The Future of Collective Bargaining:

Interviews with Two Prominent Players in the Field

William A. Herbert

The Labor Center interviewed William A. Herbert, executive director of the National Center for the Study of Collective Bargaining in Higher Education and the Professions at Hunter College, City University of New York. Herbert is an attorney and scholar whose prior experience includes serving as deputy chair and counsel of the New York State Public Employment Relations Board and as a labor and employment practitioner. Here he shares his thoughts about the National Center's mission, resources, and upcoming events with our newsletter readers:

William A. Herbert

Q1. What is the mission of the National Center for the Study of Collective Bargaining in Higher Education and the Professions? The National Center is a labor-management resource center focused on collective bargaining in higher education and the professions. The National Center is dedicated to the belief that collective bargaining and unionization are important means for advancing higher education and the working conditions of faculty and staff in colleges and universities. We, at the National Center, believe that research is an essential element for a knowledge-based dialogue on labor and management issues.

Q2. How does the National Center pursue its mission? What are some of the National Center's main activities? Since 1973, the National Center has held an annual conference in New York City, the next of which will be March 26-28, 2017, bringing together labor representatives, administrators, academics, attorneys, and neutrals, for panel discussions and the presentation of papers. We also publish a monthly electronic newsletter that closely follows unionization and collective bargaining issues and provides relevant data relating to private and public sector higher education unionization issues. The National Center maintains data concerning collective bargaining units on campuses. The data collection is a continuation of our historical role of publishing a directory of collective bargaining in higher education (*Directory of US Faculty Contracts and Bargaining Agents in Institutions of Higher Education*). Since I came here in 2013, we have been closely following the certification and recognition of new bargaining units, and we are in the process of re-imagining the format and substance of the next directory.

Q3. What trends or changes in higher education collective bargaining do the empirical data suggest? Are there diverging trends in different areas, such as public/private institutions, full faculty vs. adjunct, or geographic locations? Over the past four years there has been a continued growth in unionization efforts and collective bargaining relationships in higher education. The strongest area of organizational and bargaining unit growth has been with respect to non-tenure track faculty at private nonprofit colleges and universities. The phrase *non-tenure track* encompasses all faculty who are outside the tenure system. The growth in non-tenure track faculty unionization stems from core changes that have taken place in higher education. In 1969 tenure track faculty made up almost 80% of the overall faculty. Since then there has been a complete flip. As of 2009 only 33%-34% of faculty members are tenured or on the tenure track.

This change in faculty composition has had an important legal consequence for faculty unionization under the National Labor Relations Act. The [US] Supreme Court ruled in 1980 in *Yeshiva University*[1] that tenure track faculty at that private university were managerial employees excluded from statutory coverage because they had control over essential functions of the university through shared governance. The *Yeshiva* decision led to a decline in faculty unionization at private colleges and universities. However, the decision is largely irrelevant to non-tenure track faculty unionization because they are excluded or marginalized from shared governance.

Q4. On a personal note, how did you get interested in employment law? I would say that one of my first introductions to labor issues was the alienation and struggle for workplace control in Herman Melville's, *Bartleby, the Scrivener*.[2] I read it in high school and have re-read it many times since. It is a fascinating story and an excellent pedagogical tool.

The major influences that led to my interest in labor and employment law was observing my father's experiences as a public employee in New York City in the days before collective

1 *NLRB v. Yeshiva University*, 444 US 672 (1980).

2 *Bartleby, the Scrivener: A Story of Wall Street* is a short story by Herman Melville published in 1853.

bargaining. He was a police officer. I also had an uncle who was a professor at Cornell's School of Industrial and Labor Relations and who had been a labor activist. The social ferment and activism of the 1960s and 1970s also played a key role in my decision to go to law school. When I applied, I had the idea of becoming a civil rights or labor attorney.

