

NO. A05-0446

State of Minnesota
In Court of Appeals

All Metro Supply, Inc.,

Respondent,

vs.

Keith Werner,

Defendant,

vs.

Green Gardens Nursery and Landscape, Inc.,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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TABLE OF CONTENTS

STATEMENT OF THE LEGAL ISSUES 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT 8

 I. Standard of Review 8

 II. The District Court was asked to modify or correct a faulty and incomplete award, pursuant to Minn. Stat. §572.20 Subd. 1(1) and subd. 2, and reasonably and properly reserved confirmation of the award until after it sought clarification from the arbitrator. 8

 III. It was proper procedure for the District Court, conducting judicial review pursuant to a motion under Minn. Stat. §572.20 Subd. 1(1), to refer the matter to the arbitrator for clarification and then confirm the award as clarified by the arbitrator. 11

 IV. The District Court acted appropriately by confirming the award amended by the arbitrator on remand to remove ambiguous language and definitively determine the parties’ dispute on all issues, although no request for clarification had been made by the parties under Minn. Stat. §572 .16 within 20 days of delivery of the award. 13

CONCLUSION 14

TABLE OF AUTHORITIES

STATE CASES

<u>American Ins. Co. V. Seagull Compania Naviera, 774 F.2d 64,67 (2d Cir. 1985)</u>	10
<u>BEMI, L.L.C. v. Anthropologie, Inc., 301 F.3d 548 (7th Cir. 2002)</u>	9
<u>Colonial Penn Ins. Co. v. Omaha Indem. Co., 943 F.2d 327 (3d Cir. 1991)</u>	9
<u>Crosby-Ironton Fed'n of Teachers, Local 1325 v. Independent Sch. Dist. No. 182, 285 N.W.2d 566, 568 (Minn. App. 1987)</u>	12
<u>Domino Group, Inc. V. Charlie Parker Memorial Foundation, 985 F.2d 417, 420 (8th Cir. 1993)</u>	10
<u>Duluth Police Union v. City of Duluth, 360 N.W.2d 367, 370 (Minn.App.1985)</u>	8
<u>Hennessy v. Stelton, 302 Minn. 550, 224 N.W.2d 926 (1974)</u>	13
<u>Hilltop Const., Inc. V. Lou Park Apartments, 324 N.W.2d 236, 240 (Minn. App. 1982).</u>	11
<u>Hoit v. Berger-Crittenden Co., 81 Minn. 356, 358, 84 N.W. 48, 49 (1900)</u>	10
<u>Menagha Education Association v. Menahga Independent School District No. 821, 568 N.W.2d 863, 866 (Minn. App. 1997)</u>	1,2,9
<u>Metropolitan Airports Comm'n v. Metropolitan Airports Police Fed'n, 443 N.W.2d 519, 525 (Minn.1989)</u>	11
<u>State, Office of State Auditor v. Minn. Ass'n of Prof'l Employees, 504 N.W.2d 751, 754 (Minn.1993)</u>	8
<u>United Steelworkers of America, Local 4839 v. New Idea Farm Equipment Corp., 917 F.2d 964 (6th Cir. 1990).</u>	9
<u>Welch v. Commissioner of Public Safety, 545 N.W.2d 692 (Minn. App.1996).</u>	14

STATE STATUTES

Minn. Stat. §572	3
Minn. Stat. §572 .16	1,2,11,13,14
Minn. Stat. §572.18	2,6,10
Minn. Stat. §572.20	1,2,7,8,9,10,13,14
Minn.R.Civ.P., 52.01	13

LEGAL ISSUES

1. When asked to modify or correct a faulty and incomplete award, pursuant to Minn. Stat. §572.20 Subd. 1(1), may a District Court reserve confirmation of the award until after it seeks clarification from the arbitrator.

Decision Below: The District Court reserved confirmation of the initial award until after the matter had been referred back to the independent arbitrator for clarification. Subsequently, the District Court confirmed an modified award.

