

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Region 21**

THREE STAR REFRIGERATION, INC.  
d/b/a KOOL STAR and VOLT SERVICES GROUP;  
A DIVISION OF VOLT MANAGEMENT CORPS,<sup>1</sup>

Employers

and

Case 21-RC-20732

MISCELLANEOUS WAREHOUSEMEN, DRIVERS  
AND HELPERS, LOCAL 986, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing<sup>2</sup> was conducted before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.<sup>3</sup>

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<sup>1</sup> The name of each employer appears as corrected at the hearing. Three Star Refrigeration, Inc. d/b/a Kool Star will herein be called "Kool Star" and Volt Services Group, a division of Volt Management Corps. will herein be called "Volt".

<sup>2</sup> No party filed a post-hearing brief in this proceeding.

<sup>3</sup> The hearing officer mistakenly declined to call a representative of Volt to testify concerning the temporary

2. The Employers are, and each of them is, engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and seeks to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production employees employed by the Employer, at or out of 15001 South Broadway, Gardena, California; excluding all office clerical employees, professional employees, guards and supervisors, as defined in the Act.<sup>4</sup>

#### **ISSUES AND CONCLUSIONS**

Three issues are presented for resolution. The first issue concerns the identity of the entity that employs the 30 employees who perform the production work at the Kool Star facility. The Petitioner and Volt claim that the entity that

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employees' expectations of continued employment. However, in light of my determination to permit these employees to vote subject to challenge, the hearing officer's ruling has resulted in no prejudice to any party.

employs these 30 production employees is solely Kool Star, while Kool Star avers that the 30 employees are solely employed by Volt.

The second issue concerns the inclusion of four temporary employees who perform work in the Kool Star production process and that are provided to Kool Star by Volt. Petitioner and Volt assert that these four employees should be excluded from the unit because they do not have an expectation of continued employment, while Kool Star claims that they should be included in the unit.

The final issue presented concerns the supervisory status of the five leadmen. Kool Star contends that they are supervisors and that they should be excluded from the unit, while the Petitioner and Volt take the position that they are not supervisors and that they should be included in the unit.

Based on the record in this case and the considerations noted below, it is concluded that the 30 production employees are employed by Kool Star, while the four temporary employees are jointly employed by Kool Star and Volt. The instant record does not however, permit a determination as to the eligibility of the four temporary employees, or the supervisory status of the five leadmen. I shall, therefore, permit the four temporary employees and the five leadmen to vote subject to the challenged ballot procedure.

### **FACTS AND ANALYSIS**

#### **A. The Employers' Operations**

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<sup>4</sup> The unit description is consistent with the parties'

Kool Star is a California Corporation engaged in the manufacturing of refrigerant products with its principal offices and a production facility located at 15001 South Broadway, Gardena, California (hereinafter the "facility").<sup>5</sup> The record discloses that the Kool Star has five departments where the "production" employees work: assembly, metal, doors, cutting and cleaning. There are five leadmen, one assigned to each department, who oversee the production work. In addition, Kool Star employs an estimating manager, a production manager, a production coordinator, a general manager, a marketing sale manager, and two owners.<sup>6</sup>

Volt is a Delaware Corporation engaged in providing temporary employees to businesses with its principal offices located at 2401 LaSalle Street, Orange, California.

**B. Employer Status**

**1. Facts Regarding Employer Status**

Prior to April 9, 2004<sup>7</sup>, Kool Star directly employed about 30 production employees. In addition, it utilized the services of four employees that were provided by Volt on a temporary basis to also perform production work.

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stipulation.

<sup>5</sup> The record discloses that another company called Blue Air shares use of the building at the same address. The parties agreed that Blue Air is a separate entity and that its employees are not part of the instant unit.

<sup>6</sup> No party contends that any of these senior managers should be included in the unit. Based on the record presented, I conclude that these seven are managers and they are excluded from the appropriate unit.

On about April 9, Kool Star and Volt entered into a verbal agreement by which Volt agreed to take all 30 of Kool Star's production employees and place them under Volt's payroll systems.<sup>8</sup> As part of this verbal agreement, the five employee leads were also placed on Volt's payroll. The record discloses that subsequent to April 9, Kool Star continued to control all of the wages and working conditions of all of these 30 production employees and that Volt only provides payroll checks and some additional health insurance for them, as well as a direct deposit service. The record reveals that since April 9, the owner of Kool Star, James Pak, maintains final authority as to the hiring and firing of the 30 production employees originally hired by Kool Star.

The record discloses that Kool Star entered into the payroll agreement with Volt as a means by which to lower its worker's compensation insurance costs. Kool Star also disclosed that the agreement was economically beneficial to it because by making the payroll payment to Volt, and then having Volt disburse the paychecks to the employees, it was able to achieve greater financial flexibility in its cash flow.

The record also discloses that Volt provides temporary production employees to Kool Star based on Kool Star's production needs. Kool Star pays a fee to Volt for providing the employees and Volt then pays some undisclosed amount of that fee to the employees as wages. Kool Star can end the employment of the

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<sup>7</sup> All dates hereinafter are in 2004, unless otherwise noted.

