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Defamation Actions Arising from Arbitration and Related Dispute Resolution Procedures - Preemption, Collateral Estoppel and Privilege: Why the Absolute Privilege Should Be Expanded

John B. Lewis

Lois J. Cole

DEFAMATION ACTIONS ARISING FROM ARBITRATION AND RELATED DISPUTE RESOLUTION PROCEDURES — PREEMPTION, COLLATERAL ESTOPPEL AND PRIVILEGE: WHY THE ABSOLUTE PRIVILEGE SHOULD BE EXPANDED

*By John B. Lewis**
*and Lois J. Cole***

I. INTRODUCTION

Arbitration and related dispute resolution procedures have long been viewed as less expensive and more expedient alternatives to litigation. Today, the increasing costs of litigation, the uncertainty of jury verdicts, and recent court decisions[1] have encouraged even more parties to choose non-judicial procedures to resolve their disputes. This is true not only in the employment context, but also in the broader arena of commercial disputes.[2]

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* Partner, Arter & Hadden, Cleveland, Ohio; B.A., J.D., University of Missouri; LL.M., Columbia University.

** Associate, Arter & Hadden, Cleveland, Ohio; B.M. Ed., Indiana University; J.D., Cleveland Marshall College of Law.

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1. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding an ADEA claim can be subjected to compulsory arbitration). In *Gilmer*, the Supreme Court held that statutory claims of age discrimination in employment could be the subject of an arbitration agreement enforceable under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-14 (1994). The Court also acknowledged that the FAA's provisions "manifest a 'liberal federal policy favoring arbitration agreements.'" *Gilmer*, 500 U.S. at 25 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). In comparing arbitral and judicial procedures, the Court declared: "Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Id.* at 31 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)); *see also* Rodriguez de Quijas v. Shearson/American Express Inc., 490 U.S. 477 (1989) (arbitration of claims under the Securities Exchange Act of 1933, 15 U.S.C. § 77l(2) (1994)); Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987) (arbitration of claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 (1994)); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (arbitration of claims under the Sherman Act, 15 U.S.C. §§ 1-36 (1994)).

2. *See* ELIZABETH S. ROLPH ET AL., ESCAPING THE COURTHOUSE: PRIVATE ALTERNATIVE DISPUTE RESOLUTION IN LOS ANGELES (Rand Corp., 1994) (examining the use of alternative

The strong feelings aired in arbitration and pre-arbitration procedures sometimes persuade the participants to sue other parties and witnesses for defamation — as a means of visiting retribution, preserving their reputations, stifling future criticism, or to collaterally attack a negative award from the arbitrators. While courts may view arbitration as a legitimate substitute for legal action and welcome the reduction in their dockets, they still do not have a uniform approach to libel and slander litigation arising from the arbitral process.[3] Even

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dispute resolution proceedings in Los Angeles). This study acknowledges the growing interest in private alternative dispute resolution:

> In settings where the courts are clogged and criminal cases are forcing civil cases off the calendar, when public juries are perceived as "out of control," and where many are disillusioned with incremental tort reform, a growing number of private individuals are selling their services as neutrals to facilitate dispute resolution.

Id. at 1. A number of other articles have considered the use of arbitration to resolve disputes in a non-union work place. *See*, e.g., Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753 (1990) (discussing various legal responses to arbitration of employment disputes in non-union settings); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187 (1993) (considering differences in the roles of labor and employment arbitrators); Evan J. Spelfogel, *New Trends in the Arbitration of Employment Disputes*, 48 ARB. J. 6 (1993) (discussing the proliferation of dispute resolution use by employers as a means of reducing burdens on the judiciary and controlling the rising costs of litigation). Many company executives have signed the Center for Public Resources Policy Statement which declares, in part: "We recognize that for many business disputes there is a less expensive, more effective method of resolution than the traditional lawsuit. Alternative dispute resolution (ADR) procedures involve collaborative techniques which can often spare businesses the high costs of litigation." Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, HARV. BUS. REV., May-June, 1994, at 124; *see also* U.S. GENERAL ACCOUNTING OFFICE REPORT, EMPLOYMENT DISCRIMINATION, MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION (1995) (discussing types of alternative dispute resolution used).

American Arbitration Association (AAA) statistics for 1994 showed that it handled a total of 59,424 cases composed of 56,417 arbitrations and 3,007 mediations. AAA CUMULATIVE CASE FILINGS (1995). Of these cases, 26% or 14,852 cases were labor; 6% or 3,564 were construction; 13% or 7,186 were miscellaneous commercial; and 1% or 565 were employment. *Id.* The total commercial cases filed with the AAA in 1994 equaled 13,192. *Id.* This total number of commercial cases represented an increase over the 1993 and 1992 filings which were 12,752 and 12,872, respectively. *Id.*

3. Arbitration, as used in this Article, refers to a non-judicial method of resolving disputes by submitting them to one or more impartial decision-makers. This submission may be required by statute, contract, or may be voluntarily agreed upon by the parties after the dispute arises. *See* LAURA J. COOPER & DENNIS R. NOLAN, LABOR ARBITRATION: A COURSEBOOK 1 (1994) (defining arbitration); HENRY H. PERRITT, JR., 1 EMPLOYEE DISMISSAL LAW AND PRACTICE 199 (3d ed. 1992) (discussing types of arbitration).

The common law courts initially viewed arbitration with skepticism and hostility. This judicial hostility was only neutralized by legislation which required the enforcement of agreements to arbitrate, such as the New York Arbitration Act which was passed in 1920, N.Y. CIV. PRAC. L. & R. 7501-7514 (McKinney 1980 & Supp. 1986) and the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1994). Labor arbitration gained acceptance after the passage of the Taft-Hartley Act of 1947, 61 Stat. 136 (1947), and a series of U.S. Supreme Court cases, which recognized a policy favoring

though defamation actions of this type are not permitted in the judicial arena, courts are frequently divided on whether an absolute privilege should be applied to foreclose or limit subsequent litigation.

It is the position of the authors that if arbitration and related dispute resolution procedures are to be truly effective, they must be accorded the same dignity and protection provided analogous court proceedings. Existing case law provides a degree of protection for the parties, witnesses and other participants through federal preemption, collateral estoppel, and privilege. A review of the case law reveals, however, that these defenses do not provide sufficient protection for the process.

Preemption is only available in the employment context and has been limited by a trio of Supreme Court decisions handed down between 1985 and 1994.[4] Collateral estoppel, while developing in the arbitration arena, still remains an unreliable defense since the arbitrator may *not* be called upon to decide the truth of the allegedly defamatory statements. Indeed, it has no application to dispute resolution procedures that do not involve legal decision-making.

While offering protection, the qualified privilege does not foreclose litigation altogether and may be overcome by proof of malice or excessive publication.[5] This defense leaves the possibility that a jury may finally resolve a dispute properly submitted to arbitration. A narrowly applied absolute privilege can lead to the same result if statements outside the hearing such as in investigations, grievances, claims, conferences, briefs or hearing notices are not covered. Thus, an absolute privilege, broadened to cover pre- and post-hearing conduct, should be applied to discourage subsequent suits against the parties, witnesses, and other participants when as a matter of law, policy

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the arbitration of industrial disputes. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (holding that the interpretation of the collective bargaining agreement is a question for the arbitrator and courts should not overrule the arbitrator's interpretation merely because they differ with it); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960) (holding that in a § 301(a) of the LMRA action, the court's inquiry is confined to the question of whether the reluctant party did agree to arbitration to resolve a grievance, with doubts as to whether the particular grievance is covered under an arbitration clause being resolved in favor of coverage); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (holding that court's inquiry in a suit to compel arbitration of a labor dispute pursuant to a collective bargaining agreement is limited to ascertaining whether the claim of the party seeking arbitration is on its face governed by the contract); *see also* COOPER & NOLAN, *supra*, at 1-13 (discussing history and background of labor arbitration); ROLPH ET AL., *supra* note 2, at 9-10 (examining history of arbitration).

4. Hawaiian Airlines, Inc. v. Norris, 114 S. Ct. 2239 (1994); Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985).

5. *See infra* note 15 (discussing the elements of the qualified privilege in Illinois).

or by agreement the dispute should be finally resolved through the arbitration process.

II. THE LAW OF DEFAMATION

To establish a claim for defamation,[6] a plaintiff must prove a false and defamatory statement was made about him; an unprivileged publication of that statement to a third party; and either that the statement is actionable irrespective of special harm or that the publication caused the special harm.[7] Once the plaintiff has established a prima facie case of defamation, several defenses are available to the defendant including (1) the truth of the statement;[8] (2) that the plaintiff con-

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6. The *Restatement* provides that a statement is defamatory "if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977). Defamation consists of either libel or slander. *Id.* The *Restatement* defines libel and slander as follows:

> (1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.
>
> (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).

Id. § 568(1)-(2).

7. *See id.* § 558 (listing the elements for a cause of action for defamation). The *Restatement* also requires fault amounting at least to negligence on the part of the publisher. *Id.* § 613(1)(g). This fault requirement is based on Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The Supreme Court decision in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), however, raises questions about this position. Many commentators believe that the *Gertz* fault requirement is inapplicable when the plaintiff is a private figure and when the defamatory statement does not involve a matter of public concern. *See* FOWLER V. HARPER ET AL., THE LAW OF TORTS § 5.0, at 20-22 (1986) (discussing the fault requirement in *Gertz*).

8. *See* Watkins v. Laser/Print Atlanta, Inc., 358 S.E.2d 477, 479 (Ga. Ct. App. 1987) (stating that "it is axiomatic that truth is an absolute defense in a defamation action"); RESTATEMENT (SECOND) OF TORTS § 581A (1977) (stating that no liability attaches to a defamatory statement of fact that is true). Some states also provide by statute that truth is an absolute defense in a defamation action. *E.g.*, OHIO REV. CODE ANN. § 2739.02 (Anderson 1988). Article I, Section 4 of the Illinois State Constitution qualifies the absolute defense of truth by stating: "In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." ILL. CONST. art. I, § 4. An important limitation on truth as an absolute defense is that a defendant's good faith belief in the truth of the statement is not sufficient since the statement must in fact be true. *Watkins*, 358 S.E.2d at 479. Conversely, truth is an absolute defense even if the defendant believes the statement to be false when he or she makes it. *See* John Bruce Lewis et al., *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 MO. L. REV. 797, 809-10 (1989) (examining the development of workplace defamation law and arguing for a uniform statute for workplace defamation).

sented to the defamatory statement;[9] or (3) the existence of an absolute or qualified privilege.[10]

In alternative dispute resolution proceedings, the most important defense to a plaintiff's defamation action may be a privilege. A privilege allows a defendant to avoid liability in certain circumstances even though its statements were false and defamatory; a privilege may be either "absolute" or "qualified."[11] Whether a privilege applies, and the type of privilege available, depends upon who made the defamatory statement, to whom it was made, and the circumstances under which it was made.[12]

An absolute privilege is a complete bar to recovery.[13] Absolutely privileged statements are not actionable no matter how false they might be or how malicious the publication.[14] A qualified or conditional privilege, however, protects only those statements made without ill motive or malice.[15]

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9. The *Restatement* states that "the consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation. RESTATEMENT (SECOND) OF TORTS § 583 (1977). Consent can be implied from the individual's membership in an organization which requires the statement of reasons for terminations. *See, e.g.*, Joftes v. Kaufman, 324 F. Supp. 660, 663 (D.D.C. 1971) (union required reasons for dismissal); Turner v. Gateway Transp. Co., Inc., 569 S.W.2d 358, 360 (Mo. App. 1978) (employee consented to procedures established by union and employer, including sending discharge letter to Motor Carrier Council).

10. RESTATEMENT (SECOND) OF TORTS §§ 594-96 (1977).

11. *Id.*; *see also infra* note 15 (discussing the elements required for use of the privilege defense).

12. *See* Bolton v. Walker, 164 N.W. 420 (Mich. 1917) (holding statements made at a regular meeting of the city's board of estimates that involved matters of public interest properly before it, were privileged); Lewis et al., *supra* note 8, at 825 (discussing privileges in defamation law).

13. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 114, at 815-16 (5th ed. 1984) (discussing absolute privilege generally); *see also infra* notes 53-62 and accompanying text (discussing the development of the absolute privilege in judicial proceedings).

14. KEETON ET AL., *supra* note 13, at 816-23; *see also* RESTATEMENT (SECOND) OF TORTS §§ 585-91 (1977) (discussing the scope of absolute privilege as it applies to judicial officers, attorneys, parties to judicial proceedings, witnesses, jurors, legislators and executive officers); RODNEY A. SMOLLA, LAW OF DEFAMATION § 8.01, at 8-3 to 8-5 (1994) (discussing common law privileges).

15. *See* SMOLLA, *supra* note 14, §§ 8.07, 8.09, at 8-19 to 8-20 and 8-31 to 8-33 (1994) (providing a general overview of conditional privilege and discussing abuse of privilege). In Illinois the courts have established five elements for a conditional privilege. They are (a) good faith by the writer or speaker; (b) an interest or duty to be upheld; (c) a statement limited in scope to its purpose; (d) a proper occasion; and (e) publication in a proper way and to proper parties. MICHAEL J. POLELLE & BRUCE L. OTTLEY, ILLINOIS TORT LAW § 5.40, at 5-59 (2d ed. 1993); *see also* Zeinfeld v. Hayes Freight Lines, Inc., 243 N.E.2d 217, 221 (Ill. 1968) (applying the five-element test for conditional privilege).

A. The History of Privilege in Defamation Actions

Courts in this country long have recognized the privilege defense in defamation actions.[16] Early courts rarely applied an absolute privilege except for statements made in judicial and legislative proceedings or certain official communications of executive officers of the federal and state governments.[17]

As the twentieth century approached, defamation actions arose more frequently in the employment context. Many were based upon statements made by an employer in response to an employee's inquiry concerning the reason for his discharge.[18] Courts often found the statements qualifiedly privileged when made in good faith in reference to a matter of common interest to the parties or in discharge of the employer's duty.[19]

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16. In Weiman v. Mabie, 8 N.W. 71 (Mich. 1881), the Michigan Supreme Court found statements contained in an affidavit presented to a superintendent of schools indicating that a prospective teacher made "habitual use of profane and bad language" and was guilty of "open and conspicuous Sabbath-breaking" qualifiedly privileged. *Id.* at 72. The court held that because the statements were made by individuals interested in the schools to the person qualified to act on the licensing of the prospective teacher, and were made for an honest purpose, the statements were "privileged." *Id.*; *see also* Bohlinger v. Germania Life Ins. Co., 140 S.W. 257 (Ark. 1911) (holding that credit report requested by employer/insurer which was forwarded on to other persons involved with the company was a privileged communication because all those viewing the report had an interest in the information in the report by reason of their duties to defendant company); Christopher v. Akin, 101 N.E. 971 (Mass. 1913) (holding that whether statement made by the defendant charging the plaintiff with taking certain articles from a client was privileged was a question for the jury); Gattis v. Kilgo, 52 S.E. 249 (N.C. 1905) (holding the publication of college board of trustees' proceedings in the investigation of charges against one connected with the college was qualifiedly privileged); Butterworth v. Todd, 70 A. 139 (N.J. Sup. 1908) (holding that a complaint made by church members about another church member in accordance with the discipline of the church is subject to qualified privilege if made in the absence of malice); Lewis & Herrick v. Chapman, 16 N.Y. 369 (1857) (holding that a banker's written communication to a mercantile house regarding the credit history of a customer is privileged); Laughlin v. Schnitzer, 106 S.W. 908 (Tex. Ct. App. 1907) (holding that defendant's statement that plaintiff was not a decent woman was conditionally privileged when it was made in conjunction with the defendant's decision to cancel a lease made with the plaintiff).

17. *See* HARPER ET AL., *supra* note 7, §§ 5.22, 5.23, at 181-200 (discussing absolute privilege as it applies to judicial, legislative, administrative and executive proceedings); *see also* Blakeslee v. Carroll, 64 Conn. 223 (1894) (holding that conditional privilege applied to statements made by witnesses appearing before board of alderman); Maurice v. Worden, 54 Md. 233 (1880) (holding that absolute privilege did not apply to a supervisor's written comments made on a letter of resignation received from an employee); Torrey v. Field, 10 Vt. 353 (1838) (discussing the scope of absolute immunity).

