

CPR INSTITUTE FOR DISPUTE RESOLUTION

ARBITRATION

DAIRY QUEEN OPERATORS' ASSOCIATION

and

**DAIRY QUEEN OPERATORS' COOPERATIVE,
Claimants and Respondents by Counterclaim**

and

**INTERNATIONAL DAIRY QUEEN, INC.
and
AMERICAN DAIRY QUEEN CORPORATION,
Respondents and Counterclaimants**

**RULINGS ON:
Claimants' Motion for Clarification
and
Claimants' Emergency Motion for Contempt**

Claimants have filed two post-award motions: one for clarification of the April 2, 2004 Award and a second motion for contempt of the April 2, 2004 Award.

I. MOTION FOR CLARIFICATION

The Arbitrator will first address Claimants' Motion for Clarification. Claimants seek clarification of the Award with respect to two issues:

1. Are Respondents required to sell new products to DQOC-endorsed warehouses at the same prices and on the same terms that Respondents offer IDQ-authorized warehouses pursuant to §III.F.4 of the Class Settlement Agreement (the "Agreement") when DQOC-endorsed manufacturers are unable to provide new products for LTOs to DQOC-endorsed warehouses in time for the LTO promotions in question?

2. Is a manufacturer's pricing of a product an appropriate consideration in determining if in fact the manufacturer is a "reasonable alternative manufacturer" within the meaning of §III.E.3 of the Agreement?

A. The LTO Issue and Section III.F.4 of the Agreement

Claimants note that LTOs are relatively new to the Dairy Queen system, lasting typically 60 days and designed to entice customers to react to new products; if successful, IDQ might add the tested product to the permanent Dairy Queen menu. As a practical matter, Claimants point out that there is often insufficient time between announcement of the scheduled LTO and the roll out of product to find a "reasonable alternative manufacturer," and that, therefore, Respondents should be required to sell new LTO products to DQOC-endorsed warehouses at the same price and on the same terms that Respondents offer IDQ-authorized warehouses during the term of the LTO.

Respondents respond to Claimants argument by looking to the obligations stated in the Agreement.

The parties addressed the issue of "new products" in §III.F. of the Agreement. Entitled "Menu Control and Development of New Products", the parties acknowledge IDQ's right to designate required and optional menu items and its right to develop new products. At the time the parties entered into the Agreement, Respondents had not used the marketing tool of LTOs in any significant way.¹ The product approval process negotiated by the parties takes a minimum of 47 to 55 business days and can take longer

¹ Claimants' Reply in Support of Motion for Clarification, p. 4.

if additional product samples have to be submitted. The product approval process can overlap the introduction of the LTO product. Had the LTO process been up and running in March 2000 when the parties executed their Agreement, they might have addressed its unique timing challenges and created more nuanced language. As it stands, §III.F.4 of the Agreement provides that if the “DQOA/DQOC and the proposed manufacturer or processor have proceeded with due diligence during the new Product development process...but the DQOA/DQOC and the proposed manufacturer or processor are not able to manufacture or process and sell the new Product on the introduction date for the new Product, then IDQ/ADQ will sell the new Product to the DQOA/DQOC, or their endorsed warehouses, for a period not to exceed the shorter of: (a) sixty (60) business days after the introduction date of the new Product; or (b) twenty (20) business days after the Product sample from a production run of the DQOA/DQOC endorsed manufacturer or processor is approved by ADQ.”

On an LTO production scale, there is simply insufficient time to jump through enough hoops to trigger the 20 or 60-day sale-on-same-price-and-terms provision of §III.F.4. Claimants are left in the position of deciding not to attempt to find an alternative at all, or investing time and effort in getting a proposed alternative manufacturer to invest time and effort in an attempt that definitionally cannot succeed. However, the Agreement provision cuts both ways. If DQOA/DQOC and the proposed manufacturer or processor have proceeded with *due diligence* and the proposed manufacturer/processor is *not* able to manufacture or process and sell the new Product on the introduction date, then IDQ must sell to DQOA on the “same price and terms.” The

parties chose arbitration as the mechanism to interpret “due diligence”. The arbitration process commences with a demand for arbitration but provides no mechanism for an expedited hearing, leaving the distinct possibility that the LTO buying season will pass before arbitration determines the due diligence of the DQOA/DQOC and the proposed manufacturer.