<sup>8</sup> The managers and owners of Kool Star remained on the payroll of Kool Star.

temporary employees by telling Volt that it no longer needs or wants the employees. Volt, however, can also send these temporary employees on different assignments or terminate them if they so choose.

The record further discloses that as of the date of the hearing, Kool Star continued using the approximately four temporary employees supplied and hired directly by Volt.<sup>9</sup> Volt hires, sets the wages for and pays the temporary employees directly. The working conditions of these temporary employees, including their work assignments, work hours, and discipline are controlled by Kool Star.

## **2. Board Standards, Analysis and Conclusion Regarding Employer Status**

The Board, in La Gloria Oil and Gas Company, 337 NLRB 1120 (2002), at fn. 2, noted its standards to determine whether two entities are joint employers:

In order to establish that two otherwise separate entities operate jointly for the purposes of labor relations, there must be a showing that the two employers share or codetermine those matters governing the essential terms and conditions of employment. Riverside Nursing Home, 317 NLRB 881 (1995), and NLRB v. Browning-Ferris Industries, 691 F.2d 1117 (3d. Cir. 1982). The employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. TLI, Inc., 271 NLRB 798 (1984).

In cases where one entity provides the manpower for work at another entity's operation, the Board has found the relationship to be a joint employer relationship. Capitol EMI

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<sup>9</sup> The record discloses that the names of the four temporary employees are Imelda Lopez, Stanley Richardson, Edwin Santos and

Music, 311 NLRB 997, 998 (1993) and M.B. Sturgis, 331 NLRB 1298 (2002). For example, in Capitol EMI Music, an employment agency supplied temporary employees to a user-employer. The user-employer could effectively fire any or all the temporary employees by simply requesting the employment agency to remove them from the user-employer's premises. Although the two employers did not have common ownership or common financial control, the Board found that the two employers shared and codetermined essential terms and conditions of employment. While the user-employer directly supervised the employees and assigned work, the supplying-employer negotiated the wage rates of the temporary employees supplied to the user-employer.

In La Gloria, the work hours and rates of pay for drivers were determined by La Gloria, a company operating refineries and employing truck drivers. PSI, the supplier-employer, provided the payroll service for La Gloria's truck drivers. La Gloria controlled basically all of the working conditions of the truck drivers, including work assignments and discipline. PSI could only tell the drivers when they were hired by La Gloria and prepared the payroll for the drivers. Under these facts, PSI and La Gloria were deemed not joint employers because PSI only provided a service to La Gloria by handling administrative functions such as payroll and other paperwork.

Like PSI in La Gloria, Volt is only providing a service for Kool Star and does not share or codetermine those matters that govern the essential terms and conditions of employment.

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Cesar Gabriel.

Unlike in Capitol EMI Music, on the other hand, Volt does not have the authority to negotiate the wage rates of these 30 production employees. As stated above, in the present case, Kool Star negotiates wage rates and simply informs Volt of the wages due to each of these employees.

Based on the record presented, I conclude that Kool Star is the employer of the 30 production employees and that Kool Star and Volt are not joint employers as to this group of employees.

However, the record reveals that the four temporary employees provided by Volt are jointly employed by Kool Star and Volt. Like in Capitol EMI Music, the two employers in this case jointly control essential terms and conditions of the four employees' employment. I, therefore, conclude that Kool Star and Volt are joint employers as to this group of four employees.

**B. Eligibility of Temporary Employees**

**1. Facts Regarding the Temporary Employees**

Prior to April 9, Volt provided some four temporary employees to Kool Star to perform production work. On the day of the hearing, Volt continued to provide four employees to Kool Star.<sup>10</sup> These employees were hired directly by Volt, who also sets their wages. Their working conditions, including hours, assignments, and the direction of their work, however, are controlled by Kool Star.

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<sup>10</sup> The record does not reveal if these four employees are the same employees employed prior to April 9. The record discloses that one of these temporary employees works in the shipping department and another works in the cleaning department. The

The record fails to disclose the terms of the temporary employees' employment by Volt, or the terms of their assignment to work at Kool Star. The record also does not disclose what, if anything, was told to each of these four employees concerning the term of their employment at Kool Star.

## **2. Board Standards, Analysis and Conclusions Regarding Temporary Employees**

The "date certain" test for determining the eligibility of individuals designated as temporary employees, is whether the employees have uncertain tenure. If the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. MGM Studios of New York Inc., 336 NLRB 1255 (2001). See also, Garney Morris, Inc., 313 NLRB 101, 120 (1993) (employee hired without limitation on tenure should be included in the unit.) In addition, "secretly held, uncommunicated limitations do not affect an employee's right of self determination under the Act." Kinney Drugs, Inc., supra at 317. Cf. American Chain Link Fence Co., 225 NLRB 692 (1981).

