dismiss.

11 MR. HUNT: But, Your Honor --

12 THE COURT: It is still not clear to me.

13 MR. HUNT: Your Honor, the law can't be, and isn't,
14 that you can never dismiss defamation claims at the 12(b)(6)
15 stage. If it were --

16 THE COURT: I am not suggesting that, Mr. Hunt, not
17 at all. Why in this case?

18 MR. HUNT: I'm trying to explain why. That is
19 because the statements themselves are either protected opinions
20 or not capable of sustaining defamatory meaning. That is our
21 position. Our position is that the Court can reach that legal
22 conclusion by looking at the statements in the context of the
23 articles themselves.

24 If the Court feels that that cannot be done without
25 taking evidence or having discovery or being decided on a

1 summary judgment basis, then that is where we are going.

2 THE COURT: I at no time said that that can't be done
3 without taking evidence or going through discovery or turning
4 it into summary judgment. You're reading far too much into
5 what I'm saying. I don't think you're listening to my
6 question.

7 Go ahead.

8 MR. HUNT: Well, I apologize, Your Honor. I thought
9 the question was why should this Court decide this at the
10 12(b)(6) stage.

11 THE COURT: No. I am in no way suggesting that we
12 have to go into full blown discovery.

13 MR. HUNT: My response is because that is what is
14 required to --

15 THE COURT: I have heard your response.

16 Go on.

17 MR. HUNT: The other basis, Your Honor, is the
18 opinion defense, and that is that statements of opinion are not
19 actionable in defamation, and we have cited the Court to the
20 opinion column of Mr. Wharton and Ms. Cortez, as well as the
21 editorials which we believe, read in context, that those
22 opinion columns and editorials which clearly signal to the
23 reader that these are opinions and not statements of fact, and
24 make those statements not capable of defamatory meaning and are
25 protected opinion and, therefore, cannot state a claim for

1 defamation.

2 THE COURT: You think I can do that without making a
3 determination of fact whether people reading those would see
4 those as opinions or statements of fact? You're asking me to
5 do that, and that is not asking the Court to engage in a
6 factual determination?

7 MR. HUNT: We think that the Court can decide,
8 reading that, whether it is a protected opinion or a statement
9 of fact and you can do that at the pleading stage, yes.

10 THE COURT: But without my making a determination of
11 fact?

12 MR. HUNT: Yes, Your Honor.

13 THE COURT: How?

14 MR. HUNT: Because that is a conclusion of law
15 whether --

16 THE COURT: We are back to the same question. How do
17 I do that? I have to read them and decide --

18 MR. HUNT: That is true.

19 THE COURT: -- what a reader would think. Is it Mr.
20 Wharton?

21 MR. HUNT: Yes, Mr. Tom Wharton.

22 THE COURT: Is Mr. Wharton expressing an opinion or
23 is he expressing a fact? We are back to the same question. I
24 cannot see how that does not require of me a determination, is
25 it a factual opinion or is it a statement of fact?

1 MR. HUNT: I guess --

2 THE COURT: I am not saying that it is a question of
3 law that the Court gets to decide because the courts have said
4 it is a question of law, and it goes back to my same question,
5 why do that at the 12(b)(6) stage. Okay.

6 Go on.

7 MR. HUNT: I think I have concluded, Your Honor.

8 I would just say that the position is that the Court,
9 reading the language and giving those words their ordinary
10 meaning, that a reasonable reader would give to those words in
11 the context of the articles, is a decision for the Court
12 whether that could sustain defamatory meaning and can be
13 decided at the pleading stage.

14 THE COURT: Well, what do I use to make such a
15 decision? Am I suddenly endowed with great powers of
16 understanding of human nature and what people would take from a
17 sentence?

18 MR. HUNT: No.

19 THE COURT: Am I that well trained?

20 MR. HUNT: No, Your Honor. It is just a reasonable
21 reader standard.

22 THE COURT: How do I know what a reasonable reader
23 would think? Do I rely on my life's experience?

24 MR. HUNT: I believe so. The Court would look at the
25 language and in the context in which it appears and ask whether

1 that language is capable of sustaining defamatory meaning to
2 the reasonable reader, bringing your life experience and
3 whatever else you would bring to that question.

