

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: July 8, 1999

TO : William A. Pascarell, Regional Director
Region 22

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Faro Services of New Jersey, Inc.
a Subsidiary of Faro Services, Inc.
Case 22-CA-23211

This case was submitted for advice as to whether Faro Services of New Jersey, Inc. (the Employer) is a successor under Burns, obligated to recognize and bargain with the Charging Party, Local 21, Union of Needletrades, Industrial and Textile Employees (UNITE), AFL-CIO, herein Union.

FACTS

Jason Tynan and Co., Inc. a/k/a Nanyt Enterprises, Inc. (Tynan) had for many years been engaged in the business of making samples of ladies sportswear, sending the samples abroad where ladies sportswear products are manufactured and importing and distributing those products in the United States. To perform these functions Tynan had employed cutters and sampl makers at its main office in New York City and warehouse employees at a warehouse in Fairfield, New Jersey. For many years Tynan had been a member of an employers association, the New York Raincoat Manufacturers' Association, Inc. (Association) for purposes of collective bargaining. The Association has entered into collective bargaining agreements with the International Ladies Garment Workers Union, AFL-CIO or its successor, Union of Needletrades, Industrial and Textile Employees (UNITE), AFL-CIO, and the Internationals' affiliated Locals, including the Union, covering the employees of their members.

The most recent collective bargaining agreement between the parties is effective June 1, 1997 to May 31, 2001. The contractual unit includes regular and trial period production, maintenance, packing and shipping employees. While the recognized unit of Tynan employees included employees employed at two locations, in practice,

the Union (Local 21) represented Tynan's warehouse employees employed at its warehouse in Fairfield, New Jersey while Locals 10 and 89 of UNITE represented Tynan's cutters and samplmakers, respectively, employed in New York.

Tynan had normally employed from one to three cutters and from three to eight samplmakers in New York. Working in its warehouse in New Jersey were usually about five regular full time employees and, at times, other employees who were considered temporary or on call. When Tynan ceased performing warehouse services in New Jersey, one cutter and three samplmakers were working in New York, and five full time employees were working in its warehouse in New Jersey, namely, Elena Silva, Azad Allie, Marvin Guifarro, Khemraj Moonsawmy and Julio Sanabria.

Silva, Allie, Guifarro and Moonsawmy were members of the Union. Sanabria, however, was not a member of the Union. He was never offered an opportunity to become a member of the Union and the Union was never advised that Sanabria was employed by Tynan. While performing the same type of work in the warehouse as was being performed by other unit employees, under the same Tynan supervisors, Tynan was carrying Sanabria on the payroll of one of its other companies, Bertwood Industries, which was not under contract with the Union.¹ The Region has concluded that Sanabria was a member of the bargaining unit, but did not receive contractual wages and benefits.

In late 1998, Tynan entered into negotiations with Faro Services, Inc., an Ohio company engaged in the material handling and public warehousing business, to perform warehousing functions for it. Faro Services, Inc. established a subsidiary company, Faro Services of New Jersey, Inc. which, beginning on about January 4, 1999 began operating out of the same Fairfield facility which had previously been used by Tynan, performing warehousing services for Tynan. Faro did not purchase the business or assets from Tynan, although Tynan left some equipment in the warehouse, which equipment is now being used by Faro. There was not hiatus in time between when Tynan ceased

¹ It would appear that the only connection that Sanabria has with Bertwood is that Tynan caused Sanabria to be paid by Bertwood payroll checks. This is insufficient to make Bertwood and Tynan joint employers. Some element of common control of terms and conditions of employment is necessary. NLRB v. Browning Ferris Industries, 691 F.2d 1117 (3d Cir. 1982), enfg. 259 NLRB 148.

operating out of the warehouse and when Fargo began operations there. Faro leased the facility from the same company, unrelated to Tynan, which had previously leased it to Tynan.

