poration. The New Jersey Corporation has the right to control the operations of the dealers by its apparently unlimited right to prescribe plans, procedures, and policies relating to the operation and maintenance of the truck, and the Employer carries out this control by virtue of its authority to terminate the agreement. The fact that the drivers are not paid wages does not in and of itself establish that they are free of the Employer's control over the critical cost factors which are determinative of their pay.[3]

Accordingly, on all the facts, we conclude that the Employer has reserved the right to control the manner and means as well as the result of the single-owner drivers' work, and that these drivers are, therefore, employees and not independent contractors.

We therefore find that a unit of the following employees of the Employer is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All single-owner drivers and all nonowner drivers operating equipment under permanent leases with the Employer; and all drivers operating the Employer's equipment who are employed by the Employer in the Indianapolis, Indiana, area, excluding all multi-owner drivers, guards, and supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.] [4]

[3] See *The Seven-up Bottling Company of Detroit,* 120 NLRB 1032, 1034.

[4] An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 25 within 7 days after the date of this Decision and Direction of Election. The Regional Director shall make the list available to all the parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.,* 156 NLRB 1236.

Karat Inc. d/b/a The Stardust Hotel *and* American Federation of Casino and Gaming Employees. *Case 31–CA–341. December 23, 1966.*

DECISION AND ORDER

On August 26, 1966, Trial Examiner Herman Marx issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Decision and a supporting brief, and the Respondent filed a brief in support of the Trial Examiner's Decision and in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Members Fanning, Brown, and Zagoria].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision and the entire record in this case, including the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

[The Board dismissed the complaint.]

DECISION OF THE TRIAL EXAMINER

STATEMENT OF THE CASE

The complaint alleges that the Respondent, Karat Inc. d/b/a The Stardust Hotel (herein the Company or Stardust), has violated Section 8(a)(3) of the National Labor Relations Act, as amended (herein the Act),[1] by discharging, and refusing to reinstate, an employee named Alfred Kissam because he "joined or assisted" a labor organization named American Federation of Casino and Gaming Employees (herein the Union), or "engaged in union or concerted" activities protected by the Act; and has, by such conduct, threats of discharge for such activities, and promises to employees of recommendations for other employment if they would abandon the Union, violated Section 8(a)(1) of the Act.[2]

The Respondent has filed an answer denying, in material substance, that it committed the unfair labor practices imputed to it in the complaint.

A hearing on the issues was held before Trial Examiner Herman Marx at Las Vegas, Nevada, on June 9, 1966. All parties appeared and were afforded a full opportunity to adduce evidence, examine and cross-examine witnesses, and submit oral argument and briefs.[3]

Upon the entire record, from my observation of the witnesses, and having read and considered the briefs filed with me, I make the following:

FINDINGS OF FACT

I. NATURE OF RESPONDENT'S BUSINESS; JURISDICTION OF THE BOARD

Karat Inc. d/b/a The Stardust Hotel is a corporation; maintains a place of business in Las Vegas, Nevada, where it is engaged in the operation of a hotel known as the Stardust Hotel, and of restaurant, bar, and gambling facilities located on the hotel premises; and is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.

In the course and conduct of its business during the calendar year 1965, the Company derived, from its said operations, gross revenue in excess of $500,000, and purchased and received in Nevada from suppliers located outside that State products valued in excess of $50,000. By reason of such interstate transactions, the Company is, and has been at all material times, engaged in interstate commerce, and in operations affecting such commerce, within the meaning of Section 2(6) and (7) of the

[1] 29 U.S.C. Sec. 151, *et seq.*

[2] The complaint was issued on April 27, 1966, and is based upon a charge filed with the National Labor Relations Board (herein the Board), by the Union on March 8, 1966. Copies of the charge and complaint, and of a notice of hearing, have been duly served upon all parties entitled thereto.

[3] The General Counsel and the Respondent have each filed unopposed motions, respectively dated July 21 and 13, 1966, for correction of the transcript of the hearing in specified particulars. In the absence of opposition, each motion is granted and the transcript is amended in the particulars specified in each such motion.

Act. Accordingly, the Board has jurisdiction of the subject matter of this proceeding.[4]

II. THE LABOR ORGANIZATION INVOLVED

American Federation of Casino and Gaming Employees is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Prefatory statement*

Alfred Kissam entered Stardust's employ as "a crap dealer" in its gambling casino in or about 1959; served on the swing shift at the times material here; worked under the supervision of two "shift bosses," Lorenzo Grillette and Al Sachs, who oversee "anything concerning gambling on the swing shift," and are supervisors within the meaning of Section 2(11) of the Act; and was discharged by Sachs on January 28, 1966, under circumstances to be described later.