18. *See, e.g.*, Beeler v. Jackson, 2 A. 916 (Md. 1886).

19. In Beeler v. Jackson, 2 A. 916 (Md. 1886), a railroad employee brought an action for slander against his employer based upon the railroad's stated reason for the employee's discharge—that the employee was "discharged for stealing fish, nuts and breaking off car-doors, and taking them home." *Id.* at 916. The employee alleged that the statements were made in the presence of other employees. *Id.* at 917. The court found the statements protected by a qualified privilege holding that, upon inquiry from the employee, the employer had a duty "to truth-

B. *Development of a Qualified Privilege for Investigations and Grievance Procedures Pursuant to Labor Agreements*

By the early 1900's, courts were confronted with defamation actions where the alleged defamatory statements were made in the course of investigations or grievance proceedings provided for by a labor agreement. The courts consistently found the statements qualifiedly privileged when the individual making the statement had an interest in the subject matter of the communication and the person to whom it was made had a corresponding interest or some duty concerning the communication.[20]

The Illinois Court of Appeals in *Wuttke v. Ladanyi*[21] found statements made in an investigation hearing privileged.[22] Wuttke, an employee of a sausage company, was discharged after his employer discovered a considerable amount of spoiled meat.[23] After Wuttke filed a notice of his discharge with the union, the president of the union, who was required to investigate any labor dispute in an attempt to settle it, met with him and a company manager to investigate the discharge.[24] Wuttke alleged that during that meeting, the company manager stated that he had syphilis.[25]

The Court of Appeals upheld the lower court's finding that the employer's statements during the meeting were qualifiedly privileged because they were "uttered privately for a good and proper purpose, to a person or to persons having an interest in the subject matter."[26] The court explained that alleged slanderous communications made confi-

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fully and frankly tell him the reason" for his discharge. *Id.* As to the publication of the statement, the court noted that the plaintiff could not complain that his inquiry was answered "where and when it was asked." *Id.* at 917-18; *see also* Bacon v. Michigan Cent. Ry. Co., 33 N.W. 181, 184 (Mich. 1887) (finding discharge list protected by qualified privilege because it was communication made by "a person interested in behalf of [the company] . . . to another person alike interested in behalf of the company regarding matters pertaining to his duties as an agent of the company authorized to employ men"); Ramsdell v. Pennsylvania Ry. Co., 75 A. 444 (N.J. Sup. 1910) (holding that a notification of discharge is privileged as to other employees of the department); Missouri Pac. Ry. Co. v. Richmond, 11 S.W. 555 (Tex. 1889) (finding communication circulated among railroad personnel indicating that former conductor was terminated for carelessness qualifiedly privileged based upon the railroad's duty to see that only competent and careful employees were employed as conductors).

20. *See infra* notes 21-52 and accompanying text (providing case illustrations where a qualified privilege attached).

21. 226 Ill. App. 402 (1922).

22. *Id.* at 405.

23. *Id.* at 403.

24. *Id.* at 403-404.

25. *Id.* at 404.

26. *Id.* at 405.

dentially in response to an inquiry are privileged since the party "has invited the communication."[27]

Similarly, in *Polk v. Missouri Pacific Railroad*,[28] the court found statements made to a witness during an investigation hearing privileged.[29] There, the superintendent of the railroad held a hearing, pursuant to the labor contract, to investigate the reason for the discharge of a member of the plaintiff's railroad crew.[30] During the hearing, the superintendent accused the plaintiff of defrauding the company.[31] The Supreme Court of Arkansas found the superintendent's statement qualifiedly privileged because it was made in good faith in reference to a matter in which both parties had an interest, and in reference to a corresponding duty on the part of the superintendent.[32]

The South Carolina Supreme Court extended a qualified privilege to affidavits submitted in support of statements made during an investigation hearing in *True v. Southern Railroad Co.*[33] True, a railway conductor, was discharged for irregularities in his transportation revenue returns.[34] An investigation was convened pursuant to an agreement between the railroad and the union.[35] Charges of dishonesty and stealing were made during the course of the investigation hearing and those statements were supported by various reports and affidavits.[36]

The court found both the statements made during the hearing and the affidavits supporting those statements qualifiedly privileged since the investigation was called in response to an obligation of the com-

27. *Id.* The court further noted that a dangerous precedent would be set if it held that an employer could not give a private and confidential explanation to a discharged employee or his representative who had solicited an explanation of the discharge "without laying himself open to a charge of slander." *Id.* at 405-06.

28. 245 S.W. 186 (Ark. 1922).

29. *Id.* at 188.

30. *Id.*

31. *Id.*

32. *Id.* In Bird v. Medal Gold Prod. Corp., 302 N.Y.S.2d 701 (N.Y. App. Div. 1969), the court also found statements made by the employer at a pre-arbitration conference qualifiedly privileged where the statements were germane to the employee's reinstatement; *see also* Henthorn v. West Md. Ry. Co., 174 A.2d 175 (Md. 1961) (holding that an employer is entitled to a qualified privilege in making certain statements about an employee in an inquiry investigating the discharge of the employee as long as the statements were made in good faith); Elmore v. Atlantic Coast Line Ry. Co., 127 S.E. 710 (N.C. 1925) (holding that statements made by railroad's superintendent in a conversation with a ticket agent pursuant to investigation of the plaintiff were qualifiedly privileged).

33. 157 S.E. 618 (S.C. 1931).

34. *Id.* at 619.

35. *Id.*

36. *Id.*

pany under the labor agreement.[37] The court noted that if the company had discharged the plaintiff without complying with the provision of the agreement requiring an investigation, it would have subjected itself to a suit for damages.[38]

The New Jersey Superior Court further extended a qualified privilege to correspondence concerning an employee's discharge. In *Murphy v. Johns-Manville*,[39] a millwright was caught removing company property without permission.[40] A hearing was conducted, as required by the labor agreement, and minutes were taken.[41] The minutes subsequently were transcribed and sent by the company supervisor of industrial relations to the union and to certain management personnel.[42] The company also forwarded a letter to the union president stating that the employee was being discharged for theft.[43] The employee then brought an action for libel based upon the letter and the minutes of the hearing.[44]

The court affirmed judgment for the employer finding both the minutes and the letter qualifiedly privileged.[45] It found that the letter was sent in accordance with the company's duty under the labor agreement.[46] The court also held that the minutes were sent only to individuals who "had a sufficient interest in the matter" so as to make the minutes qualifiedly privileged.[47]

Some courts have also found statements made in *notices* of investigation meetings and employee terminations qualifiedly privileged. In *Hardee v. North Carolina Allstate Services, Inc.*,[48] the court considered allegedly libelous statements contained in notices of an investigation sent to an employee, his union, his manager, and the company leasing the employee's services.[49] The investigation was to consider the em-

37. *Id.* at 620.

38. *Id.*

39. 133 A.2d 34 (N.J. Super. Ct. App. Div. 1957).

40. *Id.* at 36.

41. *Id.* at 37.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 40-41.

46. *Id.* at 42.

47. *Id.* at 41; *see also* Jorgensen v. Pennsylvania R.R. Co., 138 A.2d 24, 36-40 (N.J. 1958) (applying a qualified privilege to statements made in a letter sent to the employee at the conclusion of an investigation hearing held pursuant to the union contract).

48. 537 F.2d 1255 (4th Cir. 1976).

49. *Id.* at 1257-58.

ployee's falsification of his driver log and theft of company property.[50] The court held that the notice of investigation and a notice of the employee's termination sent to the same recipients were qualifiedly privileged.[51] According to the court, the notices contained a reasonable description of the employee's behavior.[52]

III. THE ABSOLUTE PRIVILEGE

A. *Development of Immunity and Absolute Privilege in Judicial Proceedings*

Following English precedent, American courts established complete protection and immunity from civil liability for statements made or actions taken by judges during the course of judicial proceedings. In 1872, Supreme Court Justice Field, writing for the majority in *Bradley v. Fisher*,[53] addressed judiciary immunity:

> For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.[54]

The principle of judicial immunity "guarantees impartiality by assuring that the judge need not fear the cost and burden of defending a lawsuit brought by a disappointed litigant."[55]

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50. *Id.* Although the company was apparently required to notify the employee, his union, and his manager of the investigation, it was *not* required to notify the company leasing the plaintiff's truck driving services. *Id.* at 1259 n.4.

51. *Id.* at 1259.

52. *Id.* at 1258-59.

53. 80 U.S. 335 (1871). *Bradley* was the United States Supreme Court's first landmark judicial immunity case. The defendant, Fisher, had been the presiding judge of a case in which the plaintiff, Bradley, had been defending a man accused of the murder of President Lincoln. *Id.* at 336-37. Bradley, outside the presence of the jury and outside the record of the court, allegedly made a series of derisive statements directed at Fisher. *Id.* at 337. Fisher then ordered that Bradley's name be stricken from the roll of attorneys permitted to practice before the Supreme Court of the District of Columbia. *Id.* Bradley brought suit against the defendant-judge to recover damages sustained "by reason of the wilful, malicious, oppressive and tyrannical acts and conduct" of the defendant, whereby the plaintiff was deprived of his right to practice as an attorney in that court. *Id.* at 336.

54. *See id.* at 347 (citing Floyd v. Baker, 77 Eng. Rep. 1305 (S.C. 1608)) (stating that a judge may not, for things done by him as a judge, be questioned before another judge). For a general discussion of judicial immunity, see Robert S. Catz & Jill J. Lange, *Judicial Privilege*, 22 GA. L. REV. 89 (1987); Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, (Part I), 9 COLUM. L. REV. 463 (1909).

55. Phillip J. Roth, *The Dangerous Erosion of Judicial Immunity*, 18 BRIEF 26, 26 (1989).

As with judges, statements made by those participating in a judicial proceeding are absolutely privileged.[56] Therefore, statements by court officers, attorneys, parties, witnesses, and jurors cannot serve as the basis for a defamation action.[57] Such statements are absolutely privileged if related or pertinent to the matter before the court.[58]

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56. Early English cases established broad protection for statements and writings made as a part of judicial proceedings. *See* Henderson v. Broomhead, 157 Eng. Rep. 964 (Ex. 1859) (holding no action lies in a case against a party who makes an affidavit in support of a summons that is scandalous, false and malicious); Rex v. Skinner, 98 Eng. Rep. 529, 530 (K.B. 1772) ("[N]either party, witness, counsel, jury or Judge, can be put to answer, civilly or criminally, for words spoken in office."); Anfield v. Feverhill, 80 Eng. Rep. 1113 (K.B. 1614) (stating no action lies against one for bringing an action against another in the ordinary course of justice); Cutler v. Dixon, 76 Eng. Rep. 886 (K.B. 1585) (stating allegation in articles of peace exhibited to justices not actionable); *see also* Paul T. Hayden, *Reconsidering the Litigator's Absolute Privilege To Defame*, 54 OHIO ST. L.J. 985, 1017-18 (1993) (discussing the English case law and its adoption in the United States). The English courts have established the principle that "no action of slander or libel lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law." Dawkins v. Lord Rokeby, 8 L.R.-Q.B. 255, 263 (1875). *See generally* PETER F. CARTER-RUCK ET AL., CARTER-RUCK ON LIBEL AND SLANDER 120-22 (4th ed. 1992) (discussing the absolute privilege for statements made in judicial proceedings).

57. Because the need for participants to speak freely during judicial proceedings is so essential to the judicial process, the individual's right to redress for defamation is necessarily curtailed. McDermott v. Hughley, 561 A.2d 1038 (Md. 1989); *see also* Miner v. Novotny, 498 A.2d 269 (Md. 1985) (holding that a citizen's police brutality complaint was protected by a qualified privilege); Keys v. Chrysler Credit Corp., 494 A.2d 200 (Md. 1985) (holding that creditor and its attorney's statements uttered in course of judicial proceeding to garnish a debtor's wages were absolutely privileged). Illinois courts also have accorded an absolute privilege to statements made by participants in judicial proceedings. In Illinois Traffic Court Driver Improvement Educ. Found. v. Peoria Journal Star, Inc., 494 N.E.2d 939 (Ill. App. Ct. 1978), the court held that an absolute privilege extended even to the administrative aspects of a judge's normal judicial function. *Id.* at 941-42. In Illinois, the privilege further extends to parties and witnesses who testify in a case. Anderson v. Matz, 384 N.E.2d 759 (Ill. App. Ct. 1986). In addition, the absolute privilege attaches to the contents of a complaint so long as the court has colorable jurisdiction. *See, e.g.*, Defend v. Lascelles, 500 N.E.2d 712 (Ill. App. Ct. 1986) (holding that pleading in a civil cause of action for violation of applicable RICO provision is absolutely privileged from claim for defamation so long as it has some relation to the matter in controversy provided that the trial court had at least color of jurisdiction over plaintiff's civil RICO claim); Talley v. Alton Box Bd. Co., 185 N.E.2d 349 (Ill. App. Ct. 1962) (holding comments on the conduct of an attorney in performing the services for which he is seeking fees are absolutely privileged in judicial proceedings to determine the propriety of awarding attorneys fees). Illinois courts have also found that statements made by an attorney in a judicial proceeding are privileged so long as the attorney's remarks have any bearing at all on the subject of the litigation. Weiler v. Stern, 384 N.E.2d 762 (Ill. App. Ct. 1978). Even letters written by the attorney come within the absolute privilege if they are related in some way to the litigation. *Id.* at 764-65.

58. *See generally* McCutcheon v. Moran, 425 N.E.2d 1130, 1133 (Ill. App. Ct. 1981) ("It has long been the recognized rule of law that whatever is said or written in a legal proceeding which is pertinent and material to the matters in controversy is privileged and no action of slander or libel can be maintained upon it."); RESTATEMENT (SECOND) OF TORTS §§ 585-89 (1981) (discussing absolute privilege as it applies to judicial officers, attorneys, parties to judicial proceedings, witnesses, and jurors); *see also* Surace v. Wuliger, 495 N.E.2d 939, 942-43 (Ohio 1986) (holding that "a claim alleging that a defamatory statement was made in a written pleading does

The absolute privilege encompasses the legal process as well. Statements in pleadings and briefs are absolutely privileged, as are oral statements made to the judge and jury while representing a client in the course of litigation.[59] Pre-trial procedures including depositions and pre-trial conferences also enjoy the protection of absolute privilege.[60] Absolute privilege has been significantly expanded and is no longer limited to formal pleadings and in-court communications, but includes any communication pertinent to pending litigation.[61]

Absolute privilege thus affords protection to any judicial proceeding, including statements made within the courtroom itself and pleadings and briefs. Such privilege has attached to judicial proceedings and to those participating in the legal process as a result of society's desire to assure free and open communication in the pursuit of equity and justice. While American courts uniformly have recognized an absolute privilege in traditional judicial proceedings, they have sometimes been reluctant to accord the same status to arbitration and related dispute resolution procedures.[62]

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not state a cause of action where the . . . statement bears some reasonable relation to the judicial proceeding").

> The requirement that statements made in a judicial proceeding be pertinent or relevant is not applied in a strict sense. When it is applied and questions are raised, all doubts are resolved in favor of relevancy or pertinency. Although a party may not introduce into a judicial proceeding inflammatory matters entirely unrelated to the litigation, he is not answerable for those volunteered or included in his pleadings if they have any bearing on the subject at issue.

Macie v. Clark Equip. Co., 290 N.E.2d 912, 914 (Ill. App. Ct. 1972) (citations omitted).

59. *See generally* RESTATEMENT (SECOND) OF TORTS § 586 cmt. a (1977) ("The institution of a judicial proceeding includes all pleadings and affidavits . . . [and] the examination and cross-examination of witnesses, comments upon the evidence and arguments both oral and written upon the evidence, whether made to a court or jury."); *see also* Justice v. Mowery, 430 N.E.2d 960, 962 (Ohio Ct. App. 1980) ("The great weight of authority is that attorneys conducting judicial proceedings are privileged from prosecution from libel and slander in respect to words or writings used in the course of such proceedings . . . .").

60. *See generally* ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS § 7.2.1.3, at 416 (Robert D. Sack & Sandra S. Baron eds., 2d ed. 1994) (discussing the absolute immunity given attorneys).

