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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

INTERNATIONAL ASSOCIATION OF UNITED WORKERS UNION, C. W. MINING COMPANY, *et al.* Plaintiffs, vs. UNITED MINE WORKERS OF AMERICA *et al.*, Defendants.	**MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OF UNITED MINE WORKERS OF AMERICA *et al.*** Civil No. 2:04CV00901 Judge Dee Benson

Plaintiffs International Association of United Workers Union (IAUWU), C. W. Mining Company (CWM) *et al.* respectfully submit this memorandum in opposition to the Motion to Dismiss filed by the United Mine Workers of America, Cecil Roberts, Carlo Tarley, Mike Dalpiaz, Bob Butero, Robert Guilfoyle, Harry Huestis, Jim Stevenson, and Dallas Wolf.

ARGUMENT

Defendants have not offered any evidence to controvert the allegations of the Amended Complaint (the Complaint). Therefore, the facts it alleges and all reasonable inferences must be construed in favor of Plaintiffs for purposes of this motion. The Complaint cannot be dismissed under Rule 12(b)(6) if Plaintiffs can prove any set of facts in support of their claims, accepting the allegations of the complaint as true and construing them in the light most favorable to Plaintiffs. Yoder v. Honeywell, Inc., 104 F.3d 1215, 1224 (10th Cir. 1997). *cert. den.* 522 U.S. 812. When the court applies this standard, the court must deny Defendants' motion.

I. THIS COURT HAS JURISDICTION UNDER THE LABOR MANAGEMENT RELATIONS ACT.

This action invokes the jurisdiction of the Court under the Labor Management Relations Act, 29 U.S.C. §185. [Amended Complaint (Complaint) ¶ 58] The LMRA expressly gives this court jurisdiction over Plaintiffs' unfair labor practice claims:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties.

29 U.S.C. §185(a).

Although only UMWA, Dalpiaz, Roberts, Tarley, Butero, Guilfoule, Huestis, Stevenson, and Wolf brought this motion, UMWA is bound by the acts of all of its agents, 29 U.S.C. §185(b), including Aguilar, Chavez, Estrada, Hector and Natividad Flores, González, Daniel and Guillemo Hernandez, Kennedy, Leon, Olivas, Panduro, Rodriguez, Gonzalo, Jesus and Jose Juan Salazar, Sanchez, and Villa, all of whom were workers of CWM and subject to a collective bargaining agreement between IAUWU and CWM. A worker in one labor organization's bargaining unit can and in this case did act as an agent of another labor organization. At all pertinent times Defendants Aguilar, Chavez, Estrada, Hector and Natividad Flores, González, Daniel and Guillemo Hernandez, Kennedy, Leon, Olivas, Panduro, Rodriguez, Gonzalo, Jesus and Jose Juan Salazar, Sanchez, and Villa, while subject to the IAUWU/CWM collective bargaining agreement, were agents of UMWA acting within the scope of their authority. [Complaint ¶¶ 22, 23] Their acts violated the IAUWU/CWM collective bargaining agreement, bringing them squarely within the scope of 29 U.S.C. §185. UMWA is bound by the acts of its agents, §185(b).

29 U.S.C.§187 gives this court jurisdiction over Plaintiff's unfair labor practice claims:

> (a) It shall be unlawful, for the purpose of this section only, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States ...

In turn, 29 U.S.C. §158(b)(4) provides:

> It shall be an unfair labor practice for a labor organization or its agents ... (I) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or

> to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
>> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;
>>
>> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title ...;
>>
>> (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title ...

CWM workers subject to the IAUWU/CWM collective bargaining agreement, who were agents of UMWA, in violation of that agreement persuaded other CWM's workers to leave their jobs and picket CWM with the object of forcing IAUWU out and UMWA in as the workers' bargaining representative, and with the object of forcing CWM to recognize or bargain with UMWA as the representative of CWM's workers. IAUWU invited the workers to use the discharge and grievance procedures under the IAUWU/CWM collective bargaining agreement, but UMWA's agents subject to that agreement persuaded or coerced other workers to ignore the discharge and grievance procedures. In further pursuit of its unlawful objective, UMWA and its agents subject to the IAUWU/CWM collective bargaining agreement induced other workers of CWM subject to the agreement to refuse to process, transport, or handle CWM's products, to picket CWM in an unlawful "wildcat" strike, and to engage in secondary picketing of other businesses. At all pertinent times IAUWU was certified by NLRB as the representative of CWM's workers and had a collective bargaining agreement with CWM, a question concerning IAUWU's representation of CWM's workers could not appropriately be raised under 29 U.S.C. §159, and the picketing was conducted without a petition under 29 U.S.C. §159(c). The unfair labor practices of CWM's workers, agents of UMWA, constitute a violation of their collective bargaining agreement and a breach of contract. Paragraphs 63, 66, 67, and 68 of the Amended Complaint expressly allege the acts of UMWA's agents subject to the IAUWWU/CWM collective bargaining agreement were a violation of that contract.