Most Relevant Authorities: Minn. Stat. §572.20 Subd. 1(1) (evident mistake in the description of property referred to in award); 572.16 Menahga Education Association v. Menahga Independent School District No. 821, 568 N.W.2d 863, 866 (Minn. App. 1997) rev. denied Nov. 18, 1997.

2. Whether it was proper procedure for the District Court, conducting judicial review pursuant to a motion under Minn. Stat. §572.20 Subd. 1(1), to refer the matter to the arbitrator for clarification although no request had been made by the parties under Minn. Stat. §572 .16 within 20 days of delivery of the award.

Decision Below: The District Court made the referral to the arbitrator for clarification of the ambiguous reference in the award to “vehicles identified in Claimant’s Exhibit 12”, with instructions, to “open the record as [the arbitrator] deems fit”, take additional testimony if necessary and “define ‘vehicles’ so that the parties can specifically

identify what pieces of equipment and/or [sic] automobiles are included within the definition of vehicles.”

Most Relevant Authorities: Minn. Stat. §572.20 Subd. 1(1) (evident mistake in the description of property referred to in award); 572.16 Menahga Education Association v. Menahga Independent School District No. 821, 568 N.W.2d 863, 866 (Minn. App. 1997) rev. denied Nov. 18, 1997.

3. Whether the District Court erred by confirming the award amended by the arbitrator on remand to remove ambiguity and definitively determine the parties’ dispute on all issues, although no request for clarification had been made by the parties under Minn. Stat. §572 .16 within 20 days of delivery of the award.

Decision Below: The District Court, upon return of the amended award by the arbitrator, confirmed the award and entered judgment based on Minn. Stat. §572.18 there being no pending motion by Appellant to vacate, modify or correct the amended award. The District Court also issued Findings, Conclusions and a Memorandum.

Most Relevant Authorities: Minn. Stat. §572.18; 572.16 Menahga Education Association v. Menahga Independent School District No. 821, 568 N.W.2d 863, 866 (Minn. App. 1997) rev. denied Nov. 18, 1997.

STATEMENT OF FACTS

Respondent All Metro Supplies, Inc.¹(“All Metro”) is a Minnesota corporation

¹

Respondent notes for the Court that its correct legal name is All Metro Supplies, Inc. This name has been mistakenly shown as All Metro Supply, Inc. in the caption here which mistake was not noted until just recently.

organized in 1997 and doing business as a landscape supply business in Chaska since that time. In the summer of 2003, All Metro was attempting to sell its assets, consisting of inventory, equipment² and intangibles, and had several potential buyers, including Defendant Werner. The parties signed a letter of intent in August 2003 by which Werner made a non-refundable earnest money deposit of \$50,000, and continued negotiating toward a final agreement for almost six months. While negotiations were ongoing, Werner through a new entity he had organized in January 2004, Green Gardens Landscape and Nursery, Inc. ("Green Gardens") negotiated a separate lease of the premises occupied by All Metro and took possession of those premises and of the assets he was negotiating to purchase.

In response, All Metro started a District Court action, obtained a temporary restraining order against Werner and Green Gardens and sought an expedited resolution of its claims against them. The parties agreed to binding arbitration³ and obtained a court order referring the matter to arbitration, but reserving jurisdiction over the TRO and the assets it protected. (App.0007-0008.)⁴

²

For purposes of several arguments in this appeal, the most significant assets were those identified on All Metro's List of Major Assets marked and referred to as Exhibit 12 in the arbitration proceeding and award. That exhibit is attached to Appellant's Appendix as App. 0037.

³

Although Appellants' brief states at pg. 3 that the parties agreed to submit the dispute to binding arbitration under Minn. Stat. Ch. 572, the arbitration agreement and stipulation are silent as to statutory authority. (Appellant's Appendix App.0001-0006.)

⁴

As used herein, "App. _____" refers to Appellant's Appendix: "Resp. App. _____" refers to Respondent's Appendix.