61. *See, e.g.*, Izzi v. Rellas, 163 Cal. Rptr. 689, 692 (Cal. Ct. App. 1980) (applying privilege to letter to opposing counsel regarding default judgment as "proceedings which have the real potential for becoming a court concern"); Richards v. Conklin, 575 P.2d 588 (Nev. 1978) (holding letter to potential defendant in legal malpractice action privileged); Simmons v. Climaco, 507 N.E.2d 465 (Ohio Ct. App. 1986) (holding letters to supervisors of agents investigating client privileged). *But see* Smith v. Suburban Restaurants, Inc., 373 N.E.2d 215, 218 (Mass. 1978) (rejecting privilege because there was "no indication that the attorney seriously contemplated a judicial proceeding in good faith").

62. *See* William. J. Andrle, Jr., *Extension of Absolute Privilege to Defamation in Arbitration Proceedings*—Sturdivant v. Seaboard Service System, Inc., 33 CATH. U. L. REV. 1073, 1079 (1984) (analyzing the broadening scope of absolute privilege and its effect on arbitration in the District of Columbia). In Great Britain there was early consideration of extending an absolute

B. *Absolute Privilege and Labor Dispute Resolution Procedures*

In 1966, the United States Court of Appeals for the Tenth Circuit decided *General Motors Corp. v. Mendicki*,[63] the case most often cited for the proposition that statements made incident to grievance resolution are absolutely privileged.[64] The court based its decision on the important federal interest in the peaceful settlement of industrial disputes through arbitration.[65]

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or qualified privilege to arbitral proceedings. *See* CARTER-RUCK ET AL., *supra* note 56, at 121 (providing early analysis of extending the privilege in arbitral proceedings in Great Britain). The Scottish case of Neill v. Henderson 8 S.L.T. 377 (1901) addressed this issue. The defamation action in this case arose following an arbitration proceeding during which Neill, a witness, made an alleged defamatory statement to the arbitrator about Henderson, the other party to the dispute. *Id.* at 377. Lord Trayner, for the court, wrote "the language in question was used in the course of a judicial or quasi-judicial proceeding, and was not plainly irrelevant or impertinent to the matter being discussed, [therefore] I think [Neill] was privileged, at least to the extent of requiring that malice should be put in issue. . . ." *Id.* Later, in Slack v. Barr 1 S.L.T. 133 (1918), Lord Anderson of the Scottish Outer House revisited the privilege issue and the extension of an absolute privilege to defamatory statements made during the course of arbitration proceedings. *Id.* at 135-36. Lord Anderson based his decision on the well-recognized rule of law in Scotland that the application of absolute privilege is based on considerations of public policy. *Id.* at 135. He wrote, "I am unable to see why these [considerations] should not apply to all occasions on which evidence is given for public purposes before any public body, whether that body is purely judicial or quasi-judicial, or exists merely for administrative purposes." *Id.* at 136. Lord Anderson concluded that the alleged defamatory statement was absolutely privileged because the statement was made before an "arbitration tribunal" in the course of an inquiry as to the administration of the law. *Id.* In England, in Tadd v. Eastwood, 12 Indus. Rel. L. Rep. 320 (1983), Justice Hirst expressed the view that certain forms of arbitration are sufficiently comparable to court proceedings and should, therefore, be absolutely privileged. *Id.* at 324-26. Justice Hirst commented:

> many arbitrations, particularly those in the commercial and maritime field, determine finally issues identical to those decided in a court of law, and are presided over and conducted in a manner virtually indistinguishable from court proceeding, apart from the fact that they are held in private; this last factor should not in itself . . . lend to a conclusion adverse to the existence of absolute privilege. . . .

Id. at 326. One English commentator on the law of libel and slander also suggests that

> in an age in which commercial arbitrations involving huge sums of money are frequently conducted by lawyers of great eminence, including many retired judges, with a high degree of legal formality and sophistication, it is submitted that it would be appropriate for statutory reform to bestow absolute privilege on most forms of arbitration to which the English Arbitration Act of 1950 applies.

CARTER-RUCK ET AL., *supra* note 56, at 12.

63. 367 F.2d 66 (10th Cir. 1966); *see* Donald W. Bostwick, Comment, *The Availability of Defamation Remedies for Statements Made During the Course of Labor Grievance—Arbitration Proceedings*, 15 KAN. L. REV. 553 (1967) (providing an early discussion of *Mendicki*); *see also* Gary D. Spivey, Annotation, *Libel and Slander: Privileged Nature of Communications Made in the Course of Grievance or Arbitration Procedure Provided for by Collective Bargaining Agreement*, 60 A.L.R.3d 1041 (1974) (providing a general survey of the law relating to privilege).

64. *Mendicki*, 367 F.2d at 70-71.

65. *Id.*

The labor policy favoring arbitration is found primarily in two federal statutes, the National Labor Relations Act (NLRA),[66] including Section 301 of the Labor Management Relations Act (LMRA), and the Railway Labor Act (RLA).[67] These statutes affect workplace defamation actions in at least two ways. The NLRA encourages and the RLA mandates resolution of disputes through arbitration procedures.[68] These very procedures simultaneously provide the opportunity for defamatory utterances and a means to foreclose defamation claims based upon federal preemption and absolute privilege.

1. The Absolute Privilege and the National Labor Relations Act

In *Mendicki*, the employee brought a defamation action based upon statements made by his employer at a meeting between union and company representatives to resolve a grievance he had filed following his discharge for theft.[69] The jury found in Mendicki's favor, and General Motors appealed.[70]

The Tenth Circuit reversed and entered a final judgment for General Motors, finding the statements protected by an absolute privilege.[71] It reasoned that permitting employees to resort to defamation claims would unduly burden the federal interest in the peaceful settlement of industrial disputes and impair national labor policy.[72] The federal interest required a complete shield against liability.[73] The *Mendicki* court acknowledged that in *Linn v. United Plant Guard Workers of America*,[74] the Supreme Court had found that federal law only imposed additional requirements on state defamation law in the context of a labor dispute.[75] Nevertheless, the court found that the

66. 29 U.S.C. §§ 151-169 (1994). When referred to in this article, the National Labor Relations Act (NLRA) is understood to include the Wagner Act of 1935, the Taft-Hartley Act of 1947 (Labor Management Relations Act or LMRA) and the Landrum-Griffin Act of 1959. References to the individual statutes will be made when necessary for clarity. *See* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 1-6 (1976) (providing a concise history of the National Labor Relations Act).

67. 45 U.S.C. §§ 151-188 (1982).

68. *Compare* the LMRA, 29 U.S.C. § 171(a) *with* the RLA, 45 U.S.C. § 153 First (i).

69. 367 F.2d 66 (10th Cir. 1966).

70. *Id.* at 67.

71. *Id.* at 70.

72. *Id.* at 70-71. The Court recognized that "[t]he declared policy of the national legislature on labor relations is to encourage, facilitate and effectuate the settlement of issues between employers and employees through the 'processes of conference and collective bargaining between employers and representatives of their employees,' in order to promote and preserve industrial peace." *Id.* at 70 (citation omitted).

73. *Id.* at 70-72.

74. 383 U.S. 53 (1966).

75. *Mendicki*, 367 F.2d at 71-72.

additional concern of peaceful dispute resolution justified the imposition of an absolute privilege.[76]

Many courts have followed the reasoning and holding in *Mendicki* and have further developed and shaped the limits of the absolute privilege.[77] In *Brooks v. Solomon Co.*,[78] the district court found alleged slanderous statements made during an informal union-management grievance meeting absolutely privileged.[79] Relying upon *Mendicki*, the court held that the statements were made during a proceeding encouraged by federal law to peacefully resolve grievances.[80]

In *Watts v. Grand Union Co.*,[81] the district court extended an absolute privilege to statements made at a meeting called by management to discuss possible discrepancies in an employee's cash register reports.[82] The issue before the court was whether the allegedly slanderous statements were made during a conference to adjust a grievance or for other peaceful disposition of a dispute covered by a collective agreement, as required by *Mendicki*.[83] The court concluded that because the meeting was called "for the purpose of disposing of 'differences, disputes, or complaints' and was conducted in an attempt to settle disputes" pursuant to the collective bargaining agreement, the statements were unqualifiedly privileged.[84]

In *Honaker v. Florida Power & Light Co.*,[85] the court also extended an absolute privilege to statements made in an informal grievance conference preceding the filing of a formal grievance.[86] In that case, a company manager called an employee to his office to determine if the

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76. *Id.* at 72.

77. *See, e.g.*, Wallin v. Vienna Sausage Mfg., 203 Cal. Rptr. 375 (Cal. Ct. App. 1984) (holding statements made by parties and witnesses during the course of grievance procedure hearings established by collective bargaining agreements absolutely privileged against claims of defamation); Sturdivant v. Seaboard Serv. Sys., Ltd., 459 A.2d 1058 (D.C. App. 1983) (holding that statements made by a witness in an arbitration proceeding arising from the discharge of a cashier based on the violation report filed by the witness was absolutely privileged); Rougeau v. Firestone Tire & Rubber Co., 274 So. 2d 454 (La. Ct. App. 1973) (holding that statements made by an employer during an investigation of theft of employer's lawnmower "enjoyed an unqualified privilege"); Neece v. Kantu, 507 P.2d 447 (N.M. Ct. App.), *cert. denied*, 507 P.2d 443 (N.M. 1973) (holding that absolute privilege applied to defamatory remarks made during course of labor grievance proceedings).

78. 542 F. Supp. 1229 (N.D. Ala. 1982).

79. *Id.* at 1234.

80. *Id.* at 1233-34. The Court cited 29 U.S.C. § 171(a) as the source of this federal policy. *Id.* at 1234.

81. 114 L.R.R.M. (BNA) 3158 (N.D. Ga. 1983).

82. *Id.* at 3160.

83. *Id.*

84. *Id.* at 3161.

85. 95 L.R.R.M. (BNA) 3265 (M.D. Fla. 1977).

86. *Id.* at 3270-71.

employee falsified his application for employment by failing to disclose that one of his relatives worked for the company.[87] Upon learning that a relative did work for the company, the manager summoned the union steward to his office and accused the employee of falsifying his application, requested the employee's resignation and when the employee refused to resign, terminated his employment.[88]

The district court noted that the manager's statements were made at an informal meeting preceding the filing of a formal grievance and that such a meeting was specifically provided for in the labor contract between the company and the union.[89] Relying upon the public policy rationale established in *Mendicki*, the court found the statements absolutely privileged.[90]

Courts have also expanded the scope of the absolute privilege adopted in *Mendicki* to disciplinary action notices when the collective bargaining agreement requires them. In *Hasten v. Phillips Petroleum Co.*,[91] the Tenth Circuit found that an absolute privilege was not limited to statements made during oral grievance proceedings, but extended to "the entire proceeding contemplated by the provisions of the agreement for the grievance machinery."[92] The court held that this included a written discharge notice as long as the statements in the notice were not published to "persons without a legitimate job-related interest in receiving [them]."[93] The court reasoned that "federal policy encouraging collective bargaining and frankness in labor disputes applies to termination notices as well as to bargaining sessions."[94]

Similarly, in *Joftes v. Kaufman*,[95] the court found statements contained in three different letters of dismissal to the plaintiff absolutely privileged.[96] Premised upon *Mendicki* and national labor policy, the court held that because the notices were "contemplated by the collective bargaining agreement" and were published only to those individu-

87. *Id.* at 3266-67.

88. *Id.*

89. *Id.*

90. *Id.* at 3270. Interestingly, the Court noted that "even if under federal law no absolute privilege exists . . . under both federal and Florida law the statements are qualifiedly privileged in the absence of express malice on the part of the defendant." *Id.* at 3271.

91. 640 F.2d 274 (10th Cir. 1981).

92. *Id.* at 277.

93. *Id.* at 279 (quoting Joftes v. Kaufman, 324 F.Supp. 660, 664 (D.D.C. 1971)).

94. *Id.* at 276; *see also* Rougeau v. Firestone Tire & Rubber Co., 274 So. 2d 454 (La. Ct. App. 1973) (denying employee's right to recover on defamation charges when investigation of employee's actions focused on theft occurring during employee's shift).

95. 324 F. Supp. 660 (D.D.C. 1971).

96. *Id.* at 663.

als having a legitimate job-related interest in the matter, they were unqualifiedly privileged.[97]

Some courts specifically have held that statements made in connection with grievance procedures governed by Section 301 of the LMRA are absolutely privileged. In *Nelson v. Lapeyrouse Grain Corp.*,[98] a discharged employee brought an action against his employer and others, alleging that statements made during a grievance hearing following his discharge were slanderous.[99] The court first found that the employee's defamation action was not preempted by Section 301 because it could be resolved without recourse to the collective bargaining agreement.[100] The court, however, found that an overriding federal labor policy mandates that statements "made during federally recognized labor grievance hearings be absolutely privileged."[101]

In *Patterson v. State of Alaska, Department of Agriculture*,[102] the court found statements made in a letter to the union absolutely privileged even though the collective bargaining agreement was not yet in effect.[103] In *Patterson*, an employee brought an action against his employer for making defamatory statements in a letter to the union concerning the employee's misconduct.[104] The court upheld summary judgment for the employer.[105] It reasoned that statements made during the course of grievance proceedings conducted pursuant to the provisions of a collective bargaining agreement, subject to Section 301, were absolutely privileged.[106]

Although the collective bargaining agreement containing the grievance procedures was not in force when the letter was sent, the court held that the letter was sent pursuant to an "employer implemented

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97. *Id.* at 662-64. In distinguishing Linn v. United Plant Guard Workers of Am., 383 U.S. 53 (1966), the Court declared:

> Here, on the other hand, Joftes had available to him an opportunity through the grievance machinery to secure personal relief and vindication .... To allow him to proceed instead by way of a burdensome, expensive, vexatious libel suit against individuals who did no more than fulfill their duty to inform him of reasons for his discharge would indeed be subversive of the carefully constructed system of procedures and remedies for employment disputes.

Id. at 664.

98. 534 So. 2d 1085 (Ala. 1988).

99. *Id.* at 1089.

100. *Id.* at 1090-91; *see infra* part IV.A (discussing preemption of workplace defamation actions).

101. *Nelson*, 534 So. 2d at 1092.

102. 880 P.2d 1038 (Alaska 1994), *cert. denied*, 115 S. Ct. 936 (1995).

103. *Id.* at 1047.

104. *Id.* at 1040.

105. *Id.* at 1047.

106. *Id.*

last offer agreement" which was a "substitute for a collective bargaining agreement."[107] Thus, "[the letter's] relationship with the grievance resolution process brought it within the scope of an absolute privilege."[108]

Courts have also found statements made by legal counsel and arbitrators in the course of a grievance procedure absolutely privileged. In *Kaminski v. Roadway Express, Inc.*,[109] the district court found statements made by the company's legal counsel during an arbitration hearing absolutely privileged because the hearing was quasi-judicial.[110] The court explained that because the attorney's statements "were merely part of a cross-examination of Plaintiff in a quasi-judicial proceeding," they were absolutely privileged and not actionable.[111]

Not all courts have agreed that federal labor law or policy requires an absolute privilege for statements made in the course of arbitration and related dispute resolution procedures. In *Thompson v. Public Service Company of Colorado*,[112] an employee brought a defamation action against his employer arising from statements made by the employer in two disciplinary notices.[113] The trial court granted summary judgment for the defendant, finding that the employer's statements were protected by a qualified privilege under state law.[114] The court of appeals affirmed on other grounds, finding the statements absolutely privileged under Section 301 of the LMRA.[115]

The Supreme Court of Colorado found that both the trial court and the court of appeals had erred and reversed the grant of judgment to the employer.[116] The court first held that Section 301 of the LMRA did not preempt the state law defamation claim, since resolution of

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107. *Id.*

108. *Id.*; *see also* Hyles v. Mensing, 849 F.2d 1213 (9th Cir. 1988) (holding that the need to protect the collective bargaining agreement rendered statements made in the grievance process privileged).

109. No. 94-C4425, 1995 U.S. Dist. LEXIS 2475 (N.D. Ill. Mar. 1, 1995).

110. *Id.* at *16-17.