Kissam became a member of the Union in 1964. On or about October 30, 1965, by telegram bearing that date, the Union notified the Stardust management, including Milton Jaffe and Yale Cohen (each identified in the record as a "part-owner" of the Company, meaning, presumably, that each holds corporate shares in the enterprise), that Kissam was a member of the Union's "organizing committee," and would serve as its "shop steward" at the casino. The wire, substantially paraphrasing language of Section 7 of the Act, included a warning that "attempts" by the management "to interfere with, coerce, intimidate or restrain employees in the exercise" of their Section 7 rights would "lead to filing of unfair labor practices charges."

There is no explanation in the record for the inclusion of the warning, but it is evident that Kissam regarded it as gratuitous and deplored it, for at one point or another after receipt of the wire by the management, he admittedly made an apology for the warning to Grillette, whom he had known for a substantial number of years, and had consulted as to whether he should accept the shop steward's post (receiving a noncommittal reply), telling Grillette that he was "ashamed" of the Union's action in "threatening" Stardust.

Kissam gave testimony to the effect that about 2 or 3 weeks after the telegram was sent, Grillette told him in a restaurant called The Flame, located near the Stardust Hotel, and frequented by casino employees, that upon receipt of the wire, Cohen and Jaffe asked him to point out Kissam in the casino, that he did so, and that Cohen and Jaffe stated they "wanted to fire" Kissam, but that he had dissuaded them. Grillette denied telling Kissam that Cohen and Jaffe had expressed any wish to discharge him, or that he had ever discussed the Union with Kissam at the restaurant. The credibility issue will be treated at a later point.

According to Kissam, during his employment, he secured the execution of cards designating the Union as bargaining representative from approximately 30 Stardust employees. He does not specify the period in his employment when this was done, except that the last card was signed "probably in the middle of January" (1966). There is no evidence that any of these activities were known to any of Stardust's supervisory or management personnel at the time of Kissam's dismissal.

Each dice table at the Stardust Hotel is customarily served by a crew of four dealers, and, while Kissam was employed there, the four shared evenly in all tips, known as "tokes," given to any member of the crew by a player during the course of the shift. In contrast, tips given dealers at the "21" tables are pooled for all shifts and divided evenly among such dealers who number approximately 30.

The practice of "hustling," or seeking, tips from players is quite common among the dealers, and may take a variety of forms, ranging from conventionally courteous service to "rough" or "hard hustling" such as excessive attention to a player, with accompanying disregard of others at the table, or outright solicitation of a tip or a bet on the dealer's behalf. The management disapproves of "hard" or "rough hustling," and depending on the nature of the conduct and the capability of the dealer in other respects, will reprimand, warn, or discharge him for such conduct.

---

[4] *N.L.R.B.* v. *Harrah's Club*, 362 F.2d 425 (C.A. 9); *Siemons Mailing Service*, 122 NLRB 81. I note, too, that in the calendar year 1965, less than 75 percent of Stardust's hotel guests were "permanent" within the meaning of *Floridan Hotel of Tampa, Inc.*, 124 NLRB 261, 264; and that thus the criteria for the assertion of jurisdiction set forth there are applicable here.

Kissam, as he concedes, was reputed among the Stardust dealers to be the greatest "hustler" among them; crews of which he was a member were among the leaders in tip intake; and, as a result, many dealers sought to work with him. He was regarded by the management as a capable dealer, but was reprimanded and warned a substantial number of times by both Sachs and Grillette concerning his "hustling" tactics.[5]

B. *The discharge and the refusal to reinstate Kissam*

On January 28, 1966, Sachs posted a notice, signed by him, in the "dealer's room" at the Stardust Hotel to the effect that effective February 1, 1966, all dealers' tips (including those for "21" dealers), would be pooled for all three shifts, and divided evenly each day among all dealers. The even distribution, as Sachs testified credibly, would tend to reduce objectionable "hustling."