4 THE COURT: Okay. Thank you.

5 MR. HUNT: Thank you, Your Honor.

6 THE COURT: Thank you, Mr. Hunt.

7 Mr. Hansen.

8 MR. HANSEN: I hope the Court will bear with me a
9 little bit this morning. I think I'm outnumbered here. I will
10 be the first one to --

11 THE COURT: Well, that is because you sued so many
12 people.

13 MR. HANSEN: That is because so many people did so
14 many wrong things.

15 THE COURT: Okay.

16 MR. HANSEN: I admit I'm no Judge Boyce, so with that
17 admission, on the defamation claim it only takes one defamatory
18 statement to make it a defamation claim. Even if the Court
19 threw out, and if there were six articles or 60 articles and
20 five of them or 59 of them were found not to be defamatory, the
21 Court would have to go through each and every statement in each
22 and every article to find out if a single statement is capable
23 of being defamatory. So we have a basis for a defamation
24 claim.

25 Here we really are on a 12(b)(6) motion. Does the

1 complaint state a claim for defamation? Mr. Dryer argued only
2 two points, are the statements capable of defamatory meaning,
3 and --

4 THE COURT: Mr. Hunt.

5 MR. HANSEN: Mr. Hunt. I'm sorry.

6 Are the statements factual or solely an opinion? You
7 can't determine whether a statement is capable of defamatory
8 meaning just by looking at a single statement. I agree, and I
9 think Mr. Hunt said this and if so I agree, that you do have to
10 look at the statements in context and you do have to look at
11 the entire article. You have to look at the article as a
12 whole, which is why I think it is kind of an artificial
13 construct to require in the complaint that we just look to an
14 article that may be five or six pages long and pull out one or
15 two or three or ten statements and say that these are the
16 defamatory statements.

17 Those statement do have to be taken and considered in
18 context, and that does go beyond the scope of the complaint,
19 and it does require a factual analysis not only of the
20 statements themselves but the context in which they are made,
21 which requires the Court to go into facts that are not alleged
22 in the complaint. It is going to require a lot of discovery in
23 this matter to get all of those things resolved, Your Honor.

24 Is a statement capable of defamatory meaning? For
25 that we need to look at what are defamatory meanings. We are

1 dealing with state law here, and the principle as stated in the
2 cases that I have cited, particularly West versus Thompson
3 Newspaper, the Utah Supreme Court case, the guiding principle
4 in defamation is, does the statement have the tendency to
5 injure the reputation in the eyes of its audience? If a
6 statement tends to injure the reputation and the statement is
7 false, then that is defamation and that is all we need to show.
8 That is all that we need to allege and we have alleged that.

9 The question is whether a publication might be
10 considered defamatory by a reasonable person. Mr. Hunt has
11 said this is a question of law. I think it is a mixed question
12 of fact and law. The complaint does allege that certain
13 individuals who have not been sued upon reading the statements,
14 and the kind of statements alleged in the complaint as being
15 defamatory, have come forward with statements of their own,
16 wherein they have concluded from hearing those statements that
17 the plaintiffs had done certain inappropriate things. In other
18 words, actual reasonable people have heard those statements and
19 have come forward with statements to the effect that the
20 reputations of the plaintiffs have been injured in their eyes.

21 We have people that have been reported by these same
22 newspaper people as having heard those statements and having
23 concluded that the plaintiffs' reputations have been injured in
24 fact, and how is it possible that those statements are not
25 capable of defamatory meaning? They are capable because they

1 have resulted in defamation and they have resulted in injury.
2 The only other thing we need to prove is that those statements
3 that injured the reputation were false as far as the newspapers
4 are concerned. There is an additional hurdle that we need to
5 overcome as far as the statements by the U.M.W.A., and that is
6 the mine workers, the people that are actually involved in the
7 labor dispute, and the newspapers are not involved in that
8 dispute. Certainly where individuals that have heard those
9 statements have imputed a defamatory meaning to us, then they
10 are capable of defamatory meaning.

11 For one example, I would agree that mere statements
12 that certain workers were fired or locked out may not be
13 defamatory. But if you say a worker was fired and locked out
14 for trying to organize a union, that is imputing unlawful
15 conduct and that is defamatory if it is not true.

16 THE COURT: Tell me your best, and I know that is
17 qualitative, but tell me your best allegation of a defamatory
18 statement by either the Deseret News or the Salt Lake Tribune,
19 where either of those publications defamed one of your clients.
20 Tell me exactly, if you can, and I know I'm putting you on the
21 spot, but you have narrowed it down now to only a few articles
22 as to each of these papers, but pick one and tell me what was
23 said and why you claim it is defamatory and who it defamed.
24 That would be very helpful to me.

