

Oak Tree Farm Dairy, Inc. *and* Martin J. Benkovich. Case 29-CA-793

February 13, 1968

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZAGORIA

On November 3, 1967, Trial Examiner Paul Bisgyer issued his Decision in the above-entitled proceeding, finding that 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 Trial Examiner's Decision and a supporting brief, and the Respondent filed an answering brief.

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.

The Board has reviewed the rulings of the Trial Examiner made 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, the General Counsel's exceptions and supporting brief, the Respondent's answering brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the complaint be, and it hereby is, dismissed.

¹ In the absence of exceptions, we adopt, *pro forma*, the Trial Examiner's finding that the General Counsel has failed to sustain his burden of proving by a preponderance of the evidence that Benkovich's discharge violated Section 8(a)(1) and (3) of the Act.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

PAUL BISGYER, Trial Examiner: This proceeding, with all the parties represented, was heard on June 15, 16, and 20, 1967, in Brooklyn, New York, on the complaint of the General Counsel¹ and the answer of Oak Tree Farm Dairy, Inc., herein called the Respondent. In issue are the questions whether the Respondent in violation of Section

¹ The charge, on which the complaint is based, was filed on November 21, 1966, and a copy was served by registered mail on the Respondent the next day.

8(a)(3) of the National Labor Relations Act, as amended, discriminatorily discharged Martin J. Benkovich because of his union or other concerted activity, and whether, by this and other conduct, it interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act. At the close of the hearing, the General Counsel and the Respondent orally argued their positions which they thereafter amplified in briefs submitted to the Trial Examiner. The Respondent's motion to dismiss the complaint, on which ruling was reserved at the hearing, is now granted for insufficiency of proof, as found below.

Upon the entire record,² and from my observation of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a New York corporation with its principal office and plant in East Northport, New York, is engaged in the bottling, sale, and distribution at wholesale of milk, orange juice, fruit juice, and related products. In the course and conduct of its operations, it annually purchases milk, dairy products, containers, bottles, and other goods and materials valued in excess of \$50,000 which are shipped to its plant from points outside New York State. In addition to its wholesale business, the Respondent, through its wholly owned subsidiary, Dairy Barn Stores, Inc., operates 47 retail stores in Nassau and Suffolk Counties, New York, for the sale to the public of its dairy and other products. Gross income derived from its retail operation exceeds \$500,000 per year.

The Respondent admits, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. I further find that effectuation of the policies of the Act warrants the Board's assertion of jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

It is undisputed that Local 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

1. Background; creation of the employee committee

Essentially, it is the General Counsel's position that the Respondent unlawfully terminated the employment of Martin J. Benkovich because of his efforts to reestablish the Union as the collective-bargaining representative of the Respondent's plant employees and his protected concerted activity to improve the employees' terms and conditions of employment. Prior to 1962, the Union had represented these employees as part of a multiemployer

² The General Counsel's offer to introduce in evidence G.C. Exh. 4 for identification, on which ruling was reserved, is received. Also, in accordance with his unopposed request made in his brief to correct various typographical errors in the transcript of testimony herein, it is hereby ordered that the transcript be corrected as requested.

bargaining unit for some 20-odd years pursuant to successive collective agreements. With the expiration of the then current contract in October 1961, the Union called an industrywide strike which lasted until about November 7, 1961.³ Thereafter, the negotiators for the Employers and the Union reached agreement the following November 18. The Respondent, however, refused to sign this multiemployer agreement with the result that the Union ceased representing the Respondent's employees.

Since the Union's withdrawal, a three-man committee elected by the employees has been functioning as their representative to present and discuss with management grievances, complaints, discharges, and proposed improvements in terms and conditions of employment.⁴ For such purposes, the committee meets monthly with Arthur G. Berger, the Respondent's vice president and secretary, and Dieter Cosman, its president, if available, both of whom are the Respondent's principal stockholders. It has been the Respondent's long-declared policy to maintain terms and conditions of employment at least equal to, if not better than, those prevailing in the industry under union contracts.⁵

2. Benkovich's employment history; his union and concerted activity

Benkovich, whose competency as an employee is candidly conceded, was first employed by the Respondent in its plant as a utility man, performing bottling, case stacking, loading and unloading of trucks, and other duties. At the inception of the Union's strike in 1961, he continued working in the plant to prevent spoilage of milk and tried to persuade others to do likewise. Apparently, he thereafter joined the strike. In 1962, Benkovich was promoted to foreman, a supervisory position,⁶ working under Superintendent Charles Ackerly. In August 1964, Benkovich resigned as foreman rather than transfer from the morning to the night shift and returned to his rank-and-file job of utility man, which he held until his discharge on November 14, 1966, under circumstances to be considered below.