Kissam saw the notice when he reported for work on the night of January 28, joining in a discussion (not elaborated in the record), of the notice in the dealers' room. He and two other members of his crew, Winslow Drew and Tony Lane, then proceeded to their assigned table to "open" it for play. They encountered Sachs at the table or on the way there, and a discussion of the tip-sharing announcement followed. The conversation, various aspects of which are in dispute, bears significantly, as will presently appear, on Kissam's discharge.

According to Kissam, Sachs asked the three dealers whether they "liked the idea of the toke split," and the three replied that they did not. Then, Kissam testified, Sachs, Lane, and Drew "kept on with the conversation for . . . two or three more minutes," talking "basically about this idea of the tokes," and following that, Sachs "asked don't we (the three dealers) think that all of the dealers in the casino should get the same amount of money." To this, Kissam stated, he replied, "Yes, I do. Does the joint (the casino management) . . . feel the same way?" Then, Kissam testified, receiving an affirmative response, he told Sachs that in the 7 years that the Stardust casino had been operating, the "21 dealers" had been receiving less money than the "crap dealers," and "if the joint felt the same way, why didn't the dealers get the same amount right from the beginning, since the place opened?" According to Kissam, Sachs did not reply. Kissam denied that he was angry during the conversation.

Sachs, on the other hand, denying that Lane or Drew participated in the conversation, gave testimony to the effect that Kissam opened it by asking him, "with a very belligerent attitude," why he had made such "a decision" (for tip-sharing); he replied that he felt that all dealers should "make the same amount"; Kissam asked why, if that were the case, "21 dealers" were not paid the same rate as "crap dealers," and was told that the management intended to bring the pay of the "21 dealers" up to the level of the others; Kissam questioned that "bad dealers (should) make the same amount as good dealers;" and there followed an exchange in which he (Sachs) said that what Kissam meant by a "better dealer" was "one that hustles more," and that Kissam was "a better hustler" than "a good dealer."

According to Sachs, he became "angry" during the conversation, and he concluded it by turning and walking away from Kissam, proceeding then to a desk he uses, where he made out a "termination slip" for Kissam and sent it to the timekeeper; and then to the dealers' room where he removed the tip-sharing notice and "ripped it up."

One may infer from both versions that Kissam, by implication, questioned the management's purpose in requiring equal tip sharing by pointing out, in the form of a rhetorical query, that the management did not pay "21 dealers" as much as "crap dealers" and thus, contrary to what Sachs said, did not have a policy of equal pay. There can be no doubt that Sachs, at least, became angry during the course of his discussion with Kissam. His self-description in that regard is not disputed by Kissam, and is supported by Drew's testimony, and by the undisputed evidence, which I credit, that he proceeded promptly to prepare a termination slip, and directly thereafter to the dealers' room and ripped the notice apart.

[5] I do not credit Kissam's claim that he was reprimanded only once, a reproof by Sachs, in the 7 years he was a Stardust dealer. In view of Kissam's "hustling" results, admitted reputation, and the management's attitude toward agressive "hustling," I think it more likely than not that over so long a period Kissam was reprimanded a substantial number of times, and have based the relevant finding on testimony to that effect by Sachs and Grillette

There are, however, a number of divergent details worth noting and resolving. The problem of resolution is complicated by the fact that both Kissam and Sachs are obviously interested witnesses, each disposed, in my judgment, to give himself the better of the conversation, and a consequent image he deems helpful to his cause, while Lane did not testify and Drew, who was called by the General Counsel, appeared to me to be a man of divided loyalties (he is a nephew of one of the Stardust "owners"), and aware of the uses of vagueness and claims of inability to remember as instruments of noncommitment.

Be that as it may, contrary to Sachs, I believe it was he, rather than Kissam, who opened the discussion, doing so by asking the dealers what they thought of the tip-sharing idea. Drew, who was plainly a reluctant witness, corroborates Kissam on that score. On the other hand, I do not believe Kissam's claim that he was without anger during the discussion. Drew termed the discussion between Kissam and Sachs an "argument" at one point, and testified that both Kissam and Sachs were "a little angry," thus disputing Kissam to some extent (albeit with a demeanor of reluctance and an observation that "I wouldn't care to make an opinion on it"). Moreover, even as Kissam tells it, his reference to the unequal pay of the "21" dealers, carried a note of challenge and hostility, for, addressed, as it was, to Sachs' statement or intimation that equality of earnings was the purpose of the tip-sharing policy, the allusion to the "21" dealers' unequal scale implied that "the joint," to use Kissam's phrase, had some other purpose.