The Arbitrator notes the instructive provisions of the Agreement: §III.O.2 prohibits the arbitrator from making any award that extends or modifies any term of the Agreement and the Arbitrator is unwilling to write in a provision that addresses the new business challenge of LTOs. Section III.M recites that a significant portion of the consideration for the Agreement is the elimination of disruption that disputes cause between the parties and requires the parties to cooperate in good faith with one another. Section III.M.9 acknowledges that the DQOA/DQOC can play a meaningful role in the advancement of the Dairy Queen system. Reading these several sections together, and keeping in mind that this is a year 2000 Agreement addressing year 2004 business issues, the smooth handling of LTOs might be a fruitful topic of further negotiation by the parties. The Arbitrator is unempowered to write language to solve business problems unanticipated by the parties.

B. Is Price an Appropriate Consideration in Determining Whether a Manufacturer is a “Reasonable Alternative Manufacturer” of a Particular Product Under the Agreement?

The Arbitrator found that Dean Foods owns Frostbite and as Dean Foods “sells” to IDQ, Frostbite was not a “reasonable alternative manufacturer” for manufactured novelties.² Because the Arbitrator found that Dean sells to IDQ, she did not address the question whether it is appropriate to consider the price at which the manufacturer offers to sell a product. The Claimants again ask her to do so.

Price obviously is a critical consideration to Claimants in deciding whether to go with an alternative manufacturer. The whole point of finding an alternative source for product is to create a cost savings for DQOA/DQOC. Although the motivating reason, the parties nowhere address price point in defining a “reasonable” alternative manufacturer. The bracketing definitions are solely that the manufacturer/processor is not selling to IDQ and that it does not need to invest in major equipment.³ Pricing in part depends on a manufacturer’s costs of labor, transport and materials, and in a closed marketplace it might be that prices vary little or at least insufficiently to make it cost effective for DQOA to bring an alternative manufacturer on line. Market driven pricing is not addressed in the Agreement and the Arbitrator, following the parties’ admonishment to not extend any lawful term of the Agreement, declines to invent new terms. The Arbitrator offers the following caveat: In the testimony proffered by Claimants there was a suggestion that Frostbite’s pricing was not competitive *because* of its relationship to Deans Food. Were *that* claim to be made at any time prospectively in

² Award and Opinion, p. 27.

³ Agreement, §III.E.3.

the dealings of the parties regarding any alternative source, price could become relevant under the Agreement.

II. MOTION FOR CONTEMPT: MANUFACTURED NOVELTIES

The Arbitrator **DENIES** Claimants motion to hold Respondents in contempt and hence will not assess Claimants' attorneys' fees and costs in connection with the motion. The Arbitrator **GRANTS** Claimants' motion, and thereby clarifies her Award, to order Respondents to sell manufactured novelties to DQOC-endorsed warehouses *immediately* at the same price and on the same terms that Respondents offer to IDQ-endorsed warehouses. This order is limited to the period May 2004 through August 2004. The Arbitrator declined in her April 2 Order and Opinion to issue a general prospective order as to all future manufactured novelties and LTO products.⁴ Claimants' set forth their efforts to locate a reasonable alternative manufacturer of manufactured novelties in their exhibits 68 and 69. Frostbite was the only manufacturer indicating interest and capability. Frostbite is owned by Dean Foods who "sells" to IDQ.⁵

Given that Spring is turning to Summer and the time to order manufactured novelties is now, there is no time to set the matter for arbitration, assuming that

⁴ Award and Opinion, p. 37. Future was intended to refer to products not considered in the course of this Arbitration.

⁵ The Arbitrator notes Respondents' explanation of Dean Foods' relationship to IDQ. (Respondents' Response to Claimants' Motion for Clarification, fn. 1.) The Arbitrator was satisfied that the relationship was sufficient to come within the meaning of the term "sell" in §III.E.3 of the Agreement.

Respondents on May 4 identify a proposed alternative source. Although §III.E.5.b of the Agreement allows IDQ 20 business days within which to respond to Claimants' certification sent by Mr. Cooper on April 6, 2004, there is no requirement that Respondents actually take all 20 business days. Respondents have had Exhibits 68 and 69 since November 21, 2003; testimony was proffered on Claimants search for alternative manufacturers. It was entirely foreseeable that if Frostbite was not a reasonable alternative manufacturer, Claimants would invoke §III.E.1.b.⁶

Dated: May 4, 2004

Judith Meyer, Standing Arbitrator

⁶ Under the Agreement, Respondents have alternative choices: either to approve a manufacturer that offers a functionally equivalent product, or sell to DQOC-endorsed warehouses at the same price and on the same terms.