Following an agreed schedule for the arbitration hearing, an award was issued on June 23, 2004 which provided that Green Gardens pay All Metro an additional \$100,000 in exchange for the assets remaining on the premises. The award specifically excluded certain assets which were described as "vehicles" and which appeared on Claimant All Metro's Exhibit 12. (App. 0037).⁵ ⁶ As can be plainly seen on Exhibit 12, the identifier "vehicles" does not appear. The assets listed on Exhibit 12 are all self-driven wheeled vehicles⁷ with the exception of the pulverizer and conveyer which are also intended to be mounted on wheels and transported from work-site to work-site.

The award also required a Bill of Sale and Lien Releases be delivered by All Metro to Green Gardens as a condition of payment. Only as All Metro attempted to provide those documents to Green Gardens did it become apparent that Green Gardens was attempting to get more than it was entitled to.

5

The language of the Award is "All Metro shall retain ownership of all vehicles identified in Claimant's Exhibit 12". (App. 0009-0010)

6

Claimant's Exhibit 13, which is attached as App. 0022-24 were not attached to or referenced in the Award. There is no evidence in the record that the arbitrator relied on or utilized Exhibit 13 in the initial Award. The first instance where it appeared in the court record was as an unverified attachment to Green Gardens' Response to Motion to Confirm Arbitration Award dated August 5, 2004.

7

The Court can take judicial notice from the descriptions and model identification that a Volvo L70 Payloader front loader is a four wheeled piece of commercial equipment with a large bucket in the front. (See e.g., <http://www2.volvo.com/constructionequipment/na/en-us/products/wheelloaders/L70E/>) (Resp. App.0009). Similarly, a forklift is a movable motor vehicle that either runs on an internal combustion engine or is powered by an electric motor that runs on a power cell or battery used to push, lift and tier resources in a manufactur-ing, retail, agriculture or warehouse environment. A [Princeton] Hitchhiker forklift is one that attaches to a delivery truck's bed to be taken to a remote site and used to unload materials, usually on pallets. (See e.g., <http://www.piggy-back.com/basics.html>) (Resp. App.0010).

In a letter dated July 16, 2004⁸, Green Gardens demanded delivery of the Payloader, Forklift, Pulverizer and Conveyer and that All Metro restore them to "working condition consistent with its condition in February 2004", claiming that they were not excluded in the Award. (App. 0029-0030). It also demanded that a judgment be released that had no bearing on the assets to be transferred. Id.

All Metro had conducted its due diligence and was preparing to close according to the terms of the Award. When presented with these additional demands, All Metro articulated its dispute with the interpretation of the Award by Green Gardens (App. 0031) and after it received Green Gardens' letter refusing to close (App. 0032), contacted the arbitrator and requested a clarification of his use of the word "vehicles" and inquired about the terms of closing, contemplated by the Arbitrator. (App. 0033-0037).

In response, the arbitrator declined to modify the language of the award, on the basis that the time limit for direct application to him had passed and suggesting that the Court could consider modification of that language, which he acknowledged was ambiguous and was being improperly interpreted by Green Gardens, contrary to his intent.⁹

At this time, it had become apparent that the parties were deadlocked and were not going to be able to carry out the intent of the award without the intervention of the Court.

⁸

It is not without significance that Green Gardens waited until the 21st day after delivery of the Award to articulate its self-serving interpretation of the language of paragraph 2 of the Award regarding the disposition of the disputed items and that those items have a value approaching the entire amount of the amount payable to All Metro.

⁹

The arbitrator's response was: "For your information, the intent of the award was for your client to retain all the assets identified on Exhibit 12. I understood them all to be vehicles. I intentionally referred to Exhibit 12 in the award to [sic] void any misunderstanding." (App. 0038) (emphasis added).

Well before the passing of 90 days from the delivery of the initial arbitration award, on July 27, 2004, All Metro filed its motion to modify or correct the Award¹⁰ and then confirm it according to Minn. Stat. §572.18. (App. 0011-0013). At the hearing on that motion, the Court was presented with a description of the course of dealing of the parties which led to the deadlock requiring further litigation. (App. 0025-0039).