29 U.S.C. §185 gives this Court jurisdiction. *See* Retail Clerks Intern. Ass'n v. Lion Dry Goods, Inc., 369 U.S. 17 (U.S. 1962) (Section 185 gives the district court jurisdiction over disputes involving not only collective bargaining agreements, but all contracts between an employer and a labor organization, or between labor organizations. "It is enough that this is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them." [at 27]). Agents of UMWA were also CWM employees subject to the IAUWU/CWM collective bargaining agreement. [Complaint ¶¶ 22, 23] Their acts as agents of UMWA were clear violations of that agreement. Under section 185(b) UMWA is bound by the acts of its agents. LMRA Sections 187 and 158 extend the Court's jurisdiction to the unfair labor practice claims of UMWA and its agents, which are themselves violations of the collective bargaining agreement. [Complaint ¶¶ 63, 66-68]

San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959) and its progeny do not preempt the court's jurisdiction under the LMRA and 29 U.S.C. §185. Retail Clerks, *supra*.

The six month limitation of 29 U.S.C. §160(b) deals with the procedure for the Board to issue complaints before the NLRB. The LMRA does not have a statute of limitations for actions under section 185. Arguably, the limitation period is Utah's six year limitation on written contracts, Utah Code Ann. §78-12-23(2). But even if the limitation period for this section 185 action is six months, Defendants' violations of LMRA were continuous and ongoing. Plaintiffs commenced this suit on September 14, 2004. UMWA's agents' violations of the LMRA and the collective bargaining agreement continued well after March 14, 2004. *See* Complaint ¶¶ 81(pp), 83(f), 116 – acts of UMWA's agents in violation of LMRA and the collective bargaining agreement were ongoing at least into May of 2004, four months or less before Plaintiffs filed suit. Therefore, this action is timely if commenced within six months of the last date Defendants violated 29 U.S.C. §§185, 187, and 158(b)(4). *See* Local Lodge No. 1424 v. N. L. R. B., 362 U.S. 411, 416, 80 S.Ct. 822 (1960) (A claim not time barred where occurrences within the limitations period in and of themselves constitute unlawful acts).

Based on the above, this Court has jurisdiction pursuant to the LMRA, 29 U.S.C. §§185 and 187, and pursuant to section 187 over Plaintiffs' claims under 29 U.S.C. §158(b)(4).

II. PLAINTIFFS' DEFAMATION CLAIMS ARE PROPERLY BEFORE THE COURT.

A. Linn Expressly Authorizes Plaintiffs' Defamation Claims.

In Linn v. Plant Guard Workers, 383 U.S. 53, 86 S.Ct. 657 (1966), the Court observed that while the NLRB "tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false. In such case the one issuing such material forfeits his protection under the Act." Id. at 61. Further,

> [I]t must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned. ... Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences. ... The injury that the statement might cause to an individual's reputation – whether he be an employer or union official – has no relevance to the Board's function. ...
>
> On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption.

Id. at 63-64. The Linn Court expressly held that when a agents of a labor organization circulate false and defamatory statements during a union organizing campaign, the court has jurisdiction over state common law defamation actions, upon proof that the statements were made with "malice," defined as "with knowledge of their falsity or with reckless disregard of whether they were true or false," and upon proof of harm, "which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law." Id. at 65.

The Complaint alleges, and the Court must accept as true for purposes of this motion, that Defendants' statements were false and defamatory; that Defendants made them with knowledge of their falsity, or with reckless disregard as to their truth or falsity; that Defendants made them with malice; and that as a direct and proximate result Plaintiffs have suffered damage to reputation, [1]

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[1] The Complaint alleges specific facts showing damage to reputation. *See* Complaint ¶ 81 [Reporters and editors of *The Militant* believed Defendants' excretory publications that injured Plaintiff's reputations]; ¶ 83 [same, reporters and editors of the *Salt Lake Tribune*]; ¶ 85 [Same, *Deseret Morning News*]; ¶ 87 [same, *Emery County Progress*]; ¶ 89 [same, *Price Sun-Advocate*]; ¶ 93-97 [same, Catholic Church publishers]; ¶¶ 98-127 [same, others]

pecuniary losses [2] and other injuries. [Complaint ¶¶ 130-132, 135-138] Thus, the Complaint alleges, and Plaintiffs are entitled to prove to a jury, the malice and injury elements of a defamation claim as Linn expressly allows.