25 MR. HANSEN: The Deseret Morning News, and I don't

1 have the exact cite to the news article here, Your Honor --

2 THE COURT: Well, we are going to need that.

3 MR. HANSEN: Okay.

4 THE COURT: It is sort of rug cutting time here, so
5 to speak, so tell me what they said and why it is defamatory or
6 capable of defamatory meaning, and let's use Mr. Hunt's
7 phrasing, and tell me who it defamed. Who, as in the people.

8 I have your amended complaint here right in front of
9 me, second amended complaint.

10 MR. HANSEN: Yes.

11 THE COURT: This is a test to see if you have one.
12 Because I have read every one of these articles, and if I'm
13 entitled to do what Mr. Hunt seems to think that I'm entitled
14 to do at this stage of things, I am going to throw the whole
15 thing out. I cannot read these based on my life's experience
16 and find any way that any reasonable person could believe that
17 one of these two -- and Mr. Dryer has a tougher case -- that
18 one of these two newspapers could be accused reasonably of
19 defaming anybody connected with your clients.

20 I have read every word of every article. I am not
21 sure why I am doing it in a 12(b)(6) motion, as I hammered
22 Mr. Hunt on, but I have. So help me out here. Where do they
23 say something? Usually when people get defamed they have some
24 basis for alleging it because they know their reputation has
25 been hurt and they know, or at least they feel strongly that

1 way, and they know what evidence they have to support it. It
2 is that this person said X and it has really caused me to be
3 held up to ridicule or my financial situation has plummeted. I
4 wish they had not said that lie about me.

5 Let's give it a go.

6 MR. HANSEN: Let's look at paragraph 173, the Deseret
7 Morning News article of July 8th, 2004. It is written as an
8 editorial, but the title is Victory, First Step For Miners.

9 THE COURT: Okay. Your paragraph 173?

10 MR. HANSEN: Yes.

11 This one is I think a good one because it is written
12 as an editorial, but it also covers his fact versus opinion
13 kind of a question.

14 THE COURT: Do you think it is a good one because it
15 is an editorial?

16 MR. HANSEN: I think it is a good one to talk about.
17 It is a part of our complaint, and so it is something that we
18 need to address and we may as well do it here.

19 THE COURT: Great, but I have asked you for your best
20 one. Wouldn't you go with a news story as opposed to an
21 editorial? An editorial is going to be endowed with a fair
22 amount of good argument that it is expressing opinion. It is
23 on the editorial page. I could take judicial notice that we
24 look at editorials in newspapers differently than we look at
25 news stories.

1 MR. HANSEN: That is true.
2 THE COURT: Okay.
3 MR. HANSEN: We are here on a 12(b)(6) motion with
4 all the --
5 THE COURT: I have got you. Let's go with that.
6 MR. HANSEN: Let's go with that one.
7 THE COURT: They have given me copies of these
8 articles in Exhibits A and B to Mr. O'Brien's and Mr. Hunt's
9 memorandum, so we can refer to the actual article if you want
10 to. It is D-10, I think.
11 MR. HANSEN: Yes.
12 THE COURT: Okay. I have it right here.
13 MR. HANSEN: Maybe I ought to pull it out.
14 THE COURT: Victory Is First Step For Miners is the
15 way that the editorial is headlined. Okay. Show me in there
16 where you think somebody among your clients has been defamed.
17 Is it the second line? The miners, most of them Mexican
18 nationals, were fired from their jobs last fall for attempting
19 to organize a union to address poor pay and mine safety issues.
20 Is that the part that you feel is clearly defamatory, or at
21 least that you allege is defamatory?
22 MR. HANSEN: I am trying to find the article right
23 now, because I do want to look at the article rather than the
24 complaint.
25 THE COURT: Yes.

1 It is in Exhibit B to their memorandum, if that
2 helps. It probably does. Mr. O'Brien can hand it to you.

3 MR. HANSEN: Okay.

4 THE COURT: Yes.

5 MR. HANSEN: Okay. The miners, most of them Mexican
6 nationals, were fired from their jobs last fall for attempting
7 to organize a union. That statement is not attributed to
8 anyone. That is an affirmative statement in the article. What
9 it is saying is that C.W. Mining Company and its managers
10 engaged in activity that is prohibited under federal law.