All Metro argued that Court intervention was necessary because “[t]he communication between the parties following the rendering of the award clearly demonstrate that the award’s language is unclear and ambiguous in its description of the assets to be retained by Plaintiff All Metro.” (Resp. App. 0001-0004). Specifically, the Court was asked to recognize an evident mistake in the description of the property referred to in paragraph 4 of the Award, and provide that Plaintiff All Metro was entitled to retain all assets identified on its Exhibit 12.¹¹ It was also urged that the Court would have to “make it clear how [the Award] would be enforced”. *Id.* The motion asked the Court to require the parties to place the documents necessary to comply with the award and the purchase price plus interest into the Court’s hands for safekeeping. (App. 0011).

Based on the arguments of All Metro, the Court in its August 18, 2004 order, undertook to modify or correct the award, reserved a ruling on confirmation of the award until the matter was returned to the

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As correctly noted by Green Gardens the moving papers incorrectly cited Minn. Stat. §572.19 Subd. 1(1) & Subd. 2 rather than Minn. Stat. §572.20 Subd. 1(1) & Subd. 2, which error was apparent to the parties and the Court and rectified at the motion hearing.

¹¹

The arbitrator’s July 23, 2004 letter clarifying his intent with regard to paragraph 4 was before the Court in that hearing.

arbitrator for clarification. In response to All Metro's application for modification or correction pursuant to Minn. Stat. 572.20 subd. 1(1) & Subd. 2, the Court determined it was "appropriate to return the matter to ADR with Arbitrator William D. Hull." The Court did not issue specific findings, but the clear context was that it was referring the ambiguous use of the term "vehicles" in the Award to the arbitrator who authored it. As Green Gardens, acknowledges in its brief, All Metro specifically requested the Court to correct the Award for evident mistake. (Appellant's Brief at pg. 5).

The arbitrator convened a second hearing on October 5, 2004, and, pursuant to the August 18 Order, opened the record as he deemed fit, taking additional testimony. Following the second arbitration hearing, the arbitrator issued an Amended Arbitration Award dated November 4, 2004 based upon a Memorandum, Findings of Fact and Conclusions of Law clarifying the Award. (App. 0046-0052).

Following the issuance of the Amended Award, and in spite of its assertions that it was participating in the second arbitration hearing "under protest" (Appellant's Brief at pg. 5), Green Gardens sought and obtained a clarification and/or a modification of the Amended Award from the arbitrator. (Resp. App. 0004-0008; App. 0044-0045).

All Metro then sought confirmation of the arbitrator's decision by the Court. That motion was heard on December 29, 2005 and an order confirming the Amended Arbitration Award issued on January 4, 2005 with accompanying Memorandum. Judgment was entered effective January 10, 2005 against Green Gardens and in favor of All Metro in the amount of \$104,000.¹² This appeal followed.

¹²

In response to proceedings in aid of execution by All Metro, the Court on its own initiative, issued an order Nunc Pro Tunc on March 14, 2005, entering judgment according to the January 10 order. (App. 0070).

ARGUMENT

I. Standard of Review

An appeal from an arbitration decision is subject to limited review and the reviewing court must exercise "[e]very reasonable presumption" in favor of the arbitration award's finality and validity. State, Office of State Auditor v. Minn. Ass'n of Prof'l Employees, 504 N.W.2d 751, 754 (Minn.1993) (citations omitted). On appeal, the Court of Appeals does not review the decision of the district court from which the appeal is taken but rather, reviews the arbitrator's decision. See, e.g., Duluth Police Union v. City of Duluth, 360 N.W.2d 367, 370 (Minn.App.1985) (where court reviewed arbitrator's decision on appeal rather than district court's decision).

II. The District Court was asked to modify or correct a faulty and incomplete award, pursuant to Minn. Stat. §572.20 Subd. 1(1) and subd. 2, and reasonably and properly reserved confirmation of the award until after it sought clarification from the arbitrator.