Nor am I able to accept, as credible, the image Kissam seeks to project of Lane, Drew, and Sachs as the major participants in the discussion, and himself as saying relatively little. ("I wasn't in on most of the conversation," he testified.) Beyond a claim, in somewhat conclusional terms, that Lane and Drew expressed disapproval of the new policy, Kissam gave no details of what they said, testifying repeatedly that he could not recall more than that "basic" position by them. But the fact is that Kissam "hustled" more than most; one may clearly infer from this that he had more than most to lose from the new policy; and it does not credibly appear why Lane and Drew, rather than Kissam, would be the major participants with Sachs in the discussion. What is more, for all that appears in Kissam's account of the conversation in his direct examination, nothing was said about "hustling" during its course; yet it is evident that there was some reference to it, for under cross-examination, Kissam, somewhat reluctantly, conceded that "Mr. Sachs did mention something about it," adding that "at the present time I can't remember." It appears to me that Kissam, upon whose testimony the allegations of unfair labor practices basically rest, was not as candid as he should have been, and that view is reinforced by testimony he gave that he was actually "happy" with Sachs' new tip-sharing policy (because, so he testified, it would facilitate union organization), and was the only one of his crew who approved it—claims plainly of odds with his own testimony that he, like Lane and Drew, told Sachs that he did not like the "idea of the toke split."

Summarizing my conclusions regarding the conversation, I am convinced that each of the three dealers replied in the negative to Sachs' inquiry whether they "liked" the new policy, and to that extent credit Kissam, but I am persuaded, too, that Lane and Drew said nothing substantially beyond that, and do not credit Kissam's claim that he "wasn't in on most of the conversation," concluding, instead, that he and Sachs were the primary participants.[6] I am persuaded, also, and find,

[6] Drew testified that he "didn't actually discuss" the notice with Sachs, and then that he could not "recall" whether he and Lane said anything to Sachs In parts of a pre-hearing affidavit (pp 3 and 4) offered by the General Counsel "as past recollection recorded," and received over objection following testimony by Drew that the affidavit is "true," Drew says that he "cannot recall the full discussion but I know that we (the three dealers, presumably), let Sachs know we did not like the new method" (of tip-sharing). The transcript quotes me as expressing disagreement that the affidavit constituted "a past recollection recorded" because Drew "didn't say he has no recollection." But Drew had at several points professed a lack of it, and I do not recall making the statement in the form imputed to me. In any event, whether or not the transcript quotes me accurately, the relevant portions of the affidavit were received, and objection to it on the ground that it is inadmissible as "past recollection recorded" is not well taken. 3 Wigmore, *Evidence* § 734, 747 (3d ed. 1940) ; cf. *State* v. *Helm,* 66 Nev. 286, 304. However, the statement, "I know that we let Sachs know that we did not like the new method," is objectionable as a conclusion, and I base no findings on it (nor, for that matter, on any of the other portions of the affidavit offered, which, in any case, add nothing of substance to Drew's testimony).

that following Sachs' opening inquiry, and a reply by each of the three dealers to the effect that he did not like the new policy, a discussion limited to Kissam and Sachs developed, Kissam asking Sachs why he had made such a decision, and the discussion from the point of Kissam's inquiry developing into and continuing as an "argument" between Kissam and Sachs, following substantially the course described by Sachs in his testimony, with a display of anger by both men.

Kissam learned of his dismissal upon checking out at the end of his shift on January 28 when the timekeeper so informed him.

On the following Monday, February 1, Kissam telephoned Sachs and asked what he "should put down" as the reason for his termination (presumably for such purposes as job applications and unemployment compensation), and whether Sachs would be willing to discuss Kissam's reemployment. Sachs replied that Kissam should give dissatisfaction with his job as the reason for its termination, and that there was no possibility of Kissam's reemployment, but that he had no objection to talking to Kissam at the casino.

Kissam called on Sachs at the casino later that day or the next. In the course of the conversation, Kissam asked Sachs for "a recommendation for another job" (actually, in the sense in which Kissam uses the term "recommendation," the request was for permission to refer prospective employers to Stardust for a "recommendation"), and Sachs agreed to the request. Sachs also said that he would consult with Grillette, who was not then at the casino, regarding restoration of Kissam to his job, and suggested that Kissam call him on the following Thursday for an answer to his reemployment request.