11 THE COURT: Well, it does not say that. It does not
12 tell the reader anything about this being activity that is
13 prohibited under federal law. It just says they were fired for
14 attempting to organize a union.

15 MR. HANSEN: Yes.

16 THE COURT: You think that is defamatory because you
17 didn't fire them for that reason?

18 MR. HANSEN: You can't fire someone for attempting to
19 organize a union.

20 THE COURT: Not that you can't; did you? You claim
21 you did not, correct? You claim the mine did not fire them for
22 that reason?

23 MR. HANSEN: That is right. That is a false
24 statement. We contend that a reasonable person could read that
25 statement and find that C.W. Mining and its managers'

1 reputations were injured as a result of that statement.

2 THE COURT: I guess this reasonable reader wouldn't
3 read the next paragraph?

4 MR. HANSEN: The next paragraph begins with, the
5 National Labor Relation Board has said the mine owners fired
6 the miners illegally. That is also a false statement. The
7 N.L.R.B. has never said any such thing.

8 The N.L.R.B. said that the miners should be
9 reinstated. They have never said any such thing.

10 THE COURT: Well, didn't the settlement indicate a
11 reinstatement?

12 MR. HANSEN: The settlement concluded --

13 THE COURT: Didn't it involve a reinstatement of the
14 miners?

15 MR. HANSEN: Yes, but it was completely voluntary.
16 It was not the N.L.R.B. The reason for reinstating the miners
17 is not set forth anywhere in the complaint and it is not set
18 forth anywhere in the news article. That has not been
19 disclosed by C.W. Mining Company. My understanding, and I
20 don't represent C.W. Mining Company, but from my understanding,
21 and I can't testify because I am not privy to it, but I think
22 the evidence is going to show that these 75 workers left their
23 jobs, and they were lobbying for a union organizational vote,
24 and C.W. Mining Company thought that if they offered these
25 people their jobs most of them would not come back to work, and

1 that would disqualify those that didn't come back to work from
2 being able to vote.

3 Now, here we are getting into facts that may be
4 capable of proof, but they are not alleged in the complaint and
5 they are not set out anywhere in the articles, so we are
6 getting into factual issues that go well beyond the 12(b)(6)
7 motion.

8 THE COURT: To finish our little exercise, tell me
9 who this defamed.

10 MR. HANSEN: That would be C.W. Mining Company and
11 its lead management that would have been responsible for the
12 decision to fire these people if, in fact, they were fired.

13 THE COURT: But they were not.

14 MR. HANSEN: They were not.

15 THE COURT: Who is it in the community now that is
16 being held up to public ridicule or whose reputations have been
17 damaged by this? Are you equating all false statements in an
18 editorial with defamation?

19 MR. HANSEN: There may be false statements that are
20 not defamatory.

21 THE COURT: But you claim that this one is
22 defamatory?

23 MR. HANSEN: Yes. The N.L.R.B. said that the mine
24 owners had fired the miners illegally.

25 THE COURT: Yes.

1 MR. HANSEN: Yes.

2 THE COURT: Why is that defamatory? I'm just
3 wondering. What is your theory?

4 MR. HANSEN: Because the statement is a statement
5 that the federal government has already determined that the
6 firings were illegal. The firings were not illegal. If the
7 firings were illegal that would injure the mine's reputation,
8 in that they were engaged in illegal activity against the
9 workers. That is the statement that is injurious to a
10 company's reputation, that they are engaging in illegal
11 activity.

12 THE COURT: And that these persons have named how
13 many people among the officials of this mine that have suffered
14 the loss of reputation?

15 MR. HANSEN: Now we are getting into the group
16 defamation, and that is another issue, but --

17 THE COURT: I am just asking a simple question about
18 who you believe is suffering, I guess daily, a loss of
19 reputation in the community in which they live because --

20 MR. HANSEN: At the very least it would have been
21 Charles Reynolds, who was the mine manager. He would have been
22 ultimately responsible for the firings. So Mr. Reynolds in
23 particular.

24 THE COURT: Where does he live?

25 MR. HANSEN: The mine is located in Bear Canyon,

1 which is an offshoot off of Huntington Canyon. I am not sure
2 if Mr. Reynolds actually lives in Bear Canyon, because there is
3 another group of people that work and live in Trail Canyon that
4 is about --

5 THE COURT: He lives close to the mine?

6 MR. HANSEN: He lives within a mile of the mine
7 itself, yes.

8 THE COURT: He lives in a community with the Kingston
9 clan, does he?

10 MR. HANSEN: I don't know if there are Kingstons down
11 there or not. Most of the people that actually work at the
12 mine are not Kingstons.