By its own admission, Green Gardens acknowledges that a court has statutory authority to modify or correct an award pursuant to Minn. Stat. §572.20 if the application is based on "an evident mistake in the description of any person, thing or property referred to in the award". Minn. Stat. §572.20, subd. 1(1). All Metro presented evidence to the District Court in the form of statements from the arbitrator that the description of assets in paragraph 4 of the Award was ambiguous as further evidenced by its being misinterpreted by Green Gardens. (App. 0038). It would have been speculation for the District Court to attempt to look at the list of assets on the referenced Exhibit 12 and determine, consistent with the intent of the arbitrator, which were vehicles and which

were not; which were to be retained by All Metro and which, if any were not. The mistake was evident, the correction was not.

Green Gardens argues that the District Court had but one choice at the motion hearing in August 2004 and that choice was pursuant to Minn. Stat. §572.20, Subd.2¹³ to confirm the initial Arbitration Award or to modify it on its own authority, placing itself in the position of fact finder and resolving the evident mistake.

By binding the District Court to act unilaterally to remove the evident mistake, Green Gardens would also put the District Court in the same predicament the court faced in Menahga case. Menahga Education Association v. Menahga Independent School District No. 821, 568 N.W.2d 863 (Minn. App. 1997). There, as here, the district court was told by the parties that the arbitrator had refused a party's request to clarify the award, in effect leaving the court to interpret its intent. Here, as there, this Court should be persuaded that resubmission to the arbitrator, was the proper remedy to apply to correct an uncertain and ambiguous arbitration award . If there is a serious doubt as to the arbitrators' intent, the proper remedy is a remand. Id.; see also BEM I, L.L.C. v. Anthropologie, Inc., 301 F.3d 548 (7th Cir. 2002); Colonial Penn Ins. Co. v. Omaha Indem. Co., 943 F.2d 327 (3d Cir. 1991); United Steelworkers of America, Local 4839 v. New Idea Farm Equipment Corp., 917 F.2d 964 (6th Cir. 1990).

It is well established that a reviewing court is prohibited from weighing the merits

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Although Green Gardens cites to Minn. Stat. §572.18 as the most relevant authority in its statement of legal issues.

of an ambiguous award. It is similarly prohibited from ignoring the ambiguity and summarily affirming the award. *Menahga*, supra at 869.

Also, Green Gardens misconstrues Minn. Stat. §572.18. The statute mandates confirmation, “unless within the time limits hereinafter imposed¹⁴ grounds are urged for vacating or modifying or correcting the award . . .”. Minn. Stat. §572.18 (emphasis added). All Metro sought relief under Minn. Stat. §572.20 in a timely manner, which removed any requirement that the District Court was compelled to confirm under §572.18. The alternative order of the District Court reserving a ruling on confirmation under §572.18 and seeking clarification §572.18 in order to judicially modify or correct the Award was proper.

All Metro also argued that the Award was incomplete and thus unenforceable without further litigation. Where the arbitrator’s award supports opposing conclusions, its confirmation and enforcement by the judiciary is impossible. *Menahga*, supra at 869, (citing *Hoit v. Berger-Crittenden Co.*, 81 Minn. 356, 358, 84 N.W. 48, 49 (1900) (“when award is incomplete, uncertain, or does not resolve dispute between parties so to avoid future litigation, award is not enforceable”)). An ambiguous award should be remanded to the arbitrators so that the court will know exactly what it is being asked to enforce. See e.g. *Domino Group, Inc. V. Charlie Parker Memorial Foundation*, 985 F.2d 417, 420 (8th

¹⁴

The language “time limits hereinafter imposed” has never been reviewed by any court whether under the Uniform Arbitration Act or that act as it has been adopted in Minnesota. A plain reading of that phrase leads one to conclude that it refers to time limits imposed in this section or in subsequent sections of the Act. Since the only relevant time limits imposed in this or subsequent sections are the 90 day limits of Minn. Stat. §572.19 and Minn. Stat. §572.20, it is not likely that it refers to the shorter limit “heretofore” imposed in Minn. Stat. §572.16, as is urged here by Green Gardens.