Q5. Prior to serving as executive director of the Center, you were deputy chair and Counsel to the NYS Public Employment Relations Board (PERB). How has your current position developed or changed your interests in employment law issues? At PERB, I researched and drafted decisions that resolved litigated disputes between public sector unions and employers under New York's public sector collective bargaining law. That role improved my understanding of the principles of labor relations, as well as practical tools on how to resolve and litigate disputes. In that position, I also learned a great deal about conciliation, including the use of mediation, fact-finding, and arbitration.

My academic research and writing at the National Center is a logical next step from my responsibilities at PERB. My duties at the National Center include keeping close track of developments at the NLRB and public sector collective bargaining agencies concerning higher education and the professions. At PERB, I published a number of scholarly articles, including presenting my research at NYU Labor and Employment Center's annual labor conferences. Also, I continue as a coeditor of the New York State Bar Association's treatise Lefkowitz on Public Sector Labor and Employment Law.

Paul Salvatore

Paul Salvatore, a partner at Proskauer Rose, provides strategic labor and employment law advice to companies, boards of directors, senior executives, and general counsel in labor-management relations, major litigation, alternative dispute resolution, international labor and employment issues, and corporate transactions. Below, Paul answers some questions posed by the Labor Center.

Paul Salvatore

Q1. Your practice includes representing universities and colleges in labor relations. What are the trends in higher education collective bargaining, particularly in light of the NLRB Columbia University ruling on graduate students? I'm very fortunate to represent many of America's great universities, and assisting them has been keeping me very busy lately. Proskauer's higher education labor law practice goes back decades and includes the seminal US Supreme Court decision on *Yeshiva University*, finding faculty to be managers, not eligible for unionization. This past year we represented Columbia University, where the Obama administration NLRB reversed essentially 80 years of established law, permitting PhD graduate students, along with masters and undergraduates who serve as teaching or research assistants, to unionize. We also had a 17-day NLRB hearing for Yale University, where PhD students serving as TAs are seeking to organize in only nine (out of Yale's 56) academic departments, in an extreme application of the NLRB's new micro-unit doctrine. (An NLRB decision remains pending.) And, we're representing Duke University, where the SEIU seeks to organize approximately 1,500 PhD students. However, post-presidential election, it may just be a matter of time before the new Trump NLRB returns graduate TAs and RAs to student, not employee, status. It's foreseeable that the months ahead will be filled with appeals to the Trump NLRB and circuit courts on the grad student status issue.

Q2. You have particular expertise in the real estate industry, having represented the Realty Advisory Board on Labor Relations in the very important collective bargaining agreements with SEIU Local 32BJ. What are the trends in collective bargaining in the New York real estate industry and how, if at all, may it differ from other sectors or places? I have long been active in the real estate and construction industry, both in NYC and nationally. Traditionally, this sector has been heavily unionized, both in construction and building maintenance. Times have changed, however, even in NYC (which I like to say is more of an "island off of Europe" when it comes to labor relations and union density than part of the rest of the USA). NYC construction has largely become an open-shop market, even in Manhattan, except for the tallest buildings. This has profoundly shaken up the building trades, as is apparent in the current 421(a) renewal controversy,[3] where labor has not been able to maintain or regain market share in affordable housing. In 2015, our client, The Cement League (a multi-employer bargaining association of leading superstructure contractors), had to enjoin an illegal carpenters union strike of project labor agreement (PLA) jobs in order to precipitate needed reform and moderation of the wage/benefit package. Absent negotiated easing of rates and work rules, more labor strife is likely ahead with other building trades. On the other hand, maintenance unions, such as SEIU 32BJ and Operating Engineers Local 94, have proven to be adaptable partners with the NY real estate industry, resulting in fair contracts, continuing high union market share, and solid labor-management relationships. The future of this sector undoubtedly will be exciting as the construction industry adapts to a new labor paradigm.