B. Defendants' Publications Are Defamatory.

Defendants' statements were not, as thy put it, nothing more than "imprecatory language" and "rhetoric." It is not surprising that Defendants quote none of their own statements. The litany of Defendants' defamations is far to lengthy to repeat here. However, a few examples suffice to show Defendants published false statements of fact with defamatory meaning:

UMWA and its agents repeatedly stated that CWM fired some 74 workers for seeking union representation, called in the sheriff to kick them off the property, and locked them out. CWM fired no one but Bill Estrada, who was discharged for cause. While they were meeting, some of the workers gathered outside. Estrada came out and falsely told the waiting workers they had also been fired. Relying on Estrada's lie, the other workers left their jobs. CWM never locked them out, they simply chose not to return to work.

One or more of Defendants or their agents published statements to the effect that IAUWU is a "company union," a "yellow-dog union," an "employer dominated union," "not a real union," that the union officers are all mine bosses, etc., all of which were specifically defamatory of IAUWU and its officers.

They said IAUWU's officers, suspended workers, fired them, wrote their evaluations, gave and took away raises, all lies.

They said CWM's workers had no health insurance, which was a lie.

They made specific claims of unsafe working conditions, all of which were lies.

They said workers were forced to work in violation of federal mine regulations, another lie.

They said if workers pointed out an unsafe working condition that CWM would generally do nothing about it, which was a lie.

They said when workers asked for better working conditions they were told to keep their heads down and keep working or they would be out the door, which was a lie.

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[2] The Complaint alleges the lies of UMWA's agents caused other employees of CWM to walk off the job. This obviously cost CWM the pecuniary benefit of those workers' labor for which they were hired.

They said workers were paid only $5.25 to $7.00 an hour, which was a lie. While workers' base pay was in that general range, workers also received supplemental pay and production bonuses that increased their pay, often substantially. A number of workers by applying themselves were receiving, and all workers through similar diligence could earn, $12.00 to $18.00 per hour.

They said if a worker refused to carry out an unsafe work practice he was likely to lose bonus and supplementary pay, which was a lie.

They said CWM had threatened to report the workers to INS, which was a lie.

They even gratuitously said one of CWM's directors was convicted for savagely beating his daughter, which was an imputation of criminal conduct, a lie having nothing whatever to do with the workers, and was clearly defamatory *per se*.

UMWA published statements to the effect that the NLRB ruled CWM had committed unfair labor practices by firing the miners and ordered CWM to reinstate the miners with full back pay. This was a lie.

Plaintiffs could go on and on, but the above examples adequately make the point. One or more of Defendants and their agents acting within the scope of their authority made each of these statements, and other statements, which Defendants if they did not personally make, ratified. "To be defamatory under Utah law, a communication must impeach an individual's honesty, integrity, virtue, or reputation or publish his or her natural defects or expose him or her to public hatred, contempt, or ridicule." Cox v. Hatch, 761 P.2d 556, 561 (Utah 1988). Defendants' publications as alleged in the Complaint easily satisfy this standard.

The statements summarized above are capable of being objectively verified as true or false. Taken in context, they amount to affirmative claims of specific acts done by CWM and its management, and IAUWU and its officers, constituting tortious conduct, breach of the IAUWU/CWM collective bargaining agreement, and conduct amounting to systematic violations of the federal and state labor law. They are actionable statements of fact, not opinion. They are statements of conduct incompatible with the exercise of a lawful business, and so are defamatory *per se*. But Plaintiffs do not have to meet the *per se* standard on this motion where damages are presumed, as there is evidence Defendants' defamation caused demonstrable harm to reputation. [Complaint ¶¶ 81, 83, 85, 87, 89, 93-127]

Defendants' argument about "privileged reports of governmental proceeding" is frivolous as applied to them. In response to Defendants' incorporation of the argument in *The Salt Lake Tribune* and the *Deseret Morning News*' motion to dismiss, Plaintiffs incorporate the applicable responses in their Memorandum in Opposition to Motion to Dismiss of the Salt Lake Tribune, the Deseret Morning News, *et al.* The main response to that argument is that any such privilege only applies to *truthful* reporting of governmental proceedings. UMWA published statements to the effect that the NLRB ruled CWM had committed unfair labor practices by firing the miners and ordered CWM to reinstate the miners with full back pay. This was a lie, so no privilege applies.