Cir. 1993)(citing American Ins. Co. V. Seagull Compania Naviera, 774 F.2d 64,67 (2d Cir. 1985)("A court should not attempt to enforce an award that is ambiguous or indefinite.").

III. It was proper procedure for the District Court, conducting judicial review pursuant to a motion under Minn. Stat. §572.20 Subd. 1(1), to refer the matter to the arbitrator for clarification and then confirm the award as clarified by the arbitrator.

Green Gardens bases all its arguments on the premise that unless one or the other party seeks clarification from the arbitrator pursuant to Minn. Stat. §572.16 within 20 days of delivery of the award, no modification or correction of the award is authorized by statute, common law or principles of equity. This argument is just plain wrong.

Remanding grievances to the arbitrators who originally heard the dispute promotes the speedy resolution of disputes which the arbitration act seeks to encourage." Metropolitan Airports Comm'n v. Metropolitan Airports Police Fed'n, 443 N.W.2d 519, 525 (Minn.1989). To no small extent, this result is obtained because the original fact finder and the drafter of the ambiguous language is in a much better and more knowledgeable position to timely deal with the grievance than the court.

In Menahga, supra, the court noted that only a few cases in Minnesota even discuss Minn. Stat. §572.16 and although none used it to remand an ambiguous award to the arbitrator, there was authority for doing so. Id. 568 N.W. 2d at 870 (citing Hilltop Const., Inc. V. Lou Park Apartments, 324 N.W.2d 236, 240 (Minn. App. 1982) ("the District Court does have the authority to compel arbitrators to clarify their awards");

Crosby-Ironton Fed'n of Teachers, Local 1325 v. Independent Sch. Dist. No. 182, 285 N.W.2d 566, 568 (Minn. App. 1987)(resubmission to the arbitrator for clarification is a valid option)). In Menahga, the district court performed its own interpretation of an ambiguous award. On appeal this court criticized that decision and ordered remand to the arbitrator although it is not clear that a request for clarification had been made to the arbitrator within 20 days after the initial award and it is more clear that more than 90 days had passed before either party moved the district court to modify or correct the award, or in the alternative to confirm the award.¹⁵

Green Gardens relies heavily on the Crosby-Ironton Fed'n of Teachers, Local 1325 v. Independent Sch. Dist. No. 182, 285 N.W.2d 667 (Minn. 1979) case for its position that a case can not be referred by the court to the arbitrator for clarification of an evident mistake where no application has been made directly to the arbitrator within 20 days after the award. In Crosby-Ironton, however, the arbitrator unilaterally changed a dollar value in his award without application therefore (changing from a \$600 salary increase to \$650 increase). Crosby-Ironton dealt with a substantive change and is a different situation from the present case. Here the court was attempting to deal with an ambiguous reference in the award, correction of which would not affect the merits of the case. Correcting an ambiguity is not a substantive change but goes only to form. In most cases, only the arbitrator will be able to resolve the ambiguity to restore his original intent. On this issue, Menahga appears to clarify Crosby-Ironton.

¹⁵

The timing noted in the opinion is as follows: the award was issued on April 26, 1996; sometime after April 22, 1996, a party asked the arbitrator to clarify her award, which she refused; on July 31, 1996 a party moved the district court to modify, correct or in the alternative confirm the April 12, 1996 award.

IV. The District Court acted appropriately by confirming the award amended by the arbitrator on remand to remove ambiguous language and definitively determine the parties' dispute on all issues, although no request for clarification had been made by the parties under Minn. Stat. §572 .16 within 20 days of delivery of the award.