During the period of his employment with the Respondent, Benkovich, who had been a union steward on his previous job, was regarded by the committee and other fellow employees as the most knowledgeable plant employee with respect to union terms and conditions of employment prevailing in the industry and for that reason was consulted on those matters. In discussions with the committee and employees, he was outspoken in his criticism of existing terms and conditions of employment at the plant and changes that the Company made or contemplated making, and advocated improved fringe benefits. Specifically, up until his discharge, he voiced his opposition to various facets of the Respondent's pension pro-

gram, such as the related severance pay plan, age retirement requirement, a recent amendment of the plan, effective June 1, 1967, to make provision for the contingency of employees being unionized and covered by a union pension plan, and the absence of employee participation in revising or administering the existing pension program. It was also his expressed view that the fringe benefits at the plant were progressively falling below union standards and reflected a departure from the Respondent's announced policy to keep abreast, if not ahead, of those standards. At some of these discussions, Superintendent Ackerly and foremen, all of whom had a personal interest in an improved pension system and other benefits,⁷ were present. Often, at Benkovich's instance, the committee presented these objections at meetings with management, without specifically identifying the source. According to Jacobs' uncontradicted testimony, at one of the committee's regular monthly meetings with management sometime after the July meeting but before Benkovich's discharge, Berger or Cosman referred to Benkovich as an "instigator." However, while Jacobs could not recall the context in which this term was used, he testified that the label "instigator" had been planted on Benkovich about 4 years previously and was generally used by employees and supervisors in a kidding manner.

In the middle or last week of June 1966,⁸ Union Delegate Charles Simpson communicated with Benkovich and arranged for himself and Union President John Kelly to meet with Benkovich at the latter's home. At this meeting, they discussed ways and means for reactivating the Union in the plant. With this objective in mind, another meeting at Benkovich's home was set up, at which committeemen who were considered friendly to the Union would be invited. Accordingly, at the plant Benkovich invited George Jacobs who, in turn, spoke to Frank Murphy. Both committeemen agreed to attend the meeting at which Benkovich planned on serving dinner. On Saturday, probably July 2, while Jacobs and Murphy were at work, Respondent's president, Dieter Cosman, approached them. Indicating that he was aware that they were going to a dinner meeting with the Union at Benkovich's home, Cosman told them to have a good time, listen to what the Union had to say, and compare the benefits the Union offered them with what they then enjoyed. Cosman also added that "out of curiosity—[he would] like to know what it comes down to."

At the appointed time, Jacobs and Murphy showed up at Benkovich's home where they met Simpson and Kelly and informed Benkovich of Cosman's awareness of that meeting. In the ensuing conversation, the Respondent's wage scales, pension program, welfare, and other benefits were compared with the Union's standards. The union officials also questioned Benkovich, Jacobs, and Murphy concerning their attitude toward the Union and received

³ On November 13, 1961, one of the Respondent's employees filed a petition (Case 2-RD-554) to decertify the Union as the bargaining representative of the Respondent's employees. The Regional Director dismissed the petition the following month for the reason that a single employer unit was inappropriate in view of the fact that the Respondent had not timely withdrawn from the multiemployer bargaining unit. The dismissal was sustained by the Board on January 26, 1962.

⁴ Despite the General Counsel's innuendoes, the complaint does not allege the committee to be a company-dominated or assisted labor organization proscribed by Section 8(a)(2) of the Act. In fact, although such an allegation was originally included in the unfair labor practice charge filed herein, the Regional Director subsequently approved the withdrawal of that allegation.

⁵ Brangle Brink Dairy, Inc., in which Berger, its secretary, and Cosman have a 50-percent interest, obtains its bottled milk and other products for its retail trade at the Respondent's plant. For a number of years, Brangle Brink has been in contractual relationship with the Union. The Respondent's wholly owned subsidiary, Dairy Barn Stores, Inc., is also under contract with Local 1500 of Retail Clerks Union.