III. PLAINTIFFS' INTENTIONAL INTERFERENCE CLAIM IS NOT PREEMPTED.

Defendants apply the wrong test. This is an action under the NLRA, 29 U.S.C. §185. The NLRA preempts state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213, 105 S.Ct. 1904 (1985). Conversely, state-law rights and obligations that exist independently of private agreements are not preempted. *See* Sprewell v. Golden State Warriors, 266 F.3d 979, 990 (9th Cir. 2001) (citations omitted):

> A state law claim is preempted by section 301 [29 U.S.C. §185] when it is "substantially dependent" on analysis of a CBA [collective bargaining agreement]. Stated alternatively, "[i]f the plaintiff's claim cannot be resolved without interpreting the applicable CBA ... it is preempted." "[T]he bare fact that a collective bargaining agreement will be consulted in the course of state-law litigation," however, does not require that the state-claim be extinguished. ...

State law is not preempted where the activity addressed is a peripheral concern of the LMRA, or touches overriding local interests. This includes common law defamation and *prima facie* tort in particular. Rodgers v. Grow-Kiewit Corp, 1981 WL 2390 (S.D. N.Y. 1981).

Under Utah law, to establish intentional interference with economic relations, a plaintiff must show that a defendant intentionally interfered with the plaintiff's existing or potential economic relations for an improper purpose or done by improper means, and that the interference caused injury to the plaintiff. St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 200 (Utah 1991). Improper means are present where the means used are contrary to law, such as violations of statutes, regulations, or recognized common-law rules. Id. at 201. Construing the facts and reasonable inferences in favor of Plaintiffs, UMWA and its officers, agents, and

supporters intentionally interfered with CWM's present and prospective economic relations with its workers, customers, suppliers, bargaining representatives, and others, by improper means or for a predominantly improper purpose. UMWA and officers, agents, and supporters also intentionally interfered with IAUWU's present and prospective economic relations with its bargaining unit workers, by improper means or for a predominantly improper purpose. [Complaint ¶¶ 144-45, 150-51] Those claims can be resolved without even glancing at, much less interpreting the IAUWU/CWM collective bargaining agreement. The improper means employed are not exclusively, or even necessarily, unfair labor practices. Common law defamation and fraud are not protected, proscribed, or preempted by the LMRA. Defendants' improper means include the fraud of UMWA's agent Estrada that caused workers to quit their jobs, and the defamations by UMWA and its agents of Plaintiffs, which are violations of recognized common-law rules, St Benedict's *supra*. *See* Sprewell, *supra* at 991, *quoting* PMC, Inc. v. Saban Entm't, Inc., 52 Cal. Rptr.2d 877, 891 (1996):

> Defendant's liability may arise from improper motives or from the use of improper means. [The defendant's actions] may be wrongful by reason of a statute or other regulation, or a recognized rule of common law or perhaps an established standard of a trade or profession. Commonly included among improper means are actions which are independently actionable, violations of federal or state law or unethical business practices, e.g., ... misrepresentation, ... defamation ...."

Thus, fraud and defamation are improper means by which a defendant can be liable for intentional interference with economic relations.

In Sprewell, the defendants' conduct that interfered with Sprewell's economic relationships was a media campaign designed to portray Sprewell "in a false and negative light." This was "wrongful conduct" under California law, or an "improper means" under Utah law, and a wrong independent of the terms of the collective bargaining agreement. It could "be litigated without reference to the rights and duties established in a CBA," and therefore was not preempted by section 301. In this case, Defendants' conduct that interfered with Plaintiffs' economic relations also included a media campaign designed to portray Plaintiffs in a false and negative light. This was intentional interference by an improper means, a wrong independent of the terms of any agreement between labor and management, and outside the scope of the LMRA, the NLRA, and the jurisdiction of NLRB.

Defendants' argument in footnote 25 that Plaintiffs have not stated a claim under Utah law is without merit. A party is subject to liability for an intentional interference with present contractual relations if he intentionally and improperly causes one of the parties not to perform the contract. St Benedict's, *supra* at 201. Through the artifices of defamation and fraud, UMWA and its agents caused CWM's workers, members of IAUWU's bargaining unit, not to perform their employment contract. [3] That clearly establishes interference with particular economic relationships between the workers, CWM, and IAUWU. Similarly, the allegations that Defendants interfered with CWM's present and prospective economic relations with its workers, customers, suppliers, bargaining representatives are sufficient to survive a motion to dismiss.