111. *Id.* at *18; *see also* Stiles v. Chrysler Motors Corp., 624 N.E.2d 238 (Ohio Ct. App. 1993) (finding an absolute privilege under the NLRA for allegedly defamatory statements made in connection with an investigation of a grievance held pursuant to the collective bargaining agreement). Citing the *Restatement*, the Court further recognized that " '[g]rievance proceedings have also been classified as quasi-judicial, thereby giving rise to an absolute privilege for statements made by a party concerning another if the matter has some relationship to the proceeding.' " *Id.* at 242 (quoting the RESTATEMENT (SECOND) OF TORTS § 587 (1977)).

112. 800 P.2d 1299 (Colo. 1990), *cert. denied*, 502 U.S. 973 (1991).

113. *Id.* at 1300.

114. *Id.* at 1301.

115. *Id.*

116. *Id.* at 1307.

the claim did not require an interpretation of the collective bargaining agreement.[117] Relying upon *Linn v. United Plant Guard Workers of America*,[118] the court then held that a qualified privilege sufficed to safeguard the interests of national labor policy.[119] The court viewed the federal interest in free debate that was considered in *Linn* similar to the "federal interest in encouraging frank discussion in the context of a grievance proceeding or a disciplinary action," and thus concluded that there was no basis for affording an absolute privilege to the disciplinary notice statements.[120]

In *Ezekiel v. Jones Motor Co.*,[121] an employee brought a defamation action against his former employer and a co-employee for statements the co-employee made before a joint management-union grievance board alleging that the plaintiff stole a rod and reel from the employer.[122] The trial court entered a judgment notwithstanding the verdict for the defendants on the grounds that the alleged slanderous statements were absolutely privileged.[123] The Supreme Judicial Court of Massachusetts held that the defendants enjoyed only a qualified privilege in revealing the grounds for the employee's termination to the grievance board.[124]

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117. *Id.* at 1305; *see* Thompson v. Pub. Serv. Co. of Colo., 773 P.2d 1103 (Colo. Ct. App. 1988); Brief for the United States as Amicus Curiae at 7 n.3 and Petition for Writ of Certiorari at 4 n.2, Thompson v. Pub. Serv. Co. of Colo., 800 P.2d 1299 (Colo. 1990), *cert. denied*, 502 U.S. 773 (1991) (noting that while the collective bargaining agreement did not contain an express requirement that the employer send a written disciplinary notice, the company that maintained the disciplinary notices were required by past practice).

118. 383 U.S. 53 (1966).

119. *Thompson*, 800 P.2d at 1306.

120. *Id.* In responding to the Public Service Company of Colorado's Petition for Writ of Certiorari to the U.S. Supreme Court, the Solicitor General, representing the United States as Amicus Curiae, stated:

> We recognize that some confusion exists in lower court decisions concerning the source and scope of privileges applicable to statements made during grievance hearings, arbitration, and other procedures pursuant to collective bargaining agreements. Greater clarity in this broad area is plainly desirable. But none of those decisions has concluded that federal labor law absolutely bars a defamation action where, as here, the claim is based upon statements that are not part of the process prescribed by a labor contract, and where the claim can be resolved without interpretation of the collective bargaining agreement. Accordingly, we do not believe that review of this case is likely to provide the Court with the appropriate vehicle for resolving the issue that divides some of the lower courts: whether statements made in accordance with grievance procedures established by a collective bargaining agreement are absolutely privileged under federal labor law.

Brief for the United States as Amicus Curiae at 8-9, *Thompson*.

121. 372 N.E.2d 1281 (Mass. 1978).

122. *Id.* at 1283.

123. *Id.*

124. *Id.* at 1284.

The court rejected the argument that the grievance procedure was a quasi-judicial proceeding requiring an absolute privilege because "[a] witness at the grievance hearing need not give sworn testimony, nor is he subject to the control of a judge to limit his testimony to competent, relevant and material evidence."[125] The court concluded that a conditional privilege provided a "sufficient incentive for the witness to speak openly," but did not "remove the safeguards against communications which are deliberately false."[126]

2. *The Absolute Privilege Under the Railway Labor Act*

Shortly after the *Mendicki* court recognized an absolute privilege for statements made pursuant to a grievance procedure, courts began adopting an unqualified privilege for statements made as a part of dispute resolution proceedings governed by the RLA.[127] The RLA[128] requires the submission of disputes between carriers and their workers "growing out of grievances or out of the interpretation or application of [collective bargaining agreements]" to special resolution mechanisms.[129] Grievances growing out of the interpretation or application of collective bargaining agreements are termed "minor disputes" under the RLA.[130] The resolution of minor disputes is within the exclusive jurisdiction of the National Railroad Adjustment Board (NRAB) and public law boards.[131]

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125. *Id.* at 1285.

126. *Id.*; *see also* Fisher v. Illinois Office Supply Co., 474 N.E.2d 1263 (Ill. App. Ct. 1984) (holding that statements made during grievance hearings received only traditional privilege, not absolute privilege).

127. 45 U.S.C. §§ 151-188 (1988). The Railway Labor Act covers employees of railways and airlines. 45 U.S.C. § 151 (First), 181 (1988). The absolute privilege for statements made at proceedings pursuant to the RLA also apply to statements made in a labor grievance. *See* Bell v. Gellert, 469 So. 2d 141 (Fla. Dist. Ct. App. 1985) (finding allegedly defamatory statements, contained in a labor grievance, were absolutely privileged).

128. 45 U.S.C. § 181.

129. 45 U.S.C. § 153 First (i); Union Pacific R.R. Co. v. Sheehan, 439 U.S. 89 (1978); Andrews v. Louisville & Nashville R.R. Co., 406 U.S. 320 (1972).

130. Consolidated Rail Corp. v. Railway Labor Executives Assoc., 491 U.S. 299, 303-04 (1989); *Andrews*, 406 U.S. at 322.

131. A public law board is a tribunal established by railroads and labor organizations, having co-equal jurisdiction with the National Railroad Adjustment Board to decide disputes. 45 U.S.C. § 153 Second; O'Neill v. Pub. Law Bd. No. 550, 581 F.2d 692, 694-95 (7th Cir. 1978). A minor dispute is first handled through the railroad's normal internal dispute resolution mechanisms. 45 U.S.C. § 152 First. An "investigation" or hearing is typically held on the railroad's property and conducted by railroad officials. 45 U.S.C. § 152 Sixth. The conduct of the investigation is governed by the applicable labor agreement. 45 U.S.C. § 152 Eighth. If the dispute is unresolved, a party may submit it to the NRAB or to a public law board. 45 U.S.C. § 157 First. The public law board is composed of a labor member, a railroad member, and a neutral and is an arbitral body which reviews the result of the investigation hearing to insure it conforms to the labor agreement. *See* Kulavic v. Chicago & Ill. Midland Ry. Co., 1 F.3d 507, 512-17 (7th Cir.

Courts based their decisions on the privilege issue primarily upon the strong interest in amicable dispute resolution and the quasi-judicial nature of the RLA proceedings. *Macy v. Trans World Airlines, Inc.*[132] is a commonly cited opinion for conferring an absolute privilege on statements made during grievance resolution under the RLA. In *Macy*, Trans World Airlines discharged the employee for sabotage in the presence of a union steward.[133] The airline, pursuant to the labor agreement, gave the union notice of the discharge and held a hearing in which the discharge was upheld.[134]

The court first found that the statements to the union were qualifiedly privileged under state law because Maryland protected employer-employee communications regarding employment.[135] It then held that the RLA provides an absolute privilege because of the national policy favoring statutory and contractual dispute resolution mechanisms.[136]

Other courts have found that an absolute privilege exists for termination notices sent pursuant to the requirements of the RLA. In *Urdahl v. Eastern Airlines Inc.*,[137] an airline employee brought an action for libel and slander against the airline and one of its supervisors following her dismissal for misappropriating company funds.[138] The employee had previously grieved the discipline and a hearing officer had affirmed the discharge.[139] The employee then appealed to the System Board of Adjustment pursuant to the RLA.[140] The System Board ruled that the evidence failed to establish that the employee was guilty of misappropriating company funds.[141] The Board directed

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1993); Elmore v. Chicago & Ill. Midland Ry. Co., 782 F.2d 94, 95 (7th Cir. 1986); *see also* FRANK ELKOURI & EDNA ASPEN ELKOURI, HOW ARBITRATION WORKS 146-151, 304 (4th ed. 1985) (discussing arbitration under the Railway Labor Act). An NRAB or public law board award may be reviewed by the federal district court. 45 U.S.C. § 153 First (q).

132. 381 F. Supp. 142 (D. Md. 1974).

133. *Id.* at 144-45.

134. *Id.* at 145.

135. *Id.* at 146.

136. *Id.* at 148.

137. 114 Lab. Cas. (CCH) ¶ 11,990, at 28,506 (E.D.N.Y. 1987).

138. *Id.* at 28,507.

139. *Id.*

140. *Id.* The Railway Labor Act requires airlines to establish System Boards of Adjustment to arbitrate disputes between employees and carriers growing out of grievances. *Id.* at 28,507 n.4 (citing 45 U.S.C. § 184). Airline boards of adjustment are treated in the same manner as railroad boards of adjustment by the RLA. *See* Hunt v. Northwest Airlines, Inc., 600 F.2d 176 (8th Cir.), *cert. denied*, 444 U.S. 946 (1979); *see also* ELKOURI & ELKOURI, *supra* note 131, at 151 (reviewing the Railway Labor Act's mandates to create special boards of adjustment to resolve disputes).

141. 114 Lab. Cas. (CCH) at 28,507.

the airline to reinstate the employee with full backpay and seniority and to remove the termination letter from her file.[142]

After the System Board ruling, the employee instituted the defamation action alleging that her termination letter setting forth the reasons for her discharge was libelous.[143] The court found the statements absolutely privileged on the grounds that "candid explanations of the basis for an employee's discharge are necessary to further important federal labor policies."[144]

Courts have also found communications made in proceedings under the RLA absolutely privileged because those proceedings are "quasi-judicial" in nature. In *Mock v. Chicago, Rock Island & Pacific Railroad Co.*,[145] the railroad discharged a conductor for violating one of its rules.[146] The employee filed a petition for reinstatement and back wages with the NRAB.[147]

The railroad replied to the petition, stating that the employee had been dismissed for a violation of company rules when he fraudulently submitted a claim for an on-the-job injury which had not occurred.[148] The employee sued for defamation based upon the allegation of dishonesty contained in the railroad's reply.[149]

The court found the company's reply absolutely privileged because "like the privilege which is generally applied to pertinent statements made in formal judicial proceedings, an absolute privilege also attaches to relevant statements made during administrative proceedings which are 'quasi-judicial' in nature."[150] The court noted that because Congress created the procedural framework of the NRAB for the resolution of "minor disputes," Congress "provided it with the attributes of a 'quasi-judicial' body."[151]

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142. *Id.*

143. *Id.*

144. *Id.* at 28,509. Section 27 of the flight attendants' labor agreement required written notification before any disciplinary action could be taken against an employee. *Id.*

145. 454 F.2d 131 (8th Cir. 1972).

146. *Id.* at 132.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 133. The court defined a "quasi-judicial" proceeding as one where the "function of the administrative body under consideration involves the exercise of discretion in the application of legal principles to varying factual situations and requires notice and hearing." *Id.* at 134. The court then noted that the purpose of the NRAB is to function as a body to settle grievances arising in the railroad industry. *Id.*; *see also* Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 932 (1st Cir. 1983) (holding employer's responsive pleading to employee's claim for wrongful discharge filed with the NRAB was "absolutely privileged as the writing of an attorney during the course of an adjudicative proceeding").

151. *Mock*, 454 F.2d at 134.

In *Kloch v. Ratcliffe*,[152] the court found statements made by a railroad foreman at an investigation hearing held pursuant to the RLA absolutely privileged.[153] The court held that the statements concerning an engineer's alleged falsification of his time log were made at "an arbitration proceeding which is similar to a judicial or quasi-judicial proceeding."[154]

In *Neece v. Kantu*,[155] the court extended the definition of a quasi-judicial proceeding to a discharge notice sent following a grievance proceeding.[156] The airline employee involved was discharged for stealing company property.[157] Subsequently, a grievance proceeding was held pursuant to the labor contract where the hearing officer upheld the employee's discharge.[158] The hearing officer, an airline employee, then sent a letter to the employee confirming his decision to uphold the employee's discharge for "unauthorized possession of company property."[159]

The employee brought an action for defamation against the hearing officer based upon the confirmation letter.[160] The court upheld the trial court's grant of summary judgment to the company finding the grievance hearing a "quasi-judicial proceeding" and the letter, following that proceeding, absolutely privileged.[161]

C. The Absolute Privilege and Non-Labor Arbitrations

The application of an absolute privilege to non-labor related arbitrations has not resulted in a wealth of case law. Nevertheless, some jurisdictions have provided the framework for the extension of absolute privilege to the non-labor arbitration setting.

In *Corbin v. Washington Fire & Marine Insurance Co.*,[162] a South Carolina federal district court recognized an absolute privilege in a defamation action arising from testimony and argument presented in

152. 375 N.W.2d 916 (Neb. 1985).

153. *Id.* at 919.

154. *Id.*

155. 507 P.2d 447 (N.M. Ct. App.), *cert. denied*, 507 P.2d 443 (N.M. 1973).

156. *Id.* at 453.

157. *Id.* at 449.

158. *Id.* at 451. The hearing was the second step in a procedure for adjudication of grievances provided for by the collective bargaining agreement and ultimately led to a hearing before the Systems Board of Adjudication pursuant to the RLA. *Id.* at 453.

159. *Id.* at 451.

160. *Id.*

161. *Id.* at 453; *see also* Barchers v. Missouri Pac. R.R. Co., 669 S.W.2d 235 (Mo. Ct. App. 1984) (finding that absolute privilege applies to statements made before public law boards because of their quasi-judicial nature).

162. 278 F. Supp. 393 (D.S.C.), *aff'd*, 398 F.2d 543 (4th Cir. 1968).

an arbitration proceeding involving two insurance groups.[163] The attorney representing one of the insurance groups, which was charged with failure to protect the other insurance group's subrogation rights, sued, asserting that a statement submitted to the board of arbitrators which referred to him as "false in one thing false in all things" defamed his character as an attorney and as an adjuster.[164]

The district court found the defamation claim barred on the grounds that the arbitration proceeding was quasi-judicial in character and function.[165] The court recognized the scope of the absolute privilege as extending to all "indispensable" proceedings.[166] It concluded that where "the parties cannot argue their cause or offer testimony before the arbitrators without threat of harassment via libel actions, arbitration becomes a farce and the many expressions of judicial and legislative encouragement of arbitration a snare."[167]

The Maryland Court of Appeals extended the scope of absolute privilege to include the testimony of a physician retained as an expert witness in a health claims arbitration proceeding in *Odyniec v. Schneider*.[168] Pursuant to Maryland statute, medical malpractice claims are initially submitted to the Health Claims Arbitration Office for assessment of liability and damages before the complainant may resort to the Maryland courts.[169]

The complainant retained Dr. Schneider to render an opinion as to whether Dr. Odyniec had committed malpractice.[170] Dr. Odyniec filed a defamation action against Dr. Schneider based upon the statements made by Dr. Schneider during the course of his evaluation and examination of the complainant.[171] Dr. Schneider moved to dismiss

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163. *Id.* at 400.

164. *Id.* at 395.

165. *Id.* at 398.

166. *Id.*

167. *Id.* The Court's reasoning broadens the scope of absolute privilege to something approaching the judicial model:

> If . . . arbitration is to be safely utilized as an effective means of resolving controversy, the absolute immunity attaching to its proceedings must extend beyond the arbitrators themselves; it must extend to all 'indispensable' proceedings, such as the receipt of evidence and argument thereon. To urge that the immunity should be limited to the arbitrators would be similar to arguing that judicial immunity should go no farther than the judge. . . . 'This rule reflects the prevailing common law view that the public interest in freedom of expression by participants in judicial proceedings, uninhibited by any risk of resultant suits for defamation, outweighs the interest of the individual in the protection of his reputation from defamatory impairment in the judicial forum.'

Id. (citations omitted).

168. 588 A.2d 786 (Md. 1991).

169. MD. CODE ANN., CTS. & JUD. PROC. §§ 3-2A-01 to -09 (1989).

170. *Odyniec*, 588 A.2d at 787.