⁶ This position is sometimes referred to in the record as assistant foreman.

⁷ When the Union was the bargaining representative of the Respondent's employees prior to 1962, Ackerly and foremen were covered by the collective agreements.

⁸ Unless otherwise specified, all dates refer to 1966.

a favorable response. In answer to Benkovich's inquiry as to what steps they should take to unionize the plant, the union officials suggested that they only ascertain the employees' desires for union representation.

Following this meeting, there apparently was some covert union discussion among the employees. According to Benkovich, he inquired of "maybe three" employees how they felt about bringing a union into the plant.

At the committee's next regular monthly conference with management on July 7, which Berger and Cosman attended, the subject of the Union's meeting at Benkovich's home came up. Either Berger or Cosman asked the committee how they liked the union meeting and whether they had a good time, and proceeded to inquire whether the Union's pension and welfare plan could be satisfactorily compared with the Respondent's. Jacobs answered that the Respondent's was better. Referring to other employment conditions which were mentioned at the union meeting, Jacobs indicated that the Company's were superior to those offered by the Union and expressed no desire for having the Union in the plant. It is quite clear that the subject of the union meeting constituted only a "minor" part of the committee-management discussions, which were principally devoted to the adjustment of employee grievances.

A second union meeting was held about August in New York City at the Teamsters Joint Council's office. In attendance were Joint Council President Taratola, Union Delegate Simpson, Union President Kelly, Benkovich, and Jacobs. Here, Benkovich and Jacobs were told, in answer to their question, that the time was not ripe yet for the organizational drive at the plant and that they were to sit tight until they received further word from the Union.

Following this Joint Council meeting, Benkovich refrained from engaging in union conversations in the plant except that he informed an employee, who wanted to know when the Union was going to move, to lay low for the time being. At a later time, Benkovich himself asked Simpson when could he proceed to organize the employees and was again advised to wait. In this abortive state of the Union's organizational movement Benkovich was discharged.

3. The Respondent's rule against pilferage; Benkovich's first discharge and reinstatement

It has been the Respondent's practice to permit its employees to purchase milk and fruit juices at discount prices. It has also had in effect a longstanding rule forbidding employees to take any merchandise without paying, and warning them that they risked discharge if they

⁹ The full text of the notice, signed by Berger, read as follows:

It seems that occasionally it becomes necessary for me to state company policy. It should not be necessary to restate this policy but apparently it is. This company will not tolerate the misappropriation of merchandise belonging to the company regardless of the amount involved.

Any employee found misappropriating company property, whether it be one quart of milk or whatever else, will be dismissed immediately.

This warning is no more severe than the provision in the Union's industry contracts which make theft of company property a ground for summary discharge.

¹⁰ This notice, over Berger's signature, stated:

Effective immediately, any employee purchasing milk or other items, will have his purchase checked by the foreman prior to leaving the dairy. This is being instituted for the protection of the employee as well as anyone else since in this manner suspicion cannot be cast against you. There

did so. Because this rule was being widely ignored both by employees and supervisors, the Respondent posted a notice in the plant on November 22, 1963, reminding them of the consequences of misappropriation of company property "whether it be one quart of milk or whatever else."⁹ According to Benkovich's testimony, at some unidentified time after this notice was posted, Vice President Berger called a meeting of employees at which he stated that he was aware that employees were still taking products without paying and directed that that practice stop immediately. As recently as January 31, 1966, long before any interest in the Union developed, the Respondent, apparently to curtail pilferage, posted a notice¹⁰ requiring employees to have their purchases checked by foremen.

In addition to the foregoing, there is credible evidence that at various employee meetings Berger repeated his admonition against pilferage, as well as cautioned employees against taking merchandise in Dairy Barn deposit bottles which were redeemable at 25 cents each at Dairy Barn stores and supermarkets.¹¹ However, notwithstanding the Respondent's legitimate concern over pilferage, its supervisors, and perhaps Berger and President Cosman, too, were manifestly lax in enforcing these rules, although there is evidence that at least four employees, one of whom was a steward during the Union's incumbency and another a foreman, were terminated for taking company products. These discharges were made by Berger and Cosman whose policy has been to take such action only if either of them personally catches the offender stealing. However, Berger or Cosman might give an offender another chance if this was the first time he was caught and he otherwise deserved it.