Kissam did so, and Sachs declined to reemploy Kissam, telling him that it was Stardust's "policy" not to rehire employees who had quit or been discharged. Kissam reiterated his request for permission to refer prospective employers to Stardust for a recommendation, and Sachs again acquiesced.[7]

Kissam also had a conversation with Grillette shortly after his discharge, calling Grillette on the following day. According to Kissam, he asked Grillette for assistance in finding another job, and Grillette said he would try to help. Kissam also testified that he asked Grillette on that occasion for "a recommendation"; that Grillette said he would supply it if Kissam "would leave Tom Hanley (business agent of the Union) behind," or, in other words, abandon the Union; and that he (Kissam) replied that he would "probably do this." Grillette's version of the conversation is that Kissam said that he could not understand why "Al (Sachs) got angry"; that he (Grillette) replied that he does not blame Sachs; that Kissam asked him if he would "recommend" Kissam if a prospective employer called him; and that he said he would. The material issue regarding the conversation is whether Grillette required abandonment of the Union as a condition of a recommendation, and that will be considered at a later point.

C. *Discussion of the issues; concluding findings*

There is an underlying misconception in the General Counsel's position, expressed in his brief, that Kissam was discharged because he engaged in a "protected concerted activity"; and that is the claim that Kissam acted in "concert" with Lane and Drew in expressing their views of the new tip-sharing policy. There is no basis for a finding that what Kissam said to Sachs on the subject was the product of some arrangement or understanding he had with Lane or Drew or any other employees, or that he served as a spokesman, whether in a union or other capacity, for anyone but himself. What the General Counsel treats as "concerted activity" were simply

[7] There is some immaterial divergence in the record as to what was said in connection with the Union when Kissam spoke to Sachs at the casino regarding reemployment, Kissam claiming that he asked whether his discharge pertained "to the Union," and that Sachs denied that such was the case; and Sachs quoting Kissam as saying that he had initially thought he had been discharged "on account of the Union," but had changed his mind upon reflection For the findings made regarding the conversation, I have drawn upon Kissam's version, as it appeared to me to be more circumstantially detailed than Sachs' account. Sachs does not specifically deny that he said that he would consult Grillette, or that he suggested that Kissam telephone him on the following Thursday. Sachs also does not specifically deny making the statement regarding Stardust's rehiring "policy," although he does deny having any conversation with Kissam since the conversation at the casino on or about February 1. I think it likely that he did tell Kissam on that occasion to call him on the following Thursday, and that Kissam did so, and have made corresponding findings.

the individual replies of Kissam, Lane, and Drew to Sachs' inquiry whether they liked the new tip-sharing policy, and a mounting and angry "argument" between Kissam and Sachs that went well beyond the initial replies to Sachs' query. The mere fact that he addressed his inquiry to the three men in common, and that their replies were substantially contemporaneous, did not make a "concerted activity" of their separate remarks.

Nor will the record support a finding that Kissam, as the General Counsel puts it, "was the one chosen (from among the three dealers) for the discharge because he was the known union steward." There is nothing in the history of the relations between Kissam and Sachs, or in the exchange between them on the night in question, to indicate that Kissam's union status was a focus, or at the bottom of Sachs' ire.

The evidence fairly warrants a belief that because of his superior "hustling" ability, Kissam was disturbed by the new policy and its impact upon his tip intake; that Sachs, whether justifiably or not, genuinely saw in Kissam's questioning of his decision, and in Kissam's reference to the lower scale of the "21" dealers, a rejection of his explanation that he was seeking to equalize earnings, and a challenge to his motives and "the way I was running it" (the casino); and that he was angered by Kissam's attitude. The anger is evidenced by the fact, among others, that he reduced to personal terms Kissam's argumentative point that "bad dealers (should not) make the same amount as good dealers," by intimating that what Kissam regarded as quality in a dealer was "hustling" for tips, and that he was a "better hustler" than a "good dealer." Anger is evident, too, in Sachs' removal and destruction of the notice, and I find plausible his testimony that he did this because he had sought to benefit the dealers as well as the management, and in view of "this kind of reaction" (Kissam's), he would "just as soon" return to the former tip-sharing practice.

The nub of the matter is that it is at least as consistent with the evidence, taken as a whole, that Sachs discharged Kissam because he was angered by what he regarded as a belligerant attitude by Kissam and a challenging questioning of his motives and capability as a supervisor as it is to conclude that Kissam was discharged because of his union status or any union activity. That being the case, it is evident that the General Counsel has not sustained his burden of proof in the premises.