13 THE COURT: I'm trying to think of the community in
14 which his reputation is suffering. The general notion is that
15 the Kingston group is quite -- and I am not meaning to be
16 pejorative at all here -- but somewhat clannish and that they
17 sort of stick together and live together. So where is it that
18 he is walking around being defamed? People in his own
19 community I'm assuming have a high regard for him. Maybe I'm
20 assuming too much, but do you have evidence to show that his
21 reputation has been hurt in the community in which he has any
22 participation?

23 MR. HANSEN: We have not deposed people in
24 Huntington, Your Honor. We can't do that.

25 THE COURT: But you made a claim and you have to have

1 facts to support a claim. If you say he has been defamed you
2 have to have something under Rule 11 or you can't file a
3 lawsuit. Maybe you can go flesh out more if you want to take
4 all these depositions, but lawsuits are still based on some
5 factual predicate when we bring them.

6 So what information, I'm just wondering, did you have
7 behind this allegation that he was defamed?

8 MR. HANSEN: Well, the facts that we have at this
9 point are those that are set out in the complaint of other
10 publications.

11 THE COURT: Well, doesn't that turn this whole thing
12 on itself? We have the miners making accusations, and if this
13 is the way society works, we are just going to have an endless
14 stream of defamation cases in court. People make accusations
15 about someone else and if they are false, if they turn out to
16 be false, that person against whom they were made has a
17 defamation claim and that is it. We better hire more judges.

18 You're referring now to your complaint?

19 MR. HANSEN: Yes. The specific things that we have
20 are --

21 THE COURT: Specific to Mr. Reynolds.

22 MR. HANSEN: There, Your Honor, again, I don't know
23 that anybody has named him by name, but they have talked about
24 people that have overheard these statements and that have come
25 back and said that the people who are running the mine and the

1 owners and managers are evil people and that they are
2 exploitive.

3 THE COURT: It does not say that the mine managers
4 are evil people. It says that the National Labor Relations
5 Board has said that the mine owners fired the miners illegally.
6 That is the phrase we are going from.

7 MR. HANSEN: Yes.

8 THE COURT: I don't think that says anyone is evil.

9 MR. HANSEN: Well, it does not say it there, but if
10 you look at paragraph 195 of the complaint, there are other
11 statements that have been published attributing to people who
12 have read these types of statement that show the results of
13 these statements on the reputation of the plaintiffs in the
14 eyes of the public.

15 THE COURT: Just out of curiosity, and while we are
16 in the middle of this and, Mr. Hunt, you may not know, and I
17 hope I am not being unfair to either of you for asking you to
18 get too technical here today, but he is claiming that the
19 statement that is made in this editorial, quote, the National
20 Labor Relations Board has said that the mine owners fired the
21 miners illegally, unquote, is not true, and that the National
22 Labor Relations Board never did that. They never said that.

23 Do you know what your client's defense is to just an
24 accusation about whether that is false or true?

25 MR. HUNT: Your Honor, I think that there is a

1 distinction there. I don't know that it matters for defamation
2 purposes, but I think what happened is that there was a charge
3 of unfair labor practices filed that alleged that, and then the
4 N.L.R.B. got involved and there was a settlement between the
5 parties, a voluntary settlement, that allowed the reinstatement
6 and the ability to get backpay. That fact is reported in the
7 editorial, the second to the last paragraph, and it reports
8 that it was a settlement.

9 THE COURT: Yes.

10 MR. HUNT: And there was a non-admission clause,
11 which meant that the mine did not admit to any unfair labor
12 practices. That is probably a more accurate statement of what
13 happened.

14 THE COURT: I have gotten you off your outline I'm
15 sure, Mr. Hansen. I think you have answered my question. You
16 can say whatever else you want to say in response to Mr. Hunt.

17 MR. HANSEN: Okay. I would point to one thing that
18 you have said, Your Honor, and the idea of the nature of this
19 group, and you're obviously looking at something that is beyond
20 the pleadings or even the memoranda here. You appear to be
21 looking to things that you are aware of by other news articles.
22 In other words, we are getting into things that are well beyond
23 the pleadings and that are well beyond the Rule 12(b)(6)
24 motion. That is what we are here on right now is the 12(b)(6)
25 motion.