On July 29, 1965, Cosman observed Benkovich leaving the plant with six half-gallon bottles of milk and four half-gallon bottles of orange juice, for which he did not pay. By letter dated July 30, Cosman discharged Benkovich for this offense. Following receipt of this notification, Benkovich met with Cosman and Berger at the plant to seek his reinstatement. After much discussion and to preserve Benkovich's interest in the Company's pension plan, Cosman relented and permitted his reinstatement with a loss of 2 days' pay only. However, as a condition of returning to work, Benkovich was required to write and sign an undated resignation with the understanding that it would be used only if he repeated his offense.¹²

4. Benkovich's final termination

As a result of his 1965 discharge experience,

may be times when you will be inconvenienced for a few minutes because the foreman is busy but of necessity you will have to wait and have your purchases checked

Please cooperate

It appears that this notice remained posted about 4 weeks.

¹¹ In so doing, I reject Benkovich's contrary testimony regarding the taking of Dairy Barn deposit bottles. Although there is also testimony that a notice, which specifically forbade taking products packaged in Dairy Barn deposit bottles, was posted in the plant, no such document was produced. However, since the November 22, 1963, notice, quoted above, referred to company property, it is reasonable to assume that deposit bottles, which are worth 25 cents, fall within the company rule.

¹² There is testimony given by Berger, and demed by Benkovich, that, before the 1965 incident, Berger saw Benkovich leave the plant with concealed merchandise and cautioned him to stay clean. This testimonial conflict is not important enough to resolve

Benkovich testified, he refrained from taking any milk or juice, whether by purchase or otherwise, until October 1966 when, because of his wife's hospitalization and subsequent convalescence, he found it necessary to avail himself of the privilege of buying these items at the plant.¹³ From that date until the date of his discharge on November 14, 1966, Benkovich made purchases about twice a week or a total of 8 to 10 times. His normal procedure in making purchases was to come to the plant before he was scheduled to start work at 7 in the morning and inform his foreman, Walter Henning, that he was taking milk and orange juice, without indicating the amount. Then, after obtaining those items, either he or his son would drive home with them. At 7 o'clock he would return to go to work and at some time during the day he would pay Henning for his purchases.¹⁴ It is undisputed that, contrary to company rule, Henning never checked Benkovich's purchases but accepted his word as to what he bought, even though he suspected Benkovich of taking more than he paid for. Moreover, Henning admitted that he was aware that Benkovich was taking milk and orange juice in Dairy Barn deposit bottles in disregard of company instructions and that he did not put a halt to this practice.

During the 4-week period preceding Benkovich's final discharge, Henning reported to Vice President Berger that shortages of Dairy Barn bottles of milk and orange juice had shown up in his daily inventories and informed Berger that he believed that Benkovich was taking more of these products than he was paying for. Berger, for some personal reason, delayed taking action on this report until November 14, when he came to the plant about 5 or 5:30 in the morning and concealed himself in the eaves of the roof above the icebox where he would be in a position to observe Benkovich as he left the plant with milk and orange juice.

On this day, Benkovich arrived at the plant before 7 in the morning. As was his custom, he informed Henning that he was going to take some milk and orange juice. Thereupon, he entered the icebox and, after passing by the area where nondeposit bottles of milk and orange juice were located, picked up three half-gallons of milk and one half-gallon of orange juice,¹⁵ all in Dairy Barn deposit bottles. Benkovich then left the plant and placed the bottles in his car and his son drove off. In the meantime, Berger from his vantage point, observed Benkovich carry out the four Dairy Barn bottles of milk and orange juice for his son to take home.