171. *Id.*

the defamation claim based on his contention that the alleged defamatory comments were made during the course of a judicial proceeding and were therefore absolutely privileged.[172]

The Court of Appeals held that an absolute witness immunity should be extended to any administrative proceeding, including health claims arbitrations, provided that such proceedings were at least the functional equivalent of a judicial proceeding.[173] The court equated the health claims procedure to a judicial proceeding and concluded that the "arbitration machinery established by the legislature for health care malpractice cases falls well within the principle . . . that in appropriate cases, an absolute privilege in defamation actions will be extended beyond the confines of purely judicial proceedings."[174] In addition, the court recognized the strong public policy considerations for the extension of an absolute privilege since the "social benefit derived from free and candid participation by potential witnesses in the arbitration process is essential to achieve the goal of a fair and just resolution of claims of malpractice against health care providers."[175]

More recently, in *Moore v. Conliffe*,[176] the California Supreme Court, in construing Section 47(b) of the Civil Code, held that an expert witness who testified at a deposition held in connection with a private, contractual arbitration proceeding was immunized from tort claims by virtue of the absolute privilege for statements made in a judicial proceeding.[177] Although the plaintiff's complaint did not specifically allege defamation, it did present numerous other tort actions which required the California Supreme Court to determine the applicability of privilege.[178]

The supreme court noted that the purpose of the absolute or "litigation" privilege strongly supported its application to a witness who testified in the course of a private, contractual arbitration proceeding.[179] Such a proceeding, the court reasoned, was designed "to serve a function analogous to — and typically to eliminate the need to resort to — the court system," and "the need for an absolute privilege to foster the

172. *Id.*

173. *Id.* at 792-93.

174. *Id.* at 792.

175. *Id.* at 793.

176. 871 P.2d 204 (Cal. 1994). California Civil Code Section 47(b) states in pertinent part: "A privileged publication . . . is one made: In any . . . judicial proceeding, . . . or in any other official proceeding authorized by law. . . ." CAL. CIV. CODE § 47 (West 1982 & Supp. 1994).

177. *Moore*, 871 P.2d at 205.

178. *Id.* at 207.

179. *Id.* at 209. The court recognized that the purpose of the litigation privilege is to encourage witnesses to testify completely, truthfully, and without fear of potential liability. *Id.* at 208.

giving of complete and truthful testimony was a vital component in the private contractual arbitration setting as it is in a traditional courtroom proceeding."[180]

The supreme court acknowledged that an absolute privilege not only applies to court proceedings, but also to quasi-judicial proceedings such as a private arbitration — the functional equivalent to a court proceeding.[181] Thus, the expert witness' testimony at the arbitration proceeding was absolutely privileged and could not serve as the basis for a tort claim.[182]

The continued reliance on alternative dispute resolution procedures, including arbitration, will require courts to consider whether a defamatory statement made in connection with such a procedure will be afforded an absolute privilege. The recent trend has been to extend the absolute privilege to statements made during dispute resolution procedures that are functionally equivalent to judicial proceedings.[183]

The determination of whether a body is quasi-judicial depends upon the powers and duties of the body conducting the proceedings and the nature of the proceedings themselves.[184] Traditionally, the characterization of a proceeding as quasi-judicial depended on the power to determine legal rights and affect the status of those who appeared before

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180. *Id.*

181. *Id.* at 210. The Court restricted its ruling to arbitrations by declaring: "We have no occasion in this case to determine whether the litigation privilege applies to statements made in the course of 'alternative dispute resolution' proceedings other than those involving arbitrations." *Id.* at 214 n.8.

182. *Id.* at 209. *But see* Preiser v. Rosenzweig, 646 A.2d 1166 (Pa. 1994) (holding that absolute privilege did not apply to alleged defamatory statement made in private arbitration proceeding before Special Fee Determination Committee of the Allegheny County Bar Association). This result is not inconsistent with Moore v. Conliffe, 871 P.2d 204 (Cal. 1994). *See supra* note 176 and accompanying text (discussing the *Moore* case).

183. *See* Richardson v. Dunbar, 419 N.E.2d 1205 (Ill. App. Ct. 1981) (holding statements made before a quasi-judicial proceeding are absolutely privileged, but that police committee of city council is not a quasi-judicial body); Parker v. Kirkland, 18 N.E.2d 709 (Ill. App. Ct. 1939) (finding statements presented to Board of Appeals of Cook County regarding objections to property tax assessments absolutely privileged); Allan & Allan Arts, Ltd. v. Rosenblum, 615 N.Y.S.2d 410, 412-13 (A.D. 1994), *cert. denied*, 116 S. Ct. 301 (1995) (according statements by landowner at zoning board of appeals absolute privilege); *see also* Jones v. Mirgon, No. 88-7001, 1989 U.S. App. LEXIS 13197 (D.C. Cir. Aug. 31, 1989) (finding statement made in the course of Federal Communications Commission lottery-licensing proceeding absolutely privileged); Allen v. Ali, 435 N.E.2d 167 (Ill. App. Ct. 1982) (stating that absolute privilege extended to quasi-judicial proceeding which involved state supreme court's attorney disciplinary body). *But see* Baravati v. Josephthal, Lyon & Ross Inc., 834 F.Supp. 1023 (N.D. Ill. 1993), *aff'd*, 28 F.3d 704 (7th Cir. 1994) (refusing to extend absolute privilege to statements made in termination notice of employee due to purely administrative nature of such notice).

184. *Richardson*, 419 N.E.2d at 1208.

the adjudicating body.[185] Illinois courts have identified six powers which distinguish quasi-judicial bodies from those merely performing administrative functions.[186] These powers include:

> (1) [T]he power to exercise judgment and discretion;
> (2) [T]he power to hear and determine or to ascertain facts and decide;
> (3) [T]he power to make binding orders and judgments;
> (4) [T]he power to affect the personal or property rights of private persons;
> (5) [T]he power to examine witnesses, and to hear the litigation issues on a hearing; and
> (6) [T]he power to enforce decisions and impose penalties.[187]

While not all of these powers need exist for a body to be considered quasi-judicial in nature, the greater the number of powers present, the more likely the body is, in fact, quasi-judicial and the more likely it is a court will extend an absolute privilege to statements made during such a proceeding.[188] Clearly the overwhelming majority of arbitration proceedings meet this test.[189]

IV. Other Potential Defenses to Claims Arising from Dispute Resolution Proceedings

Aside from privilege, courts confronted with defamation claims arising from arbitration proceedings have applied federal preemption and collateral estoppel to foreclose litigation. The effectiveness of those defenses will be analyzed in this segment of the Article.

A. Federal Preemption in Labor Arbitrations

Another source of protection for statements made in connection with labor arbitrations is preemption based upon either Section 301 of the LMRA[190] or the RLA.[191] While some cases have used these stat-

185. *Id.*

186. Thomas v. Petrulis, 465 N.E.2d 1059, 1062 (Ill. App. Ct. 1984) (citing with approval Parker v. Holbrook, 647 S.W.2d 692, 695 (Tex. Ct. App. 1982) (applying absolute privilege to a charge of discrimination filed with the Equal Employment Opportunity Commission)).

187. *Id.*; *see also* Parrillo, Weiss & Moss v. Cashion, 537 N.E.2d 851, 854-55 (Ill. App. Ct. 1989) (reiterating the same six powers).

188. *Thomas*, 465 N.E.2d at 1062. In England, to fall within the protection of absolute privilege the tribunal "must proceed in a manner that is similar to a court of justice . . . its object must be to arrive at a judicial and not an administrative determination, and . . . it must be recognized by law." Lincoln v. Daniels 1 Q.B. 237, 253 (1962).

189. *See supra* notes 145-82 and accompanying text (discussing cases where the privilege has been applied in quasi-judicial situations).

190. 29 U.S.C. § 185.

191. 45 U.S.C. §§ 151-88.

utes as bases for according an absolute privilege to such statements,[192] the preemption analysis is distinct with separate standards and rationales. If preemption is found, the state claim is displaced by federal law and the court may be deprived of jurisdiction altogether.[193] Absolute privilege, conversely, is a defense to an otherwise valid claim.[194]

1. *The Labor Management Relations Act*

Two United States Supreme Court decisions defined the parameters of Section 301 preemption and established a test to determine when it occurs. In *Allis-Chalmers Corp. v. Lueck*,[195] the Supreme Court held that Section 301 preempts state claims that are "inextricably intertwined" with the terms of a collective bargaining agreement.[196] The *Lueck* court held an employee's action arising from the handling of his claim for disability benefits preempted.[197] The Court reasoned that evaluation of the dispute would necessarily require a review of the collective bargaining agreement, the document establishing the employee's right to benefits.[198]

Subsequently, in *Lingle v. Norge Division of Magic Chef, Inc.*,[199] the Supreme Court recognized that federal law does not preempt claims which are analytically independent of the collective bargaining agreement.[200] In *Lingle*, an employee brought an action claiming that his employer violated an Illinois statute by discharging him in retaliation for filing a workers compensation claim.[201] The employee was covered by a collective bargaining agreement which required "just cause" for his discharge.[202] The Seventh Circuit had held the claim preempted, reasoning that a discharge for filing a workers compensation

192. For a discussion of the absolute privilege in the RLA context, see *supra* notes 132-36 and accompanying text (granting absolute privilege during grievance resolution); *supra* notes 137-44 and accompanying text (granting absolute privilege for termination notices); *supra* notes 145-51 (granting absolute privilege to quasi-judicial proceedings); *supra* notes 152-54 (granting absolute privilege to statements made during an investigation). For a discussion of absolute privilege in the LMRA context, see *infra* notes 195-217 and accompanying text.

193. *See infra* notes 195-217 and accompanying text (finding grounds for section 301 preemption).

194. *See supra* note 192.

195. 471 U.S. 202 (1985).

196. *Id.* at 213.

197. *Id.*

198. *Id.* at 218.

199. 486 U.S. 399 (1988).

200. *Id.* at 413.

201. *Id.* at 402.

202. *Id.* at 401.

claim would not be for "cause" and the labor agreement would provide a remedy for the aggrieved employee.[203]

The Supreme Court reversed,[204] finding that although the agreement might have provided a remedy, the claim was not preempted.[205] According to the Court, the state law right not to be terminated for filing a workers compensation claim was completely outside the collective bargaining agreement, and the employee's claim, therefore, required no consideration of the terms of that agreement.[206]

Whether Section 301 will preempt a defamation claim arising out of a dispute resolution procedure, therefore, hinges on the collateral issue (from an arbitration policy standpoint) of whether it requires consideration of the terms of the labor agreement.[207] Hence, the protection provided by preemption may be complete, but unpredictable, since the decisionmaker will focus on the claims' relation to the labor contract rather than on the policy of protecting the viability of dispute resolution procedures. This preemption analysis also fails to take into account the economic and institutional cost of multiple procedures aimed at resolving the same or similar issues and of essentially allowing participants to collaterally attack arbitral awards.

In *Shane v. Greyhound Lines Inc.*,[208] the Ninth Circuit found that a defamation claim arising from statements made during the course of grievance resolution procedures was preempted.[209] In *Shane*, the claim was apparently premised on Notices of Intent to Discipline which were required by the labor agreement.[210] Applying the standards articulated in *Lueck*[211] and *Lingle*,[212] the Court held "[a]ny claim based upon the discharge notification is . . . 'inextricably intertwined' with the [labor agreement]."[213] The *Shane* decision distinguished its facts from those in *Tellez v. Pacific Gas & Electric Co.*[214]

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203. Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031, 1049 (7th Cir. 1987).

204. *Lingle*, 486 U.S. at 401.

205. *Id.* at 408.

206. *Id.* at 407.

207. *Id.* at 410.

208. 868 F.2d 1057 (9th Cir. 1989).

209. *Id.* at 1063.

210. *Id.*

211. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985) (stating that § 301 preempts state claims that are inextricably intertwined with the terms of a collective bargaining agreement).

212. *See* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 413 (1988) (stating that federal law does not preempt claims which are analytically independent of the collective bargaining agreement).

213. Shane v. Greyhound Lines Inc., 868 F.2d. 1057, 1063 (9th Cir. 1989).

214. 817 F.2d 536 (9th Cir.), *cert. denied*, 484 U.S. 908 (1987)).

In *Tellez*, the defamation claim was premised on a manager's distribution of eleven copies of a letter accusing an employee of buying cocaine on the job.[215] The collective bargaining agreement did not require the manager to send written notice of the employee's suspension or establish parameters for such notices.[216] Consequently, the Ninth Circuit concluded that the resolution of Tellez's defamation claim did not require "interpretation or consideration of the agreement" and that preemption did not occur.[217]

2. *Railway Labor Act Preemption*

The RLA also preempts state law claims arising out of "minor disputes" (or grievances under labor agreements), no matter how characterized.[218] State law tort claims, including defamation, may thus be preempted by the RLA.

a. The Pre-*Hawaiian Airlines, Inc. v. Norris* Case Law

Prior to the Supreme Court's 1994 decision in *Hawaiian Airlines, Inc. v. Norris*,[219] courts recognized that the RLA could preempt defamation claims when the alleged statements were made in connection with grievance procedures required by the collective bargaining agreement and the RLA.[220]

In the companion cases of *Barchers v. Missouri Pacific Railroad Co.*[221] and *Alsbury v. Missouri Pacific Railroad Co.*,[222] two employees sought to premise their defamation claims upon letters sent among supervisory employees in connection with an investigation of their misconduct.[223] The letter used especially strong language, including the statement that "I have run across some lousy and rotten people in my time and those two rank close to the top as being the worst I have seen."[224] Finding that the dispute "grew out of" a grievance as de-

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215. *Id.* at 537.

216. *Id.* at 538.

217. *Id.*

218. Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369-70 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).

219. 114 S. Ct. 2239 (1994).

220. *Id.* at 2246-49.

221. 669 S.W.2d 235 (Mo. Ct. App. 1984).

222. 670 S.W.2d 87 (Mo. Ct. App. 1984).

223. *Alsbury*, 670 S.W.2d at 87; *Barchers*, 669 S.W.2d at 236.

224. *Alsbury*, 670 S.W.2d at 88; *Barchers*, 669 S.W.2d at 237. The full text of the letter was equally unflattering:

> In addition to information contained in the investigation and write-up from Trainmaster W. E. Richmond, these two gentlemen had been a problem for quite some time in that it was necessary to counsel this crew quite frequently for their failure to perform

scribed by the RLA, the Missouri Court of Appeals concluded the claims were preempted.[225]

In *DeTomaso v. Pan American World Airways, Inc.*,[226] the airline learned that three bins of salvage it sold to an employee contained some abandoned material.[227] An airline security official accompanied an FBI agent to the employee's home, made statements concerning the impropriety of the employee's possession of the material, and confiscated the cargo.[228] The airline subsequently discharged the employee for "fraud, dishonesty and abuse of company policy."[229] The employee successfully grieved his discharge and filed an action for defamation and intentional infliction of emotional distress in state court.[230]

The California Supreme Court held that the employee's claims for defamation were preempted.[231] It found that the statements were made during a factual investigation required by the collective bargaining agreement.[232] It specifically found that the RLA preempted claims premised upon statements made during proceedings or investigations required by labor agreements.[233]

Indeed, the Court found that the employee's claims threatened to undermine "the value of arbitration as a dispute resolution tool."[234] The Court expressed concern that if claims such as the employee's were permitted, courts would become "forums to resolve arbitral disputes," and "employees [could] make an end run thereby avoiding the carefully crafted congressional procedures set forth in the RLA."[235]

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work as requested by General Mills. They had a tendency to do the work to suit themselves, regardless of how General Mills requested their plan to be set up. They continually argued with the foreman at General Mills and at least three times a week I would receive a telephone call from General Mills' Traffic Manager in regard to these two gentlemen. Although neither General Mills or us were able to catch or prove it, we felt these gentlemen were stealing flour from the mill. Since their dismissal, General Mills tells me they have had no problems. I have run across some lousy and rotten people in my time and these two rank close to the top as being the worst I have seen. I would be very hopeful that we would not be required to return them to service as they represent a very poor image of the Missouri Pacific.

Alsbury, 670 S.W.2d at 87-88; *Barchers*, 669 S.W.2d at 236-37.

225. *Alsbury*, 670 S.W.2d at 88; *Barchers*, 669 S.W.2d. at 237.