1 Essentially what the newspapers are asking the Court
2 to do is substitute its reason for that of a jury, and to sit
3 here and say I don't think any reasonable person reading these
4 things could possibly find that the reputations of any of the
5 plaintiffs were injured in their minds. I don't think the
6 Court is in a position to do that at this stage of the
7 proceedings.

8 Again, to the extent that what they are arguing are
9 defenses, we have pointed out in our memorandum that defenses
10 that are beyond the scope of the complaint itself is beyond the
11 scope of the Rule 12(b)(6) motion to begin with, and that the
12 proper thing to do in the case is to raise those defenses and
13 if you think you have those, file a motion for summary
14 judgment, otherwise let's have a Rule 26(f) conference and do
15 our exchanges and get into it.

16 THE COURT: Thank you very much, Mr. Hansen.

17 Mr. Hunt, do you have any response to what Mr. Hansen
18 has said that you want to make?

19 MR. HUNT: Briefly on the procedural issue, Your
20 Honor. If Your Honor wishes, you can convert the motion to
21 dismiss to a motion for judgment on the pleadings or a motion
22 for summary judgment under Rule 12(c). If the Court wants to
23 do that it has the authority to do that. We believe that the
24 law is that the Court can consider the articles themselves in
25 the record as part of the pleadings, and we have cited the

1 Court to the Tenth Circuit case in our footnote one, the G.F.F.
2 Corp. case, Tenth Circuit, 1997. It makes it clear that if the
3 plaintiffs refer to an article it becomes a part of the
4 pleadings and it does not move us beyond a motion to dismiss.

5 I would just mention that as to the procedural issue.

6 THE COURT: Right.

7 I don't think there is any -- well, not think, there
8 is no question about that. They are referred to specifically
9 in the complaint and they may be considered in determining
10 whether Rule 12(b)(6) has been satisfied, whether a claim upon
11 which relief can be granted has been made. My issue has never
12 been with that. I can certainly consider all of the things
13 referred to directly in the complaint and those related to it
14 which, as I have indicated, I have done.

15 My question is, again, one of procedure primarily.
16 If from your point of view you want the Court to take advantage
17 of the Court's opportunity to decide these things in a manner
18 that has been stated by the Court to be an issue of law for the
19 Court, then I am just wondering if it wouldn't be more
20 sustainable, if there is not a more sustainable method than
21 packaging it under Rule 12(b)(6).

22 MR. HUNT: Your Honor, you may be right about that.

23 THE COURT: Well, I don't know that I am right. I
24 just know that I'm reading the West case from the Utah Supreme
25 Court, and they, in a defamation case, and this is language

1 that Mr. Hansen has provided, and they phrase it, first, could
2 a reasonable fact finder conclude that the underlying statement
3 conveys the allegedly defamatory implication?

4 Second, if so, is the implication sufficiently
5 factual to be susceptible of being proven true or false? These
6 get so close to questions of fact, and that is what is of some
7 concern to me. In your brief you refer me, and I didn't take
8 the time, and maybe I should have, to read the one case you
9 refer me to from the Northern District of California, although
10 it is a District Court like me opining on the issue, I suppose,
11 and you say other Federal District courts have considered and
12 enforced the neutral reporting privilege when it was raised in
13 a motion to dismiss.

14 Maybe I should go read Barry versus Time, Inc., a
15 1981 case.

16 MR. HUNT: Your Honor, I think a much more pertinent
17 case and more on point is the Mast versus Overson case, which
18 is a Utah case, Utah Court of Appeals, 1998, where the Utah
19 Court of Appeals sustained on a motion to dismiss defamation
20 claims that were asserted by Mast against Overson. That was
21 done at the 12(b)(6) stage. That involved a number of very
22 caustic statements such as that the plaintiffs were politically
23 motivated, mean spirited and a sham, and that they engaged in
24 character assassination, that they made statements that were
25 rife with misstatements and bare faced lies, and a number of

1 very tough caustic statements.

2 The trial judge there looked at that on the basis of
3 all of the contents of the statements and asked, are the
4 statements capable of sustaining a defamatory meaning to the
5 reasonable reader in the context of this political dispute,
6 which was the Mast/Overson dispute, and in the context of the
7 article the court said no.