Benkovich then returned to the filler machine where Henning was busily engaged "casing" bottles of milk, handed Henning a dollar bill for the items he purchased, and relieved him in the work he was performing. At this point, there is a divergence in the testimony as to what else happened. According to Benkovich, although he owed the Company \$1.20 for his purchase,¹⁶ he did not have a sufficient opportunity, when he gave Henning the

dollar, to reach into his pocket for the additional 20 cents or to inform him that he owed that sum because he (Benkovich) immediately became involved in "casing" the bottles and Henning quickly left that area. Benkovich further testified that a few minutes later, Henning returned and, on the manifest assumption that Benkovich had bought only three half-gallons of milk and orange juice, threw Benkovich a dime as change, which he caught. At this time, too, Benkovich testified, he was unable to call Henning's attention to the fact that he still owed money for one bottle for the reason that Henning again rushed away and he (Benkovich) was still preoccupied in removing bottles from the conveyer and packing them in cases. As for his failure to liquidate his indebtedness later in the day, Benkovich explained that he had forgotten to do it.

Henning, on the other hand, gave this simple account: He asked Benkovich what he had taken. Answering that he had taken two half-gallons of milk and one half-gallon of orange juice, Benkovich handed Henning one dollar. Henning, thereupon, gave Benkovich 10 cents change, went to the office to make out a cash sales ticket, and thereafter returned to the filler and watched Benkovich at work.

I am not impressed with Benkovich's testimony regarding his failure to pay the full amount of his purchase, which appears to me to be too improbable to admit of belief. By contrast, I find Henning's account more plausible and accordingly credit it.

After watching Benkovich carry out of the plant three half-gallon bottles of Dairy Barn milk and one half-gallon bottle of orange juice, Berger proceeded to his office, telephoned Henning, and directed him to check his stock. Evidently at this time, Henning advised Berger that Benkovich had paid for two bottles of milk and one bottle of orange juice. Later Henning reported to Berger that there were three Dairy Barn bottles of milk and one bottle of orange juice less than that shown in his earlier inventory.

Shortly before Benkovich's shift ended in the afternoon, Berger summoned him to his office. In Superintendent Ackerly's presence, Berger told Benkovich that he was discharged for taking that morning more milk than he paid for. Benkovich neither denied the accusation nor offered any explanation.

5. Efforts to secure Benkovich's reinstatement

A few days later, Benkovich and employee committeemen Jacobs, Murphy, and Calcagno conferred with Berger to urge him to reconsider his decision and reinstate Benkovich. Berger rejected their plea, declaring that in 1965, Benkovich was caught stealing and was given another chance and that he (Berger) was not now disposed to excuse Benkovich's latest theft. Benkovich replied that the 1965 incident had been resolved and de-

most, if Benkovich's testimony is accepted, it would simply reveal a lax practice of enforcement of company rules.

¹³ Although at the time of this incident half-gallons of orange juice were bottled only in Dairy Barn deposit bottles, it appears that quarts of orange juice packaged in disposable containers or nondeposit bottles were also available.

¹⁶ The Respondent charged employees 30 cents for a half-gallon of milk and 50 cents for a half-gallon of orange juice. However, Henning had mistakenly been charging Benkovich the same price for orange juice as for milk.

¹³ There is contradictory testimony that before this date Benkovich resumed taking milk and orange juice but paid for less than he had actually taken. In view of my ultimate determination here, I find it unnecessary to resolve this conflict, except as it relates to his last purchase on November 14, 1966, which led to his discharge.

¹⁴ Benkovich testified that on two occasions Henning told him not to pay for his purchases if no one had seen him take the milk and orange juice and that he declined the offer. Henning denied this testimony but admitted that on one occasion in 1966 he had given Benkovich milk without charge, in accordance with company policy, because Benkovich indicated that he could not afford to pay. I find no necessity to determine the truth since at

nied the accusation on which his discharge was assertedly based. He explained that the circumstance of Henning's hurried departures when he handed him the dollar bill, and when Henning gave him the 10 cents change shortly thereafter, deprived him of the opportunity to settle his account or notify Henning that he still owed the Company for one bottle of milk. Benkovich also stated that on several occasions Henning had declined payment for his purchases or had charged him less than was due. Probably at this point, Berger added that Benkovich should not have taken the milk and orange juice in Dairy Barn bottles. This elicited Benkovich's response that everybody was doing it. During these discussions, Berger also charged that Benkovich telephoned Henning the night of his dismissal and asked Henning to change his story. Benkovich denied this charge, too, insisting that he merely inquired what the story was.¹⁷ Further along in the discussions, a committeeman indicated doubt that Berger had actually observed Benkovich steal Dairy Barn bottles of milk and orange juice, as Berger had claimed. This irked Berger to the point where he offered to divulge his hiding place, against his better judgment, to prove that he was in a position to see Benkovich carry out those items. Berger thereupon led two committeemen to the crawl space in which he had concealed himself at the time of the incident. Upon their return to the group, Jacobs described the hiding place to the others and confirmed Berger's assertion. The committee then appealed to Berger to revoke the discharge and impose a suspension or other discipline upon Benkovich. Berger declined to do so and the meeting broke up with Benkovich announcing his intention to resort to other steps against the Respondent.¹⁸