That view of the matter is not negated by Kissam's testimony to the effect that some months before his discharge, Grillette had told him in The Flame Restaurant that upon receipt of the telegram announcing Kissam's appointment as union steward, Cohen and Jaffe had had him pointed out and "wanted to fire" him, but had been dissuaded by Grillette. Even if one accepts this testimony, there would be no more than a suspicion that Kissam was discharged because of his union status or activity rather than as a result of Sachs' anger at the "way . . . Kissam talked to me that day," and Kissam's dissatisfaction "with the way" in which Sachs performed his functions.

But, in addition, the record warrants at least a substantial doubt of Kissam's credibility regarding the alleged restaurant discussion. The incident occurred, according to Kissam under both direct and cross-examination, about 2 or 3 weeks after the telegraphed notification to the management of his appointment as union steward, and was the *first* occasion following the notification that he spoke to Grillette "about the Union" or, in other words, about the telegram. But under cross-examination, he conceded that shortly after the wire was dispatched, he apologized to Grillette for its threatening content, thus not only corroborating Grillette's testimony that they had such a discussion, but contradicting the prior testimony he gave that the first occasion when he discussed the wire with Grillette after it was sent was the conversation at The Flame about 2 or 3 weeks after the telegram.

Now, of course, the disparity may be no more than a memory lapse, and it may well be that the restaurant incident occurred as Kissam tells it, but the General Counsel has the burden of proving the allegation in the complaint (that Grillette "threatened employees with discharge"), based upon the alleged incident by evidence of preponderant weight, and passing the question whether Kissam's testimony spells out a threat of dismissal by Grillette, I must take into account all relevant credibility considerations, and these include not only the disparity, which I do not deem a weighty matter of itself, but Grillette's contrary testimony and such substantial factors reflecting on Kissam's general credibility as his lack of candor in describing his argument with Sachs and his implausible, self-serving testimony that notwithstanding the possibility that the new tip-sharing program would reduce his income, he was "happy" with the new policy, and was the only one of his table crew

who approved of it—claims that manifestly run counter to the fact that he admittedly expressed disapproval of the new program to Sachs (not to speak of the General Counsel's contention, in his brief, that Kissam, Lane, and Drew concertedly "complained about the new rule"), and are not entitled to belief.

Taking these considerations into account, I see no reason to accept Kissam's claim regarding the alleged restaurant discussion over Grillette's denial that he made the remarks imputed to him; nor Kissam's account of his conversation with Grillette regarding a "recommendation" over that given by Grillette. One need not be persuaded that Grillette is altogether a credible witness; it is enough that Kissam's relevant testimony lacks the qualitative weight needed to support the finding the General Counsel seeks.

Finally, as in the case of the discharge, and for much the same reasons, the record will not support a conclusion that the refusal to reemploy Kissam was unlawful. To be sure, undisputed testimony by Kissam that he was rehired by Stardust about 7 years ago after quitting suggests a possibility that, contrary to what Sachs told Kissam following the latter's discharge, Stardust has no "policy" that would preclude his rehire, but at best this raises no more than a suspicion that the "policy" excuse was a pretext to conceal an unlawful motive for the refusal to reemploy Kissam. Even if one assumes that the "policy" excuse was a pretext, one may as reasonably believe, it seems to me, that it was a mask for continuing anger by Sachs toward Kissam as to conclude that it concealed an unlawful purpose.

The sum of the matter is, for the reasons stated, that the record does not establish by evidence of preponderant weight that the Respondent violated the Act by discharging Kissam, or refusing to reemploy him, or made any statements, through Grillette, abridging any Section 7 rights of employees. Accordingly, I shall recommend dismissal of the complaint.

CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact, and the entire record in this proceeding, I make the following conclusions of law:

1. The Company is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.
2. The Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.
3. The evidence does not establish that the Company has engaged in the unfair labor practices imputed to it in the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record in this proceeding, it is recommended that the National Labor Relations Board issue an order dismissing the complaint.

Sound Contractors Association [1] *and* International Brotherhood of Electrical Workers, AFL–CIO, Petitioner. *Case 28–RC–1446. December 23, 1966*

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held at Phoenix, Arizona, on March 16, 1966, before Hearing Officer Roy H. Garner. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Thereafter, the Employer filed a brief.

[1] The name of the Employer appears as amended at the hearing.