On the contrary, if employees are employed for only one job or for a set duration or have been told that they should have no substantial expectancy of continued employment, then such employees are excluded as temporaries. E.F. Drew, 133 NLRB 155

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record does not reveal what department the two remaining temporary employees work in.

(1961). A temporary employee not entitled to be included in a bargaining unit is one who is hired for a definite limited period or who is discharged or laid off without reasonable expectation of recall. Meier & Frank Co., 272 NLRB 464 (1984).

If “supplied” employees are provided by a temporary agency to perform work at an employer’s facility without limitation (i.e., they were not told that the assignment was for a temporary or a specified time period; or for a specific job project, notwithstanding that they are labeled “temporary” employees, they may still be included in the bargaining unit if it is determined that they share a community of interest with the employees of the employer). See, e.g., Outokumpu Copper Franklin, Inc., 334 NLRB 263 (2001).

Based on the record presented, it is not possible to determine whether or not the temporary employees have a reasonable expectation of continued employment at the facility so as to permit their inclusion in the bargaining unit. Accordingly, temporary employees Imelda Lopez, Stanley Richardson, Edwin Santos and Cesar Gabriel will be permitted to vote, subject to the challenged ballot procedure.

**D. Supervisory Status Issue**

**1. Facts Regarding Supervisory Status Issue**

The record discloses that, according to Kool Star’s General Manager, Paula Donohoo<sup>11</sup>, the five leadmen are all paid an hourly wage. The leadmen, unlike the managers for Kool Star, receive their checks from Volt. The leadmen are paid premium

wages to compensate for their added responsibilities, but the record does not disclose how much more than production employees they are paid. The record further discloses that when overtime work needs to be done, it is usually the leads that work the overtime.

The record fails to disclose how many employees are in each of the five departments that the five lead men oversee, although there are between 30 and 34 employees, not including the leadmen, in the five departments. The record also does not reveal if Kool Star's operation requires the leads to oversee the work of employees during times of the day when Kool Star's managers are not on site.

The record further discloses that the production coordinator plans each day's work to be performed in the production operation and then relays the plan to the leadmen; who then oversee the work pursuant to the instructions of the production coordinator. Kool Star's plan is for the leadmen to do production work 60% of the time and to oversee the work of the production employees the remaining 40% of the time.

According to Donohoo, the leadmen cannot hire or fire employees but she "understands"<sup>12</sup> that they can recommend hiring or firing of employees to the production manager. The leadmen can also give verbal warnings and recommend to management that the production employees be given written warnings. Additionally,

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<sup>11</sup> Donohoo was the only witness to testify at the hearing.

<sup>12</sup> Donohoo's testimony is based on her understanding of Kool Star's operation, as she does not directly oversee the production work. The Kool Star production manager, who directly oversees the production work, was not available to testify.

the leadmen provide input to the managers when the managers generate yearly performance reviews of the production employees. The record fails to reveal the extent to which Kool Star makes determinations based on the leadmen's recommendations and whether or not Kool Star undertakes independent reviews of situations.

## **2. Board Standards, Analysis and Conclusions Regarding Supervisory Status Issue**

Section 2(11) of the Act defines supervisors as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well settled that Section 2(11) of the Act is to be read in the disjunctive and that possession of any one of the enumerated indicia can establish supervisory status, as long as the function is not routine or clerical in nature, but rather requires a significant degree of independent judgment. Stephens Produce Co., Inc., 214 NLRB 131 (1974); NLRB v. Kentucky River Community Care, Inc. 532 U.S. 706 (2001). "A worker is presumed to be a statutory employee and the burden of proving a worker is a supervisor within the meaning of Section 2(11) of the Act falls on the party who would remove the worker from the class of workers protected by the Act." Hicks Oil & Hickgas, Inc., 293 NLRB 84 (1989); Kentucky River Community Care, *supra*. "The Board has a duty to employees to be alert not to construe

supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights, which the Act is intended to protect.” Hydro Conduit Corp., 254 NLRB 433 (1981).

Based on the record presented, it is not possible to determine whether the leadmen are supervisors as defined in Section 2(11) of the Act. There is insufficient evidence in the record to show whether the leadmen exercise independent judgment in their supervision of the production employees or in their conduct of any of the indicia of supervisory status. Accordingly, I shall permit the leadmen to vote subject to the challenged ballot procedures.

There are approximately 39 employees in the unit found to be appropriate.

#### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike that have

retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the **Miscellaneous Warehousemen, Drivers and Helpers, Local 986, International Brotherhood of Teamsters, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an alphabetized election eligibility list, containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. North Macon Health Care

Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, California 90017, on or before April 2, 2004. No extension of time to file the list shall be granted, excepted in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

#### NOTICE OF POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.21, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three (3) working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

#### RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, 1099 14th Street, N.W., Washington, D.C.  
20570. The Board in Washington must receive this request by  
5 p.m., EST, on June 9, 2004.

DATED at Los Angeles, California, this 26th day  
of May 2004.

/s/Victoria E. Aguayo  
Victoria E. Aguayo  
Regional Director, Region 21  
National Labor Relations Board