According to the credible testimony of Jacobs, sometime after the foregoing meeting, when Cosman returned from a vacation, employees spoke to Cosman about Benkovich's discharge. This evoked advice to them to refrain from taking Dairy Barn bottles of milk and, if milk was needed, to see him and he would get it for them.

B. Concluding Findings

1. With respect to the discharge

It is the General Counsel's contention that Benkovich was unlawfully discharged on November 14 in reprisal for his union and other protected concerted activity and that his admitted failure to pay for all the milk and orange juice he had taken that morning and the fact that he had taken these products in Dairy Barn deposit bottles were mere pretexts to conceal its true discriminatory motivation. Indeed, the General Counsel ventures the suggestion that, prior to the events on November 14, the Respondent unsuccessfully attempted "to set up" Benkovich for discharge by various subterfuges which finally came to fruition with his fateful purchase on that day. I find insufficient evidentiary support in the record for the pretext theory and much less for the entrapment charge.

It is quite clear that the Respondent for years had been aware of Benkovich's active interest in improving working conditions at the plant and his alertness in seeing that these conditions did not fall below union standards prevailing in the industry. Yet, it took no retaliatory measures to impede or frustrate Benkovich's efforts. In fact, if the Respondent were concerned in the least over his concerted activity, it could have availed itself of the opportunity in July 1965 to get rid of him permanently but did not do so. As discussed previously, at that time the Respondent had discharged Benkovich for improperly taking milk and orange juice but reinstated him a few days later, despite its knowledge of his concerted activity. Similarly, after learning of Benkovich's interest in reactivating the Union in the plant about July 2, 1966, the Respondent showed no inclination to curb or discourage it, nor did it even make any adverse comment or criticism of his union attitude.¹⁹ On the contrary, it appears that the Respondent refrained from engaging in any of the familiar forms of antiunion propaganda, or campaigning, coercive or otherwise, from which an inference of discriminatory motivation for Benkovich's discharge could be drawn. Certainly, President Cosman's innocuous remarks to committeemen Jacobs and Murphy on July 2 to have a good time at the dinner meeting with union officials scheduled at Benkovich's home that evening, and his suggestion that "out of curiosity" they advise him what terms and conditions of employment the Union offered them cannot realistically serve to taint the avowed reason for Benkovich's discharge. Nor does the Respondent's inquiry at a regular meeting with the committee concerning the terms and conditions of employment the Union proposed to establish at the plant necessarily aid the General Counsel's case. Significantly, the discharge based as it was on an offense Benkovich had actually committed, occurred about 4 months after the Respondent's above inquiry at a time when the Union had still not initiated its organizational drive and Benkovich was not even engaged in proselytizing employees to the Union's cause.

Also negating a finding that unlawful considerations dictated the discharge is the fact that Benkovich had previously been separated for taking milk and orange juice without paying in July 1965, at a time when he had exhibited no union interest. Although, as noted above, the Respondent, out of compassion, subsequently reinstated him with the loss of only 2 days' pay, it was with the admonition not to repeat his offense or risk acceptance of his undated resignation he was required to give as a condition of reinstatement. Moreover, there is evidence that a discharge for pilferage was not an unusual event in the plant. Thus, the record discloses that on other occasions, both before and after the discontinuance of bargaining relations between the Respondent and the Union in 1961, the Respondent had terminated other employees who were caught by President Cosman or Vice President Berger in the act of taking company products without permission or were disciplined if that were their first offense, although, to be sure, there can be no question that super-

¹⁷ The substance of this conversation is the subject of conflicting testimony which requires no resolution.