In November and December 1998, before it began operations in New Jersey, Faro representatives met with the five employees working in the warehouse and advised them that it would be operating the warehouse, instead of Tynan, beginning in January 1999. Faro told the employees that their bosses had recommended all of them for employment and that if they wanted to work for Faro they could do so. Faro told the employees to complete applications, which they all did. Faro representatives also advised them that Faro is a nonunion company in Ohio and that it wanted to remain that way. The employees were also advised that if they wanted to work for Faro it would hire them at the same rate of pay as they had earned working for Tynan, but that there would be changes in benefits relating to travel pay, overtime pay, vacation pay and holiday pay and they were advised of what those changes would be. All five of the employees accepted employment offers from Faro and began working for it on January 4, 1999. Faro also employed two supervisors who had previously been supervisors for Tynan.

Faro currently employs nine nonsupervisory warehouse employees. In addition to the five employees, named above, an additional three employees, Antonio Vizcaino, Mongal Dhomay and Herman Coloma, were hired by Faro and began working for it on January 7, 1999. A ninth employee, Joe Speech, began working in the warehouse in about May 1999.

Vizcaino, Dhomay and Coloma had all previously worked for Tynan in the warehouse. Tynan did not pay them any benefits. Tynan had told them they were "temporary". Vizcaino had worked for about nine months, two to four day per week, until he was laid off in January 1998. Coloma had worked part-time and sometimes full time in the warehouse for about three months, from August 1998 until mid November 1998. Like Sanabria, Coloma also was not listed on Tynan's payroll even though he worked in the warehouse with other Tynan employees performing the same type of work. He was listed on the payroll of another Tynan company. At the time of the layoffs, they were told that their layoffs would be temporary, or they were not informed how long they would be laid off. Faro hired these

three employees claiming that they were temporary or seasonal employees, with no benefits. During their employment by Faro, they frequently worked full time or close to full time hours. After six months of employment, all of these employees were given benefits.

While Faro maintains that, as a public warehouse, it expects to perform warehousing services from its Fairfield facility for other employees, in addition to Tynan, and that it is actively soliciting such business, until May it had not obtained any other business. In May 1999, however, it began to warehouse medical supplies for a second company. That work constitutes a very small percentage of its business.

Tynan has continued its business in New York with Faro performing warehousing services for it. Tynan is still a member of the Association and continues to recognize Locals 10 and 89, UNITE, as the representatives of its cutters and sampl makers in New York.

On about January 21, 1999, Union representatives visited the Fairfield warehouse. Richard Greathouse, Faro's Senior Operations Manager, told the Union that Faro expected the warehouse operation to be non-union. The Union demanded recognition and bargaining. To date, Faro has refused to recognize or bargain with the Union.

ACTION

Complaint should issue, absent settlement, alleging that the Employer, as a successor, unlawfully refused to recognize and bargain with the Union in violation of Section 8(a)(5) of the Act.

We agree with the Region that the facts indicate that employee Sanabria was a bargaining unit employee when he was employed by Tynan even though he was not receiving contractual benefits. Thus, while Tynan paid him from another payroll and did not apply the contract to him, Sanabria performed the same work as the four other warehouse employees and worked with them under the same supervision. Thus, absent any evidence to the contrary, Sanabria should be considered a former Tynan employee included in the warehouse unit when the Employer took over. Counting Sanabria in the unit, the Union represented a

majority of employees.² Further, as noted above, it does not appear that Bertwood was a joint employer of Sanabria since it did not possess or exercise any control over terms and conditions of his employment.

As to Vizcano, Dhoday and Colma, there is no evidence as to whether they had an expectation of recall. Further, there is insufficient evidence as to whether they were actually "temporary" or seasonal non-unit employees, as the Employer asserts, or whether they were unit employees, as the Union asserts. If they were part of the unit, then they should be counted in determining Union majority status. Further, the Employer claims that these individuals were hired as temporary or seasonal employees. In these circumstances the Employer has effectively admitted that when hired they were not part of the unit. In any event since the Union represented a majority of employees whether or not Vizcaino, Dhoday and Coloma were unit employees prior to their layoff, the Employer was obligated to recognize and bargain with the Union at the time it employed a substantial representative complement.³

B.J.K.

² We note that the Region has concluded that there is a "substantial continuity in the business enterprise" and that successorship exists even though the Faro acquired only a portion of the predecessor's operations. See e.g. Simon DeBartelo Group a/w M.S. Management Associates, 325 NLRB No. 217 (1998); Mangold Markets, 280 NLRB 773 (1986).

³ [FOIA Exemption 5