8 THE COURT: I take it that that involves statements
9 made by the participants in the dispute?

10 MR. HUNT: That is correct.

11 THE COURT: Do you have a case, and there is never a
12 case exactly on point, and lawyers look for them, but that
13 involves a publication whose article does not attribute
14 statements to those individuals who were involved in the
15 fracas, but that has some sentences that are just statements of
16 fact without attribution, and that those are considered covered
17 by this anything goes in a labor fight sort of rule of law?

18 MR. HUNT: I think the West case is pretty close,
19 Your Honor. That was a case that dealt with an opinion column,
20 and maybe Mr. Dryer could speak to it because I think he had
21 some involvement in it, but I don't know that those statements
22 were attributed. That may not be on all fours with what we
23 have here.

24 THE COURT: Well, did West get thrown out on a motion
25 to dismiss?

1 MR. HUNT: I don't know that it did. I think it was
2 a summary judgment case.

3 THE COURT: Which gets us back into this area that I
4 have been --

5 MR. HUNT: Judge, I suggest if the Court is troubled
6 by that that the Court could convert the motion to a motion for
7 judgment on the pleadings or summary judgment.

8 THE COURT: Well, let me ask you this then. If we
9 did that, is there a way to do that without opening up this
10 matter to considerable and massive discovery?

11 MR. HUNT: It does open the door unless the Court --
12 unless there is material that is outside of the pleadings that
13 the Court is going to consider that would be determinative to
14 the Court in making that defamatory meaning protected opinion
15 decision. I can't think of anything off the top of my head,
16 but it probably does open the door to discovery.

17 THE COURT: We have parallels in other areas of the
18 law, and I think there is an arguable parallel in patent law
19 with claims construction hearings, and you don't open things up
20 all the way but you do have a little additional opportunity for
21 receiving evidence.

22 Qualified immunity gets us into this same box
23 sometimes. We don't want a person who is entitled to qualified
24 immunity to be required to run the entire gamut of the
25 litigation experience and that is why qualified immunity

1 exists. It does get discussed and decided earlier than someone
2 who is required to ride the entire ride all the way up to what
3 is a typical summary judgment proceeding.

4 I will freely admit that I am just wondering about an
5 appellate court looking at this and saying, well, why was this
6 thrown out at the 12(b)(6) stage? I am being very candid about
7 it.

8 MR. HUNT: I understand that. The analog, I guess,
9 in the defamation field would be to open discovery for the
10 limited purpose of establishing whether the plaintiff is a
11 public figure or public official. Some courts have opened up
12 discovery for that purpose. We have not brought that kind of
13 motion, because that kind of motion typically requires some
14 discovery, unless they have pleaded sufficient facts.

15 In this case, Your Honor, I don't know that it works
16 that well, because what we are claiming to be the legal
17 deficiencies really are the words themselves taken in the
18 context of the articles as not being capable of defamatory
19 meaning and being protected opinions. So I don't know that the
20 opening up the narrow vein of discovery on those issues would
21 help.

22 THE COURT: It is a bit of a head scratcher for me.
23 He wants to say, or he does say, and they have said in the
24 complaint, that this did open people up to defamation. It did
25 hurt their reputations and standing and held them up to public

1 ridicule. It seems like clearly the facts to support that are
2 extremely limited in terms of being announced in anything. But
3 that is where some would argue we are with our notice pleading
4 rules.

5 MR. HUNT: Well, Your Honor, on the issue of whether
6 they pleaded facts that establish injury to reputation, if you
7 look at 195 it is all the statements that are being made by the
8 defendants.

9 THE COURT: That is why I said it does sort of turn
10 it --

11 MR. HUNT: It does not seem to me to be facts that
12 really show injury to reputation caused by the statements they
13 claimed were defamatory.

14 THE COURT: Well, in his first one, if you look at
15 195, it makes some argument for what he is saying. As I
16 recall, the very first one is a gentleman, David Brown, of
17 P.A.C.E. Local 758 said, and then he makes a statement about
18 this being a basic struggle for basic human rights, and that
19 the co-op miners are denied the basic rights to live and
20 survive. The Kingstons are taking advantage of these miners.
21 Then from that they want to argue that the plaintiffs, whoever
22 they are, their reputations were injured in the eyes of
23 Mr. Brown. Of course, the link between where Mr. Brown got
24 that from and --

25 MR. HUNT: That is the problem.