Q3. In a 2008 Law360 interview, you were asked which aspects of employment law you think are in need of reform. At the time, you said legislators should expand, not curtail, the use of alternative dispute

3 421(a) is a New York State tax abatement afforded to developers who designate at least 20% of units affordable. The abatement is considered an important incentive for building affordable housing but had expired in 2015 in the absence of agreement on wages and other worker issues that are still being negotiated between the government, real estate developers, and labor unions.

resolution. Has this happened? Why or why not? I came to Proskauer from Cornell's School of Industrial and Labor Relations and its Law School poised to be a "traditional" labor lawyer, but my early career was swept up in the 1990s employment litigation explosion. Having been exposed to both private (mediation and arbitration) and public (courts) systems of dispute resolution for over 30 years, I see the profound value of utilizing alternative dispute resolution as the preferred forum for workplace disputes. The courts may work well for a minority of plaintiff-employees, but most employees and employers with a workplace dispute are much better served in a private, faster, and confidential forum. As the US Supreme Court recognized in *Pyett*[4] (a case arising from the NYC real estate industry), traditional labor-management dispute resolution can be applied to employment law claims without abridging anyone's rights and with salubrious outcomes for both employee and employer. After eight years of Obama-led workplace initiatives, mediation and arbitration for employment law claims is still going strong, and there is no reason to believe that the Trump administration won't favor these proven techniques to solve workplace conflicts.

Q4. What are your predictions on the future of collective bargaining generally, particularly in the wake of the recent presidential and legislative election? Collective bargaining is at a crossroad after the Trump election. Eight years of pro-labor Obama administration policies have tilted the playing field toward unions, particularly at the NLRB. Nonetheless, overall national union diversity has not skyrocketed; indeed, it's barely inched up. While a Trump NLRB will undoubtedly reverse some of the Obama Board's more controversial moves (e.g., "quickie" elections, joint employer liability, etc.), let's not forget that many current or former union members staunchly supported President-elect Trump, particularly in post-industrial battleground states. And fundamental to the Trump message was keeping traditionally union jobs in America and returning those that left. How these conflicting initiatives interact and are translated across the bargaining table will be the challenge for collective bargaining in the next few years.

Q5. What do you consider your greatest accomplishment as a labor and employment lawyer? On September 12, 2001, stunned, saddened, and staying home as the authorities recommended, I received a call from Jim Berg, the president of our client, the Realty Advisory Board on Labor Relations, the multi-employee bargaining association for NY's real estate industry. Jim told me that Mike Fishman, president of SEIU Local 32BJ, called him and emotionally recounted how, while all the details were not yet available, Local 32BJ members working at the World Trade Center had likely been killed and it appeared that thousands would be out of work for many months ahead as much of downtown Manhattan was closed, covered in smoke, rubble, and ash. Mike had asked Jim if the real estate industry would somehow help these workers as well as the families of the victims.

What happened next was collective bargaining's finest hour. The parties convened emergency negotiating sessions to hammer out special job and benefits security agreements affecting thousands of employees who found themselves in need because of 9/11 and its aftermath. The real estate industry and the union partnered together to help workers and their families get through these dark, difficult times.

Because of the extent of the devastation, the initiatives we agreed upon remained in place for several years and even had to be extended a couple of times. But, in the end, the industry's workers maintained a basic income level, received preferential hiring for new jobs, and maintained their benefit package. I'm proud to have played a hand in forging these arrangements, responding in this hour of need of our city, the industry, and its employees. ■

TalkShop 2017: Cutting-Edge Employment Law Issues

On February 8, 2017, the Labor Center hosted *TalkShop 2017: Cutting-Edge Employment Law Issues*, part of a series for specific constituencies, sometimes from labor and sometimes from management. TalkShop provides a forum for peers to discuss best practices and relevant employment law developments. At this breakfast, Mark E. Brossman '78, LLM '81, and Holly E. Weiss, both employment law and benefits partners of Schulte Roth & Zabel LLP, led a discussion about new appointees in the Trump Administration and what to expect on labor and employment policy, as well as about recent developments in employment agreements from non-competes to non-disparagement covenants. A group of in-house counsel and senior HR executives participated in the breakfast.

TalkShop on February 8, 2017

4 *14 Penn Plaza LLC v. Pyett*, 556 US 247 (2009).