¹⁸ The foregoing findings are based on the combined testimony of Jacobs, a disinterested and candid witness, and Benkovich, which is mutually corroborative in significant respects.

¹⁹ There is evidence that at one committee meeting, either President Cosman or Vice President Berger referred to Benkovich as an "agitator." While in another context the use of that label may reveal dissatisfaction with an employee's union activity, the evidence here shows that this label had been pinned on him in the plant a long time ago and that both employees and management jokingly used that term as a nickname for Benkovich.

visors did not strictly enforce company rules in that respect.²⁰ Finally, apart from the absence of probative and reliable evidence of antipathy to union or other concerted activity, it is undisputed that the Respondent at all material times has maintained a contractual relationship with the Retail Clerks Union for the employees of the Respondent's wholly owned subsidiary, Dairy Barn Stores, Inc., and that its two principal stockholders, Cosman and Berger, hold a 50-percent interest in Brangle Brink Dairy Company which is under contract with the same Teamsters Union involved herein.

It is established law that an employer may discharge an employee for any reason, good, bad, or indifferent, provided he is not actuated by considerations of the employee's protected union or concerted activity. While it is also settled that a "justifiable ground for dismissal is no defense if it is a pretext and not the moving cause,"²¹ such a case was not proved here. The most that can be said is the Respondent did not treat Benkovich fairly and should have warned him again to heed company rules regarding pilferage in view of its demonstrated laxity in their enforcement. However, an employer's unfairness or unreasonableness, if such be the case, is not a matter with which the Act is concerned. Whatever suspicion conduct of this type evokes, it cannot, of course, substitute for the evidence the Act requires to support a charge of discrimination or unlawful interference with an employee's protected concerted activity.²²

Accordingly, I find that the General Counsel has failed to sustain his burden of proving by a preponderance of the evidence that Benkovich's discharge violated Section 8(a)(1) and (3) of the Act. It is therefore recommended that the relevant allegations of the complaint be dismissed.

2. With respect to interference, restraint, and coercion of employees

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by interrogating employees concerning their union membership, activities, and sym-

²⁰ On the record before me, Foreman Henning's laxity in enforcing company rules cannot reasonably be viewed, as the General Counsel urges, as part of a premeditated plan "to set up" Benkovich for discharge.

²¹ *N.L.R.B. v Solo Cup Company*, 237 F.2d 521, 525 (C.A. 8).

²² Since it is undisputed that Benkovich was informed at the time of his discharge that the reason for his separation was his failure to pay for all

pathies; warning and directing employees to refrain from becoming or remaining members of the Union or supporting that organization; offering, promising, and granting employees wage increases and other benefits to induce them to refrain from membership in, and support of, the Union; and creating the impression of surveillance of union meetings and union and concerted activities.

I find the record is woefully lacking in evidence to substantiate these allegations. Under the facts and circumstances of this case, I am unable to view, as does the General Counsel, President Cosman's remarks to employees to enjoy their dinner meeting with union officials at Benkovich's home on July 2 as creating the impression of surveillance. Moreover, in disagreement with the General Counsel, I find that Cosman's request to committeemen Jacobs and Murphy to advise him what the Union had to offer them was nothing more than an innocuous remark not calculated to be, or having the effect of, a threat "to avoid entanglements" with the Union, or a promise of benefit "to match" anything the Union offered. Nor can I understand how at a regular meeting with management the committee's favorable comparison of the Respondent's existing terms and conditions of employment with those proposed by the Union, made in response to the Company's inquiry, could constitute an unlawful promise of benefit by the Respondent, as the General Counsel seems to urge.

In short, as I find that the General Counsel's burden of proving the foregoing alleged unfair labor practices has not been sustained, I recommend the dismissal of the complaint in its entirety.

RECOMMENDED ORDER

Upon the basis of the foregoing finding and conclusions and upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is ordered that the complaint issued herein against the Respondent, Oak Tree Farm Dairy, Inc., be, and it hereby is, dismissed.

the products he had taken, the statement in the letter sent by the Respondent's attorney to the General Counsel's attorney, in response to the unfair labor practice charge served on his client, that Benkovich's termination was based upon his "breach of company rules regarding his performance of regular duties," does not necessarily prove that the asserted pilferage reason was pretextual.