226. 733 P.2d 614 (Cal.), *cert. denied*, 486 U.S. 829 (1987).

227. *Id.* at 615.

228. *Id.* at 616.

229. *Id.* at 617.

230. *Id.*

231. *Id.* at 624.

232. *Id.* at 621-22.

233. *Id.*

234. *Id.* at 620-21.

235. *Id.* at 621.

The Sixth Circuit reviewed allegedly defamatory statements arising out of dispute resolution procedures in *Miller v. Norfolk & Western Railway Co.*[236] The employee claimed that his supervisor defamed him in disciplinary proceedings held pursuant to a collective agreement by making false statements regarding his participation in a scheme to defraud the railroad.[237] The district court concluded that because the statements were made in connection with a hearing held under a labor contract, the RLA preempted the employee's claims.[238]

The Court of Appeals found that the plaintiff's claim was simply an effort to "evade the exclusive jurisdiction of the [National Railroad Adjustment Board] by characterizing [the] claims as state causes of action."[239] Thus, the Court held that the plaintiff's claims were inextricably intertwined with the agreement and affirmed their dismissal.[240]

In a 1992 decision, the Fourth Circuit considered whether a defamation claim arising from the posting of a notice of disciplinary charges against an employee and the date for a hearing was preempted by the RLA. In *Lorenz v. CSX Transport, Inc.*,[241] the collective bargaining agreement required that the employee be given written notice of the specific charge against him and that he have an opportunity to present witnesses.[242] It did not, however, require that the notice be posted as it was.[243]

The majority in *Lorenz* found that the defamation claim was preempted because it arose from a notice "incident" to the grievance process.[244] It declared:

> The [labor agreement] required the notice to be given before an employee could be disciplined. The allegedly defamatory statement is, facially, a simple recitation of the charges against Lorenz and notice of a hearing which CSX was required to hold. This act was inextricably intertwined with the grievance procedures . . . and this dispute cannot be settled without reference to [the agreement] and the grievance procedures mandated by it.[245]

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236. 727 F. Supp. 365 (N.D. Ohio 1989), *aff'd*, 917 F.2d 24 (6th Cir. 1990).

237. *See* Miller v. Norfolk & Western Ry. Co., 834 F.2d 556 (6th Cir. 1987) (presenting an earlier decision on appeal).

238. *See Miller*, 727 F. Supp. at 366-67 (presenting the decision on remand).

239. No. 89-4101, 1990 U.S. App. LEXIS 19129, at *10 (6th Cir. Oct. 25, 1990).

240. *Id.* at *15.

241. 980 F.2d 263 (4th Cir. 1992). The notice stated in pertinent part: "You are charged with insubordination and unauthorized removal and/or theft of company property when you failed to follow instructions . . ." *Id.* at 265-66.

242. *Id.* at 265.

243. *Id.*

244. *Id.* at 268.

245. *Id.*

The dissent, presaging a future Supreme Court decision, rejected this analysis and instead applied the preemption test formulated in *Lingle v. Norge Division of Magic Chef, Inc.*[246] In so doing, Judge Sprouse maintained that the labor agreement did not require the posting of the notice and that Lorenz's defamation claim "would exist with or without the collective bargaining agreement."[247]

Finally, in *Henegar v. Banta*,[248] the Sixth Circuit once again considered the preemption of defamation claims premised upon statements occurring during an investigation and hearing mandated by the RLA.[249] Kenneth Henegar was employed as a brakeman by the Norfolk & Western Railway Company and covered by a labor agreement which required a formal hearing before the imposition of discipline.[250]

William Banta, a trainmaster, was Henegar's immediate supervisor.[251] He formally charged Henegar with having provided false and conflicting statements concerning an alleged on the job injury.[252] Banta testified at a disciplinary hearing that the alleged injury, in fact, was a pre-existing condition.[253] The hearing officer dismissed Henegar, finding that his claim of a work-related injury conflicted with the hospital records and his prior statements.[254] Henegar, through his union, appealed the decision to a public law board which affirmed Henegar's dismissal.[255]

Thereafter, Henegar filed an action in court, claiming he was defamed by Banta's statements.[256] The district court granted Banta's motion for summary judgment, concluding that the claim was "inextri-

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246. 486 U.S. 399 (1988); *see supra* notes 199-200 and accompanying text. In analyzing prior case law, Judge Sprouse stated:

> Cases in the *DeTomaso-Majors* line are misleading because they distort the congressional purpose of the RLA. Both the majority and the district court relied on language in *Majors* that entertaining Lorenz's action in the district court "would thwart the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry without resort to the courts."

Lorenz v. CSX Transp., Inc., 980 F.2d 263, 271 (4th Cir. 1992) (Sprouse, J., dissenting) (citation omitted).

247. *Id.* at 272.

248. 817 F. Supp. 668 (N.D. Ohio 1993), *aff'd.*, 27 F.3d 223 (6th Cir.), *cert. denied*, 115 S. Ct. 664 (1994).

249. *Henegar*, 27 F.3d at 224.

250. *Id.* at 224-25.

251. *Id.* at 224.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

cably intertwined" with the collective bargaining agreement and, thus, preempted by the RLA.[257]

The Court of Appeals found that Banta's statements were made in the course of an investigation of Henegar's personal injury claim.[258] The investigation and hearing were conducted as required by the collective bargaining agreement.[259] Thus, the Sixth Circuit agreed with the district court that the defamation claim was inextricably intertwined with the labor agreement and preempted.[260]

Significantly, the Sixth Circuit also stated that if the *Lingle* standard were applied, preemption would still be found:

> [E]ven under *Lingle*, there would be preemption on the facts of this case because an 'unprivileged publication' is an element of defamation in Michigan . . . and to determine whether Banta's remarks are privileged, a court would inevitably have to interpret the terms of the collective bargaining agreement since Banta allegedly made the statements during a grievance proceeding mandated by the collective bargaining agreement.[261]

Consequently, the facts in *Henegar* were sufficient to trigger preemption under both the existing RLA precedent and Section 301 standards. *Henegar* was decided in close proximity to the Supreme Court's 1994 decision in *Hawaiian Airlines, Inc. v. Norris*,[262] which examined the standards for RLA preemption.

b. The Impact of *Hawaiian Airlines* on Railway Labor Act Preemption Law

In *Hawaiian Airlines*, the Supreme Court considered the claims of an airline mechanic that he had been wrongfully discharged in violation of the public policy contained in the Federal Aviation Act and of the provisions of Hawaii's Whistleblower Protection Act.[263] Norris had been terminated by the airline when he refused to sign a maintenance record as required by the collective bargaining agreement for a plane he claimed was unsafe and reported his beliefs to the Federal Aviation Administration.[264] The state court dismissed these tort

257. *Henegar*, 817 F. Supp. at 670. Following precedent, the district court also held that the railroad supervisor could assert preemption against the employee's defamation claim. *Id.* at 671; *see also* Ferguson v. Norfolk Southern Corp., 704 F. Supp. 666 (W.D. Va. 1987) (barring recovery by employee against his supervisor).

258. *Henegar*, 27 F.3d at 226.

259. *Id.*

260. *Id.*

261. *Id.* at 227.

262. 114 S.Ct. 2239 (1994).

263. *Id.* at 2242.

264. *Id.*

claims as preempted by the mandatory dispute resolution procedures of the RLA.[265]

Justice Blackmun, writing for a unanimous Court, resolved two issues important for RLA preemption analysis.[266] First, contrary to several lower court decisions, he found that Section 153 First (i)'s reference to arbitration for disputes which grow "out of grievances or out of the interpretation and application of agreements"[267] did not support preemption independent of a labor agreement.[268] Instead, he found the *Lingle* standard "provides an appropriate framework for addressing preemption under the RLA" and limited preemption to disputes involving contractually defined rights.[269] Second, the Court found in applying the *Lingle* analysis that Norris' state law claims were independent of the labor agreement and not preempted.[270] Thus, the Court found the *Lingle* analysis applicable and then applied it narrowly.

It is impossible to predict the impact *Hawaiian Airlines* will have on the preemption of defamation claims arising out of the RLA's mandatory dispute resolution mechanisms. The *Henegar*[271] and *Shane*[272] cases which applied the *Lingle* standard, indicate that there will be continuing protection for statements made during dispute resolution procedures actually required by labor agreements.[273] How far this protection will extend beyond statements in required disciplinary notices and in hearings is unclear and will likely involve a case-by-case

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265. *Id.* at 2243.

266. *Id.*

267. *Id.* at 2240.

268. *Id.* at 2241.

269. *Id.* at 2249.

270. *Id.* at 2251.

271. *See supra* note 248 and accompanying text (illustrating use of the *Lingle* test to determine that the claim for defamation was inextricably intertwined with the labor agreement).

272. *See supra* note 208 and accompanying text (holding that claim based on required discharge notification is inextricably intertwined with the labor agreement).

273. At least one commentator who favors limiting Section 301 preemption believes its use is appropriate for claims arising out of statements made in grievance proceedings. Michael C. Harper, *Limiting Section 301 Preemption: Three Cheers for the Trilogy, Only One for* Lingle *and* Lueck, 66 CHI.-KENT L. REV. 685 (1990). Thus, Professor Michael Harper has stated:

> [The Ninth Circuit] has held that preemption is appropriate if and only if the statements that are allegedly defamatory are required to be made in the collective agreement. This is correct not because the defamation claim requires the interpretation of the collective agreement and therefore an application of Section 301 law; but rather because the risk of a defamation claim could interfere with collective bargaining by deterring an employer from agreeing to union proposals to grant to employees generally beneficial processes, such as prompt notice of charges against them. Employer acceptance even of a grievance arbitration system could be discouraged if fulfillment of the requirements of that system could result in a defamation suit.

Id. at 745.

determination. Thus, even in the labor context, preemption does not provide sufficient protection for statements made during arbitration proceedings or other non-judicial dispute resolution mechanisms.

B. Collateral Estoppel

1. Requirements of Collateral Estoppel

The doctrine of collateral estoppel precludes relitigation of factual issues.[274] A party seeking to invoke collateral estoppel must show:

(a) that the issue previously adjudicated is identical with that subsequently presented;
(b) that the prior action ended in a final judgment on the merits;
(c) that the estopped party was a party or in privity with a party in the prior action; and
(d) that the estopped party was given a full and fair opportunity to be heard on the adjudicated issue in the prior action.[275]

A party satisfying these elements may properly invoke the doctrine of collateral estoppel and preclude future claims based on previously litigated issues.[276] The doctrine of collateral estoppel "contributes to efficient judicial administration, serving the public interest in judicial economy as well as the parties' interests in finality, certainty of affairs and avoidance of unnecessary relitigation."[277]

Both federal and state courts have found plaintiffs collaterally estopped from relitigating facts determined in an arbitration setting. In *Vacca v. Viacom Broadcasting of Missouri, Inc.*,[278] a former writer and editor brought claims for wrongful discharge and breach of employment contract against the defendant television station and broadcasting company after he was terminated for insubordination.[279] After

274. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS §§ 27-29 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

275. Vacca v. Viacom Broadcasting of Mo., Inc., 875 F.2d 1337, 1341 (8th Cir. 1989) (quoting City of Bismarck v. Toltz, King, Duvall, Anderson & Assoc., Inc., 855 F.2d 580, 582 (8th Cir. 1988)); Robinson v. Hamed, 813 P.2d 171, 175 (Wash. App. Ct. 1991).

276. "The underlying rationale of issue preclusion . . . is the idea that the adversary process is as likely to lead to a correct decision on an issue the first time it is presented as it is the second time." ROBERT C. CASAD, RES JUDICATA IN A NUTSHELL 150 (1976).

277. Chisholm v. Defense Logistics Agency, 656 F.2d 42, 46 (3d Cir. 1981); *see* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-27 (1979) (stating collateral estoppel is based upon principles of fundamental fairness, that the finality of judgments be preserved and that matters not be relitigated indefinitely). After an issue has been fully litigated, "spending additional time and money repeating the process would be extremely wasteful." JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.9, at 658 (1985).

278. 875 F.2d 1337 (8th Cir. 1989).

279. *Id.* at 1338-39.

bringing his action, the parties submitted the wrongful discharge claim to arbitration under the collective bargaining agreement.[280] The arbitrator found for the defendants.[281] The district court then granted the defendants' motion for summary judgment on the breach of contract claim on the ground that the decision of the arbitrator left no genuine issue of material fact on that claim.[282]

The Eighth Circuit affirmed, finding that a crucial issue concerning the contract claims — the reason for the employee's discharge — was determined by the arbitrator.[283] Accordingly, collateral estoppel required acceptance of the arbitrator's finding that the employee was discharged for refusing to work and summary judgment was proper on the related breach of employment contract claim.[284]

In *Torre v. Falcon Jet Corp.*,[285] an inspector of corporate aircraft was suspended and later terminated for insubordination.[286] The employee grieved his discharge as required by the collective bargaining agreement, and the matter subsequently was arbitrated.[287] The arbitrator concluded that just cause existed under the collective bargaining agreement to warrant disciplinary action but modified the penalty to suspension without back pay.[288]

The employee later sued his employer, asserting he was terminated in violation of the New Jersey Whistleblower Statute.[289] The district court found that the arbitrator decided the identical issue disputed in the court action — whether the employee was wrongfully discharged for having informed the owner of a corporate jet that his employer improperly performed an aircraft inspection.[290] Thus, the court held that the employee was collaterally estopped from bringing the subsequent wrongful discharge claim.[291]

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280. *Id.* at 1339.
281. *Id.*
282. *Id.*
283. *Id.* at 1341.
284. *Id.*
285. 717 F. Supp. 1063 (D.N.J. 1989).
286. *Id.* at 1064.
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.* at 1066.
291. *Id.*; *see also* Kroeger v. United States Postal Serv., 865 F.2d 235, 239 (Fed. Cir. 1988) (finding administrative law judge properly determined that charge of mishandling postal funds was fully litigated in arbitration and thus subject to collateral estoppel); Pratt v. Purcell Tire & Rubber Co., 846 S.W.2d 230 (Mo. Ct. App. 1993) (holding employee's retaliatory discharge claim precluded by collateral estoppel where the facts had already been tried and determined by an arbitrator).

2. Application of Collateral Estoppel to Arbitration Awards

The application of collateral estoppel to defamation actions arising from arbitrations follows a consistent pattern in the employment context. Typically, a party submits a claim to arbitration to resolve an existing dispute. Such proceedings may involve the determination of factual issues — issues which cannot serve as the basis for a subsequent defamation action. Collateral estoppel will operate to preclude a party from relitigating a "controlling fact or question" which was adjudicated against that party in the former suit.[292]

In *Fulghum v. United Parcel Service, Inc.*,[293] the employees were suspected of theft and ultimately discharged following an internal investigation.[294] They grieved their terminations through the union's formal grievance procedure.[295] After their terminations were upheld by a grievance committee, the employees brought suit against the employer and their supervisors for, among other things, defamation.[296]

The Michigan Court of Appeals held that the employees were bound by the determinations made during the course of the grievance proceedings that they were guilty of theft.[297] The court found that national policy strongly favors deference towards the decisions made during grievance resolution.[298] Such procedures can function only if the courts give the decisions "full play."[299] Concluding that the employees could not collaterally attack the decisions of the grievance committees, the court upheld the granting of summary judgment in the defendant's favor.[300] On appeal, the Michigan Supreme Court affirmed, quoting the operative language of the court of appeals' decision in its entirety.[301]

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292. Northern Trust Co. v. Aetna Life & Sur. Co., 549 N.E.2d 712, 715 (Ill. App. Ct. 1989); *see, e.g.*, O'Neil v. Merrill Lynch, Pierce, Fenner & Smith, 654 F. Supp. 347, 351 (N.D. Ill. 1987) (stating where facts underlying two different causes of action are the same, the "issue" is identical for collateral estoppel purposes).

293. 343 N.W.2d 559 (Mich. Ct. App. 1983), *aff'd*, 378 N.W.2d 472 (Mich. 1985).