The actions of the District Court were internally consistent and externally consistent with Minn. Stat. §572 .20, Subd. 2. That subdivision requires the court upon granting a party's application to "modify and correct the award so as to effect its intent" and to "confirm the award as so modified and corrected". *Id.*

Green Gardens argues that there are two arbitration awards and that one must be vacated before the other can be confirmed. This ignores the nature of an application for modification or correction of an award. It is only logical that where the court ordered the arbitrator to clarify his award, the arbitrator did clarify that award and the court subsequently confirmed that award as amended, that it was both granting the application for modification and confirming the result. This is exactly what Minn. Stat. §572 .20, Subd. 2 calls for.

It is well established that failure to make specific findings, even in court centered proceedings is not reversible error. See e.g. *Hennessey v. Stelton*, 302 Minn. 550, 224 N.W.2d 926 (1974)(while making of findings of fact is to be preferred in aid of appellate review of order amending divorce decree, failure to make such findings does not constitute reversible error.); Minn. R. Civ.P., 52.01(findings of fact and conclusions of law are unnecessary on decisions on motions pursuant to Rules 12 or 56 or any other

motion except as provided in Rule 41.02.). The court's intent was clear even without the formality of specific findings urged by Green Gardens.

A remand may be required on appeal if District Court fails to make adequate findings; however, remand is unnecessary when Court of Appeals is able to infer the findings from the District Court's conclusions. Welch v. Commissioner of Public Safety, 545 N.W.2d 692 (Minn. App.1996).

CONCLUSION

All Metro's motion for modification or correction was within the 90days specified in Minn. Stat. §572.20. By confirmation, the court adopted the modification of language received in the Amended Award as proper correction of the evident mistake of referring to "all vehicles identified in Claimant's Exhibit 12" in paragraph 4 of the Award. This was a proper exercise of its authority to conduct judicial review pursuant to Minn. Stat. §572.20.

If this Court were to accept Green Garden's arguments, there would be no basis for any court to exercise the judicial review given it by the legislature in Minn. Stat. §572.20. As the scope of that review is defined in Menahga, a court cannot undertake to substitute its interpretation of an arbitrator's ambiguous language or risk reversal because it usurped the arbitrator's authority to decide all questions of law and fact. At the same time, Green Gardens argues that court cannot remand to the arbitrator for clarification in connection with a motion for modification under Minn. Stat. §572.20 unless it does so within the 20 day time limit of Minn. Stat. §572.16.

Where the legislature has determined that time limit of 90 days after an award is warranted for seeking modification or correction of that award for evident mistake, a

court must have the discretion to seek clarification from the arbitrator in resolving that mistake. Limiting the court to such a remedy only in cases where the parties have, within 20 days, both recognized the mistake and appealed to the arbitrator directly will result in an injustice not foreseen by the legislature.

Respectfully submitted,

Dated: May 2, 2005

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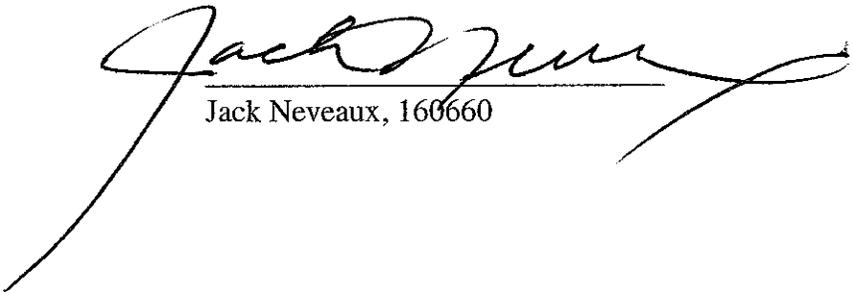
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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent All Metro Supply, Inc certifies that this brief complies with the requirements of Minn.R.App.P.13201,subs. 1 and 3, in that it is printed in a 13 point, proportionately spaced typeface utilizing Microsoft Word 2002 and contains 4,230 words, excluding the cover, Table of Contents, Table of Authorities, Appendix and this Certificate.

Dated: May 2, 2005



Jack Neveaux, 160660

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).