Defendants argument on page 13 of their memorandum regarding charges before the NLRB is a red herring and is frivolous. Plaintiffs have not alleged a claim for malicious prosecution. Plaintiffs also have not alleged that the filing of a charge with the NLRB constitutes intentional interference. [4] However, UMWA's unfair labor charges against CWM were dismissed with no finding of fault. Plaintiff's negligence claim involves questions of fact that preclude dismissal.

Plaintiffs are perplexed by Point 4 of Defendants argument at pages 14-16 of their memorandum. Their central argument is that this Court has jurisdiction over Plaintiff's state claims, a point with which Plaintiffs agree.

Based on the above, Plaintiffs' pendent common law claims are not preempted, are within this Court's jurisdiction, and should not be dismissed.

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[3] It requires no analysis of the terms of the collective bargaining unit to establish the workers' complete failure to perform, or that their failure resulted from the acts of Defendants.

[4] Defendants still don't seem to understand that CWM's workers were not, as they put it, "reinstated with a backpay award." When CWM unilaterally decided for tactical reasons to extend an offer to re-hire workers who had quit, UMWA stipulated to that as a basis for dismissing its unfair labor practice charges. CWM never agreed to give any worker one red cent of back pay, and the NLRB has never awarded any back pay to any worker.

IV. DEFENDANTS SHOULD NOT BE AWARDED ATTORNEY FEES AND COSTS.

The Court should not award Defendants their attorney fees and costs, first, because under the points and authorities argued above, the Complaint does state claims upon which relief can be granted against Defendants, and is not subject to dismissal under FRCP 12(b)(6).

While under Chambers v. NASCO, Inc. 501 U.S. 32, 45, 111 S. Ct. 2123 (1991) a court may assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, this is not such a case. "A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees ..." Id. at 50. "Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power." Id. In this case, the Rules, including Rule 11, "are up to the task." Id. To that to the best of counsel's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, this action was brought for the proper purpose to vindicate Plaintiff's rights, the allegations of the Complaint have evidentiary support, and the claims are warranted by existing law. Moreover, Defendants have not complied with the requirements to move for relief under Rule 11. Plaintiffs have acted in good faith, and not vexatiously, wantonly, or for oppressive reasons. Therefore, Defendants are not entitled to attorney fees under Chambers, Rule 11, or U.C.A. §78-27-56(1).

In response to Defendants' remaining argument based on the argument incorporated from the motion to dismiss by *The Salt Lake Tribune* and the *Deseret Morning News:*

Fees cannot be awarded under U.C.A. §78-58-105. The Utah Citizen Participation in Government Act applies only in certain limited circumstances not found here. First, there must be an action involving public participation in the process of government. "Process of government" means the mechanisms and procedures by which the legislative and executive branches of government make decisions, and the activities leading up to the decisions, including the exercise by a citizen of the right to influence those decisions under the First Amendment to the U.S. Constitution. U.C.A. §78-58-102(5). Defendants were not exercising their right to influence decisions by the legislative or executive branch of government. The NLRB is an independent agency. The rights of litigants before the NLRB are controlled by statute and government

CERTIFICATE OF SERVICE

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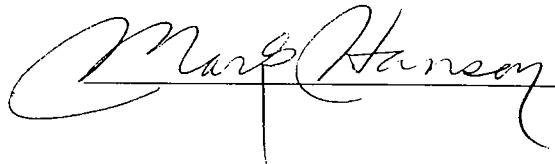


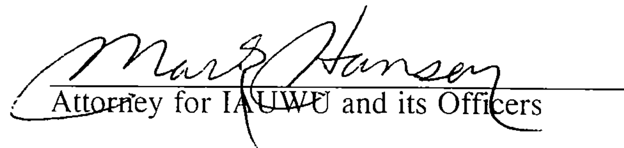
2712-p.002 oppose UMWA mot to dismiss

regulations. No citizen has a First Amendment right to influence the rights of private litigants under the National Labor Relations Act. And Defendants' acts as alleged in the Complaint were not for the purpose of trying to influence the NLRB in any event. Therefore, Defendants' publications do not constitute public participation in the process of government. In addition, based on points I - III above, this action was commenced with a substantial basis in fact and law.

CONCLUSION

For the reasons stated above, the Court should deny Defendants' motion to dismiss.

DATED March 16, 2005.



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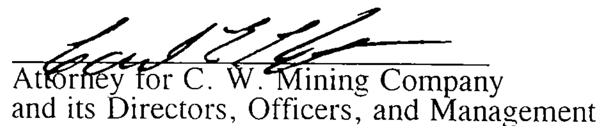

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