294. *Id.* at 560.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. Fulghum v. United Parcel Serv., Inc., 378 N.W.2d 472, 473 (Mich. 1985). In *Fulghum*, the decisions at issue were made by a grievance committee (the UPS joint-area committee) composed of labor and management representatives rather than an arbitrator. *Id.* at 473-74; *see also* Ivery v. United States, 686 F.2d 410, 413-14 (6th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983) (holding arbitrator's finding that postal worker actually committed the offense for which he was discharged collaterally estopped federal tort action for malicious prosecution); Luppo v. Waldbaum, Inc., 515 N.Y.S.2d 871 (N.Y. App. Div. 1987) (holding arbitrator's finding that em-

In *Sullivan v. American Airlines, Inc.*,[302] the district court precluded an employee's defamation action against his employer under the doctrine of collateral estoppel following an arbitration award.[303] The employee based his defamation claim upon comments made directly to him during the course of an investigation for theft of company property, including a letter accusing him of dishonesty, and from statements made at an investigation hearing.[304]

The success of the defamation claim rested on whether the statements accusing the employee of dishonesty were true.[305] This was the precise question which was presented to and ultimately decided by the arbitrator.[306] In light of the evidence presented to the arbitrator and the subsequent resolution of that question, the court concluded that the employee was collaterally estopped from relitigating his defamation claim.[307]

Similarly, in *Robinson v. Hamed*,[308] two employees of an airline had an altercation while returning from a business trip.[309] After an investigation and disciplinary review, the airline terminated one of the employees who then filed a grievance challenging his termination.[310] In an arbitration hearing held pursuant to a collective bargaining agreement, the arbitrator determined that the company had "just cause" to terminate the employee.[311]

Following the conclusion of the arbitration proceeding, the second employee filed a civil assault claim against the terminated co-employee.[312] The terminated co-employee counterclaimed, alleging, among other things, defamation.[313] The second employee asserted that the terminated co-employee was collaterally estopped from relitigating the issue of the truth of the circumstances surrounding the airport incident by reason of the arbitration decision.[314]

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ployee had engaged in theft collaterally estopped the employee's malicious prosecution and false imprisonment action).

302. 613 F. Supp. 226 (S.D.N.Y. 1985).

303. *Id.* at 231-32.

304. *Id.* at 231.

305. *Id.*

306. *Id.*

307. *Id.* at 231-32.

308. 813 P.2d 171 (Wash. Ct. App. 1991).

309. *Id.* at 172.

310. *Id.*

311. *Id.* at 172-73.

312. *Id.* at 173.

313. *Id.*

314. *Id.*

The Washington Court of Appeals held that the terminated co-employee was collaterally estopped from litigating the defamation claim because the issue decided during the arbitration proceeding—the truth of the second employee's account of the airport incident—was identical to the issue presented to the court in the subsequent case.[315] The court of appeals made clear that "it is well settled that in an appropriate case the decision in an arbitration proceeding may be the basis for collateral estoppel or issue preclusion in a subsequent judicial trial."[316]

Although courts have generally embraced the application of collateral estoppel to arbitration awards,[317] the use of the doctrine has been more difficult outside the labor setting. First, an arbitrator may not resolve the factual issue essential to the preclusion of a defamation claim. In this situation the defamation issue before the court would not be identical to the issue ultimately resolved in the arbitration proceeding. Consequently, it would be difficult to apply collateral estoppel. Thus, "the party seeking to invoke collateral estoppel must convince the Court that the facts giving rise to the arbitration award are identical to those asserted in the litigation, and that the only distinction is with respect to the theories of law being asserted."[318]

Second, in the labor arbitration context, the resolution of a claim often depends on a single issue. There may be no difficulty in determining whether the issue sought to be precluded in a defamation action was both actually litigated and necessary to the determination of the arbitration award.[319] In the commercial arbitration setting, however, the resolution of factual issues surrounding the alleged defamatory statements may not be necessary to the arbitrator's award.[320]

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315. *Id.* at 174.

316. *Id.*; *see also* Taylor v. Peoples Gas Light & Coke Co., 656 N.E.2d 134, 140-42 (Ill. App. Ct. 1995) (holding that collateral estoppel arising from prior arbitration award precluded claims for malicious prosecution, tortious interference with contract, and negligent hiring); Case Prestressing Corp. v. Chicago College of Osteopathic Medicine, 455 N.E.2d 811, 814 (Ill. App. Ct. 1983) (stating in dicta that collateral estoppel applies only to any issues in a subsequent action which were actually decided in a prior action).

317. G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 647-48 (1988); *see* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1977) (stating when an issue has been litigated, that judgment is conclusive in subsequent actions between the parties).

318. Carroll E. Nessemann, *The State of the Law*, *in* 1 SECURITIES ARBITRATION 1992 403, 505 (Practicing Law Institute ed., 1992).

319. Shell, *supra* note 317, at 651.

320. The party asserting the collateral estoppel effect of the arbitration award has the burden to prove that the issue was actually determined by the prior judgment. RESTATEMENT (SECOND) OF JUDGMENTS § 27(d) (1977). Accordingly, where a party anticipates that an arbitration award may ultimately be needed for collateral estoppel purposes, it is desirable to obtain a transcript

Finally, the party against whom preclusion is asserted in a commercial arbitration may not have had a full and fair opportunity to litigate the contested issue. In some instances the factual issues relating to the alleged defamatory statements may not bear on the outcome of the dispute and therefore, may not be fully litigated.[321] As a result, collateral estoppel will not be applicable.

This is not to say that collateral estoppel cannot be applied outside of labor arbitration proceedings.[322] In *Corey v. New York Stock Exchange*,[323] an investor who had been unsuccessful in an arbitration proceeding brought suit against the stock exchange.[324] The investor argued that he was deprived of a fair hearing in the course of the arbitration.[325] The court dismissed the suit against the stock exchange because "the same issues [adjudicated adversely to the plaintiff in arbitration] are present in this action, and because the defendant has met the conditions for application of collateral estoppel."[326] Hence, collateral estoppel, while useful in particular cases, fails to provide sufficient protection for the arbitral process.

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and request that the award contain detailed findings by the arbitrators. *See* NESSEMANN, *supra* note 318, at 504 (discussing requirements of collateral estoppel).

321. *See* Shell, *supra* note 317, at 653 (noting that the party against whom preclusion is asserted will often claim the issue was not fully litigated during the arbitral proceeding). Note the privity requirement of collateral estoppel is readily satisfied and would not pose an obstacle to the application of collateral estoppel in the commercial arbitration setting. The party asserting collateral estoppel need not have been a participant in the arbitration proceeding in order to assert issue preclusion so long as the party against whom issue preclusion is asserted was a party to or in privity with a party to the same proceeding. *See* Taylor v. Peoples Gas Light & Coke Co., 656 N.E.2d 134, 139 (Ill. App. Ct. 1995).

322. In fact, issue preclusion is consistently applied to plaintiffs seeking to relitigate the issue of damages awarded during an arbitration proceeding. *See* Ritchie v. Landau, 475 F.2d 151 (2d Cir. 1973) (holding that an arbitration of the facts precludes relitigation in the courts). Other courts have given an arbitration decision that meets the appropriate standards the same preclusive effect as judicial decisions. *E.g.*, C.D. Anderson & Co. v. Lemos, 832 F.2d 1097, 1100 (9th Cir. 1987); Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360-61 (11th Cir. 1985); Davis v. Chevy Chase Fin. Ltd., 667 F.2d 160, 172 (D.C. Cir. 1981); United States v. Weiss Pollution Control Corp., 532 F.2d 1009, 1012 (5th Cir. 1976); *see also* Mandich v. Watters, 970 F.2d 462, 465 (8th Cir. 1992) (reaffirming that an arbitration award is a prior adjudication for collateral estoppel purposes in Minnesota).

323. 493 F. Supp. 51 (W.D. Mich. 1980), *aff'd*, 691 F.2d 1205, 1207 (6th Cir. 1982). The arbitration involved a controversy between plaintiff and Merrill Lynch regarding the purchase and sale of securities. *Id.* at 55.

324. *Id.* at 52-53.

325. *Id.* at 53.

326. *Id.* at 57.

V. THE NEED FOR APPLICATION OF THE ABSOLUTE PRIVILEGE TO EXTRA-HEARING STATEMENTS AND ARBITRATION PROCEDURES

A. Support for the Extension of the Absolute Privilege from Federal Labor Law and Policy

There is strong support for applying a broad absolute privilege in the labor grievance and arbitration context. Part III.B of this Article surveys the cases applying the privilege over a thirty-year period.[327] Still, some courts do not apply such protections and others apply the privilege in a very narrow fashion.[328] This section will analyze labor policy supporting arbitration and an absolute privilege as articulated by the Supreme Court.

Some of the Court's most eloquent support for labor arbitration came in a series of cases since known as the Steelworkers Trilogy ("the Trilogy").[329] In the Trilogy, the Court sought to eliminate judicial hostility toward labor arbitration and to require the lower courts to defer to the arbitration process. Further, the Trilogy decisions restricted courts' ability to substitute their judgments for arbitrators'. Finally, the Trilogy required courts to enforce an arbitrator's award as long as it drew its essence from the labor contract.

In *United Steelworkers v. Warrior & Gulf Navigation Co.*,[330] the Court presented the policy and philosophical underpinnings supporting labor arbitration under the NLRA.[331] The court found that federal policy promoted industrial stability through the labor agreement.[332] The Court viewed arbitration provisions in collective agreements as a "major factor" in securing industrial peace.[333]

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327. *See supra* notes 63-161 and accompanying text (discussing the history of absolute privilege in the labor dispute resolution process).

328. *See, e.g.*, Thompson v. Pub. Serv. Co. of Colo., 800 P.2d 1299, 1306 (Colo. 1990), *cert. denied*, 502 U.S. 973 (1991) (holding that a qualified privilege sufficed to protect the interests of the national labor policy); Ezekiel v. Jones Motor Co., 372 N.E.2d 1281, 1284 (Mass. 1978) (holding that an employer enjoyed only a qualified privilege when revealing to a grievance board the grounds for an employee's termination).

329. *See supra* note 3 (discussing the courts's decisions in the Steelworkers Trilogy); *see generally* Archibald Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959) (urging judicial restraint from interfering with labor arbitration decisions); Charles B. Carver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571 (1990) (distinguishing between the limited role of commercial arbitration as an alternative to litigation and the more vital role of labor arbitration as integral to the collective bargaining process); Harry Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955) (discussing the proper role of the law in the collective bargaining process).

330. 363 U.S. 574 (1960).

331. *Id.* at 578.

332. *Id.*

333. *Id.*

The Court found that arbitration was a "substitute for industrial strife"[334] and actually a part of the collective bargaining process.[335] Indeed, the grievance process played a central and pivotal role in the system of industrial self-government. As the Court reasoned:

> [T]he grievance machinery under a collective bargaining agreement is at *the very heart* of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by mounting a system of private law for all the problems which may arise . . . the processing of disputes through the grievance machinery is actually a vehicle by which meaning and control are given to the collective bargaining agreement.[336]

The opinion also contrasted the role of the arbitrator with that of the courts by explaining that "[t]he labor arbitrator performs functions which are not normal to courts; the considerations which help him may indeed be foreign to the competence of courts."[337]

The Court recognized that the arbitrator was not confined to the express black letter of the labor contract but could also draw upon his knowledge of "the common law of the shop."[338] Thus, through the arbitration process, the parties primarily seek to further their joint goal of "uninterrupted production under the agreement" and to make the agreement fulfill their particular needs.[339] Given these goals, "[t]he ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance because he cannot be similarly informed."[340] Hence, the *Warrior & Gulf* Court concluded:

> The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the other regime of industrial conflict. Whether contracting out in the present case violated the agreement is the question. It is a question for the arbitrator, not for the courts.[341]

In 1962, the Supreme Court again considered the role of arbitration agreements in collective bargaining under the NLRA. In *Teamsters Local 174 v. Lucas Flour Co.*,[342] the union struck over a dispute it had agreed to submit to binding arbitration.[343] The company sued the

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334. *Id.*
335. *Id.*
336. *Id.* at 581 (emphasis added.).
337. *Id.*
338. *Id.* at 581-82.
339. *Id.* at 582.
340. *Id.*
341. *Id.* at 585.
342. 369 U.S. 95 (1962).
343. *Id.* at 96.

union in state court for damages caused by the strike and received a judgment in its favor.[344]

The Supreme Court read an implied no-strike promise by the union into the labor agreement.[345] The Court further found that state courts were not free to apply local rules when enforcing labor agreements.[346] In so doing it declared:

> [T]he possibility of conflicting substantive interpretations under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.[347]

The Court also addressed situations in which state law might conflict with federal labor policy, reasoning:

> The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process strikes at the very core of federal labor policy. . . [W]e cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.[348]

Four years later, the Supreme Court considered whether the NLRA foreclosed a libel action based upon statements made during a union organizing campaign by a union and its officers. In *Linn v. United Plant Guard Workers*,[349] an assistant general manager of Pinkerton's National Detective Agency filed an action against the union, two of its officers and a Pinkerton employee based upon statements made in employee leaflets.[350] The district court dismissed the libel complaint on the basis of NLRA preemption and the Court of Appeals affirmed.[351]

The Supreme Court found that the NLRA did not preempt the state defamation action because defamatory statements were only a "peripheral concern" of the NLRA and because the states' interests in redressing defamation are "deeply rooted in local feeling and respon-

344. *Id.* at 97.
345. *Id.* at 105.
346. *Id.* at 104.
347. *Id.*
348. *Id.* (citations omitted).
349. 383 U.S. 53 (1966).
350. *Id.* at 55-56.
351. *Id.* at 55.

sibility."[352] The Court recognized that parties frequently use strong language during labor disputes and that the National Labor Relations Board (NLRB) permits this language primarily because the NLRB cannot prevent it without discouraging free expression of opinion.[353] To balance the states' interest in protecting the reputations of its citizens and the policy of the NLRB in favor of essentially unlimited expression, the Court held that federal law does not preempt claims arising from statements made during labor disputes, but that such statements would be actionable when made with actual malice and there are actual damages.[354]

Justices Fortas and Black registered compelling dissents to the application of the actual malice standard, equally applicable to the circumstances considered here.[355] Justice Black clearly perceived the mischief created by the majority, declaring:

> This new court-made law tosses a monkey wrench into the collective bargaining machine Congress set up to try to settle labor disputes, and at the same time extends the law of libel to an even higher level of importance in the regulation of day-to-day life in this country.[356]

Justice Fortas felicitously described the nature of the problem:

> By arming the disputants with the weapon of libel suits and the threat of punitive damages, the Court jeopardizes the measure of stability painstakingly achieved in labor-management relations. It introduces a potentially disruptive device into the comprehensive structure created by Congress for resolving these disputes.[357]

Justice Fortas also viewed the standards used in libel suits as foreign to the labor relations context:

> In a libel suit, the outcome is determined by standards alien to the subject matter of labor relations, by considerations which do not take into account the complex and subtle values that are at stake, and by a jury unfamiliar with the quantity of rhetoric customary in labor disputes.[358]

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352. *Id.* at 61.

353. *Id.*

354. *Id.* at 65. The Court said that the New York Times Co. v. Sullivan, 376 U.S. 254 (1964), standard was adopted "by analogy rather than under constitutional compulsion." *Id.* The *New York Times* "actual malice" standard requires that the defendant made the statement with knowledge of its falsity or reckless disregard of whether it was false. *Id.* at 279-80. For articles discussing the *New York Times* case, see Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time To Return to "The Central Meaning of the First Amendment,"* 8 COLUM. J. ART & L. 1 (1983); Bruce L. Ottley et al., New York Times v. Sullivan: *A Retrospective Examination*, 33 DEPAUL L. REV. 741 (1984).

355. *Linn*, 383 U.S. at 67.

356. *Id.*

357. *Id.* at 69.

358. *Id.* at 71.

The court in *Mendicki* extended the absolute privilege to statements in arbitrations based upon the labor policies recognized by the Supreme Court and the concerns expressed by Justice Fortas in his dissent in *Linn*. Notwithstanding its reference to the dissent in *Linn*, the Tenth Circuit did not believe its opinion conflicted with that of the majority.[359] It noted that *Linn* did not involve the resolution of grievances, but was a "borderline" case in which the Supreme Court left open the possibility of a further extension of protection.[360] Similarly, at least one other court has distinguished *Linn* because a party suing over an arbitrable dispute has an avenue to provide "personal relief and vindication, and does not require a separate cause of action."[361]

While the NLRA and federal labor policy strongly favor arbitration, it is difficult to conceive of a countervailing interest which would legitimately subject the parties, witnesses and other participants to potential defamation liability. The RLA provides even greater justifications for application of a broadly-based absolute privilege. The resolution of "minor disputes" or grievances under the RLA is within the exclusive jurisdiction of the NRAB and of public law boards.[362] Moreover, the vast majority of labor agreements subject to the RLA provide for an investigation or hearing on the carrier's property before discipline can be imposed on workers.[363] Thus, carriers in the rail and airline industries are required to investigate misconduct, issue statements regarding discipline of employees and use grievance and arbitration procedures.

Union representatives must also investigate grievances, correspond with the carriers, and represent workers before investigations and public law boards. Plainly, conduct which is reasonably necessary to adhere to the RLA and labor agreements should be protected by an absolute privilege. The narrowing of RLA preemption after *Hawaiian Airlines* makes the extension of an absolute privilege vital to protect the statutorily mandated dispute resolution mechanisms.

The qualified or conditional privilege furthers the policies of neither the NLRA nor the RLA. The qualified privilege can be defeated by actions which, depending on the jurisdiction, can include excessive publication, a lack of good faith publication, negligence, common law

359. General Motors Corp. v. Mendicki, 367 F.2d 66, 71 (10th Cir. 1966).

360. *Id.*

361. Joftes v. Kaufman, 324 F. Supp. 660, 663-64 (D.D.C. 1971).

362. *See supra* notes 130-31 and accompanying text.

363. *See supra* note 131 (discussing the procedures followed by railroads in resolving minor disputes; specifically referring to the investigation and hearing conducted on railroad property).

malice or "actual malice."[364] Thus, at a minimum, an individual sued for arbitration-related statements will have the expense of defending the case and establishing that the privilege has not been abused or that the publication was not made with the requisite malice. These issues may also be decided by a jury uninformed of the nuances of workplace disputes or infected with a prejudice toward labor or management's positions. Since exchanges in arbitration and pre-arbitration procedures may be heated and profanely frank, a court or jury frequently may be convinced that sufficient "malice" exists to defeat the privilege. Consequently, the qualified privilege gives little comfort to the companies, unions, witnesses and other participants in dispute resolution proceedings.[365]

B. Support for the Extension of the Absolute Privilege Due to the Nature of Arbitration and Related Procedures

Many courts also have applied an absolute privilege to arbitration proceedings because of their quasi-judicial nature and functions. This rationale is independent of federal labor policy and extends to all arbitration procedures. As discussed in Part III of this Article, judges, court officers, attorneys, parties and witnesses participating in judicial proceedings all share an absolute privilege.[366] This privilege protects the entire legal process, including statements in pleadings, briefs, the courtroom, and in pre-trial procedures such as depositions.[367] The broad protections afforded formal judicial proceedings should be extended to analogous arbitral and related dispute resolution procedures.

The courts have at least begun the process of extending these protections. The vast majority of published decisions find arbitrators, like judges, are immune from personal liability for their actions and from entanglement in post-award legal actions.[368] Courts in the United States began providing arbitrators with quasi-judicial immunity in the nineteenth century.[369] Since that time, arbitral immunity has become

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364. *See* SMOLLA, *supra* note 14, § 8.07[2], at 8-19, 8-20 (comparing absolute and qualified privileges); *see also* POLELLE & OTTLEY, *supra* note 15, § 5.40 (listing the elements of conditional privilege in Illinois).

365. *See supra* notes 112-26 and accompanying text (reviewing court decisions applying a qualified privilege).

366. *See supra* note 58 and accompanying text.

367. *See supra* notes 53-62 and accompanying text (discussing the origin and extent of judicial immunity).

368. *See* Dennis Nolan & Robert Abrams, *Arbitral Immunity*, 11 INDUS. REL. L.J. 228 (1989) (discussing history of and need for arbitrator immunity).

369. *See* Burchell v. Marsh, 58 U.S. 344 (1855) (holding that in the absence of evidence of corruption, the arbitrator's award should be honored lest it become "the commencement, not

"the almost unquestioned rule in commercial and labor arbitration."[370] While arbitral immunity was first recognized in the commercial arbitration context, it has been applied with equal vitality in the labor area, in part, because of national labor policy.[371]

Arbitral immunity exists to guarantee finality of awards, protect arbitrators' impartiality and independence and to aid in their recruitment.[372] The policies supporting the extension of judicial immunity to arbitrators and arbitral sponsors also support the parallel extension of the absolute privilege to quasi-judicial bodies and their participants.

The tests for a quasi-judicial body have been defined in a variety of ways.[373] Typically, they include whether the bodies exercise judgment and discretion, hear and determine facts, examine witnesses, and have power to affect the rights of private persons.[374] As related in Part III

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the end of litigation"); Jones v. Brown, 6 N.W. 140 (Iowa 1880) (holding arbitrators act in a judicial capacity and are not liable in civil actions for their conduct in that capacity); Shiver v. Ross, 3 S.C.L. (1 Brev.) 293 (1803) (holding that arbitrator's decisions may not be impeached except in limited circumstances).

370. Nolan & Abrams, *supra* note 368, at 235-36; *see* ELKOURI & ELKOURI, *supra* note 131, at 143-44; MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 23.01, at 351-354 (Gabriel M. Wilner ed., rev. ed. 1991) (discussing arbitrator's immunity from liability); *see also* Corey v. New York Stock Exch., 691 F.2d 1205, 1208-11 (6th Cir. 1982) (upholding district court's grant of arbitral immunity to arbitrator acting on behalf of the New York Stock Exchange); Tamari v. Conrad, 552 F.2d 778, 780 (7th Cir. 1977) (extending arbitral immunity to cases in which the authority of the arbitrator in a commodities dispute is challenged); Cahn v. International Ladies' Garment Union, 311 F.2d 113, 114-15 (3d Cir. 1962) (holding labor arbitrator "clothed with immunity, analogous to judicial immunity" for conduct in capacity of arbitrator); Lundgren v. Freeman, 307 F.2d 104, 117-18 (9th Cir. 1962) (holding when architects act as quasi-arbitrators in interpreting contractual terms as between two parties, they enjoy immunity from suit for the decisions they make); Wagshal v. Foster, No. CIV. A.92-2072 (TPJ), 1993 U.S. Dist. LEXIS 4073 (D.D.C. Feb, 5, 1993) (dismissing claim against court appointed arbitrator because an arbitrator acting on behalf of the court possesses that court's judicial immunity); Larry v. Penn Truck Aids, Inc., 94 F.R.D. 708 (E.D. Pa. 1982) (extending arbitral immunity to joint union/management arbitration committee); Fong v. American Airlines, Inc., 431 F. Supp. 1340, 1343-44 (N.D. Cal. 1977) (holding in a suit regarding an airline labor arbitrator that "the integrity of an arbitral process is best preserved by recognizing the arbitrators as independent decision-makers who have no obligation to defend themselves in a reviewing court"); Corbin v. Washington Fire & Marine Ins. Co., 278 F. Supp. 393, 398-99 (D.S.C.), *aff'd*, 398 F.2d 543 (4th Cir. 1968) (granting unqualified immunity to arbitrators in insurance disputes); Hill v. Aro Corp., 263 F. Supp. 324, 325-26 (N.D. Ohio 1967) (citing a series of decisions in a variety of jurisdictions which have treated arbitrators as quasi-judicial in support of its decision to expand immunity for labor arbitrators).

371. Nolan & Abrams, *supra* note 368, at 236; *see Hill*, 263 F. Supp. at 326 (holding arbitrators must be protected from fear of consequences for their acts).

372. Nolan & Abrams, *supra* note 368, at 234-35; *see* Hoosac Tunnell Dock & Elevator Co. v. O'Brien, 137 Mass. 424, 426 (1884) (holding that immunity protects judges' impartiality, independence and freedom from undue influences, and extending the same immunity to arbitrators).

373. *See supra* notes 184-88 and accompanying text (discussing the basis for identifying a body as quasi-judicial in nature).

374. *Id.*

of this Article, a great number of courts have found that arbitration proceedings are quasi-judicial and entitled to an absolute privilege.[375]

While arbitrations are not courts, they have many essential similarities. Indeed, many have recognized that arbitral proceedings, whether in the labor, commercial or securities area, are becoming increasingly structured and judicial-like. The parties are often represented by counsel, many arbitrators are attorneys, frequently verbatim transcripts are made, pre- and post-hearing briefs may be filed, objections on evidentiary issues are ruled upon and written awards are rendered.[376] Functionally, the two procedures are virtually the same.[377]

The majority of the rationales that support protection for participants in judicial proceedings apply with equal force to arbitrations. There is no logical reason to confine the privilege's protection to arbitrators and leave parties, witnesses and counsel subject to defamation liability. Those who participate in arbitral and related dispute resolution procedures should be able to express themselves freely without

375. *See, e.g.*, Mock v. Chicago, Rock Island & Pac. R.R. Co., 454 F.2d 131, 133-35 (8th Cir. 1972) (discussing criteria for granting quasi-judicial status to an administrative body); Corbin v. Washington Fire & Marine Ins. Co., 278 F. Supp. 393, 395-97 (D.S.C.), *aff'd*, 398 F.2d 543 (4th Cir. 1968) (holding failure to grant absolute immunity in an arbitration would impair its function as a quasi-judicial proceeding); Sturdivant v. Seaboard Serv. Sys. Ltd., 459 A.2d 1058, 1060 (D.C. 1983) (granting absolute immunity to parties and witnesses at a labor arbitration); Odyniec v. Schneider, 588 A.2d 786, 789-93 (Md. 1991) (discussing public policy considerations for extending absolute immunity in certain arbitral proceedings); Kloch v. Ratcliffe, 375 N.W.2d 916, 919-21 (Neb. 1985) (discussing need for absolute immunity in arbitration proceedings); Neece v. Kantu, 507 P.2d 447, 450 (N.M. Ct. App. 1973) (granting absolute immunity to parties and witnesses in a labor grievance arbitration).

376. For views regarding legalism in labor arbitrations, see Reginald Alleyne, *Delawyering Labor Arbitration*, 50 OHIO ST. L.J. 93 (1989) (proposing alternatives to legalism in labor arbitration processes); J. David Andrews, *A Management Attorney's View*, 38 PROC. OF THE NAT'L ACAD. OF ARB. 191 (1986) (justifying "legalism" in arbitration); Anthony Bartlett, *Labor Arbitration: The Problem of Legalism*, 62 OR. L. REV. 195 (1983) (examining forces giving rise to legalism in labor arbitrations); *Creeping Legalism in Labor Arbitration, an Editorial*, 13 ARB. J. 129 (1958) (lamenting increasing legalism in labor arbitration decisions); *see also* COOPER & NOLAN, *supra* note 3, at 462-92 (providing a variety of critical perspectives on the labor arbitration process).

For arbitration rule changes by security industry self-regulating organizations since the Supreme Court's decision in *Shearson/American Express v. McMahon*, see SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, REPORT #8 6-22 (1994) (containing the Uniform Code of Arbitration) [hereinafter SICA REPORT]; SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, THE ARBITRATOR'S MANUAL (1992).

377. Arbitration involves safeguards sufficient to justify an absolute privilege. *See* AAA COMMERCIAL ARBITRATION RULES 6-20 (1993) (permitting legal representation, a stenographic record, interpreters, oaths for witnesses, subpoenas for witnesses, and requiring a written award). In most situations, arbitration is voluntarily selected. Arbitrations are guided by rules, industry codes, other arbitral decisions and case law. *See* SICA REPORT, *supra* note 376, at 6-22 (Uniform Code of Arbitration). While the grounds are narrow, arbitral awards can be overturned. *See* The Federal Arbitration Act, 9 U.S.C. §§ 9-11; the RLA, 45 U.S.C. § 153 First (q) (stating grounds for setting aside an award).

regard to liability or harassment, as long as their statements have some relation to the issues involved. Further, because witnesses in arbitrations can be compelled to testify, it would be unfair to permit a defamation claim premised upon that testimony.

Courts have held statements in judicial proceedings to be absolutely privileged if related or pertinent to the matter before the court.[378] This relationship requirement has been liberally interpreted with doubts resolved in favor of relevancy or pertinency.[379] The same interpretation should also be extended to arbitral proceedings. Putting arbitral proceedings on the same plane as courts is further supported by articulated labor policy and by the Federal Arbitration Act's liberal policy favoring arbitration agreements. Many courts even make arbitration available to litigants for dispute resolution.

The parties' selection of arbitration-type procedures should not subject them to liability when in a court they, their counsel and witnesses would be fully protected. This potential liability is a disincentive which may outweigh the savings in cost and time thought to exist in arbitration. Defamation actions should not be exalted over public and labor policy as the ultimate means to resolve disputes. Although collateral estoppel may lessen attacks on arbitral awards, it is limited to issues actually decided and to judicial-type decision-making. The narrow and carefully drafted grounds for reviewing arbitration decisions also are circumvented by unrestrained defamation actions arising out of the process. The finality expected in these proceedings is nullified if the issues can be reformulated as defamation claims and tried before a jury.

C. A Framework for the Application of the Absolute Privilege in the Arbitral Context

A straightforward framework can be constructed for the application of the absolute privilege in arbitration and related dispute resolution procedures. First, all statements, oral or written, made in the arbitration hearing by the parties, counsel or witnesses should be absolutely privileged. Second, notices, statements of claim, briefs and awards should also be protected if required or permitted in the proceedings. Pre-arbitration statements such as those in grievance conferences, disciplinary investigations, pre-hearing conferences, depositions, corre-

378. *See supra* note 58 (discussing the limitation of absolute immunity to those matters before the court).

379. *See supra* note 58 (discussing application of judicial immunity).

spondence between parties and the arbitration sponsors relating to the proceeding must also be protected.

Finally, pre-arbitration statements "reasonably necessary" to prepare for the proceedings and post-arbitration statements to comply with the award should also be covered. In order to be protected, of course, all statements must be related or pertinent to the proceedings as those terms are applied in the judicial context.

This framework will provide significant protection for those participating in arbitration and related proceedings. No extensive litigation will be required over issues of good faith, excessive publication or malice. At the same time, this standard will still allow gratuitous, irrelevant statements unrelated to the dispute to be challenged by a defamation action. It will provide equivalent protection for arbitral and judicial proceedings.

VI. CONCLUSION

Statements made in arbitrations and related dispute resolution procedures are frequent targets of defamation actions brought by participants who, rightly or wrongly, are dissatisfied by the outcome. Regardless of motivation, these actions undermine and subvert the process. Historically, courts have responded by applying a qualified or limited absolute privilege, federal preemption in the labor arena, or collateral estoppel. Each of these responses may be inadequate to protect the arbitration process and the participants.

Qualified privileges provide inadequate protection because they may be overcome by lack of good faith, excessive publication, or malice. Since a costly jury trial may be required to resolve these issues, the limited protection forces the parties to incur risks and costs they undoubtedly wished to avoid by selecting arbitration in the first instance.

Federal preemption, a potentially strong protection, has been narrowed by three Supreme Court decisions which restrict it to statements required by collective bargaining agreements or to instances in which the claim requires the construction or application of the labor contract. Preemption is of limited utility here because it must be applied on a case-by-case basis, and it looks to the statements' relation to collective agreement rather than to protecting the integrity of the arbitral process.

Collateral estoppel applies to some arbitration decisions but is limited in scope and requires a final judgment on the merits. These limi-

tations may all but eliminate application of the doctrine in the arbitral or alternative dispute resolution context.

Finally, even a narrowly applied absolute privilege may not properly shield the arbitration proceedings. If only statements made in the hearing itself are protected, the parties are exposed to liability for statements in pre-arbitral proceedings or documents, such as statements of claim, pre-hearing conferences, disciplinary notices, correspondence, depositions, or grievance committee sessions.

Public policy, labor law and the Federal Arbitration Act require that greater protection and certainty be given to arbitrations and related dispute resolution proceedings. Parties should not be exposed to additional liability because they have bowed to public or labor policy and have selected non-judicial dispute resolution procedures. According those involved in arbitration procedures the same protection afforded in court litigation not only supports the policies favoring arbitration, but implicitly recognizes it as a legitimate substitute.