

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

INTERNATIONAL BROTHERHOOD OF)
ELECTRICAL WORKERS, LOCAL 474,)
)
Plaintiff,)
)
vs.)
)
ABE RICE, d/b/a ABE RICE)
ELECTRIC, and AMFIL ELECTRIC,)
INC., LORRAINE FELTS, d/b/a)
AMFIL ELECTRIC, INC., ABE)
RICE ELECTRIC, INC. and AMFIL)
ELECTRIC, INC.,)
)
Defendants.)

No. 2:01CV2939-V

ORDER ON PENDING MOTIONS

The plaintiff, International Brotherhood of Electric Workers, Local 474 ("IBEW"), filed this lawsuit to enforce an arbitration award against defendants Abe Rice, Abe Rice Electric, Inc., and Amfil Electric, Inc. (collectively referred to as "Abe Rice") for violating provisions of a collective bargaining agreement between the parties. Subject matter jurisdiction is based on § 301(a) of the Labor Management Relations Act which confers federal subject-matter jurisdiction over suits for violations of labor contracts.¹

¹ Section 301(a) of the Labor Management Relations Act provides:

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization

Presently before the court is the December 26, 2001 motion of the defendants, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), to dismiss the complaint filed against them by IBEW for lack of subject matter jurisdiction and for failure to state a claim. In the alternative, the defendants ask the court to stay this action until the National Labor Relations Board (NLRB) adjudicates two pending matters involving the parties to this lawsuit. Also before the court is the motion of IBEW filed April 13, 2002 for summary judgment on its complaint.

UNDISPUTED FACTS

The following facts are undisputed. Abe Rice, Inc. and Amfil, Inc. are electrical contractors performing industrial and commercial electrical contracts. (Pl.'s Mem. in Supp. of Mot. for Summ. J., Pl.'s Statement of Material Undisputed Facts "SOF" 2.) The defendant Abe Rice individually is the owner and operator of Abe Rice Electric and is now the owner of Amfil Electric.² Abe

representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

28 U.S.C. § 185(a).

² The defendants state that the employees of Amfil were transferred to the payroll of Abe Rice Electric. Both Abe Rice Electric and Amfil Electric have been administratively dissolved

Rice employs electrical workers, some of whom are affiliated with the union, IBEW.

IBEW negotiated a collective bargaining agreement ("CBA") with the National Electrical Contractors Association. In a settlement agreement with IBEW resolving a pending NLRB unfair labor practice charge filed by IBEW, Abe Rice agreed on December 20, 2000 through two letters of assent to be bound by the terms of the CBA beginning January 2, 2001. (SOF 3; Pl.'s Compl. at Ex. 3.) On March 29, 2001, IBEW sent a letter to Abe Rice notifying it that there were fourteen employees who remained unclassified. The letter also stated that if the listed employees were not classified by April, they would not be covered. IBEW then filed a grievance against Abe Rice with the Joint Labor Management Committee, pursuant to the CBA, alleging that Abe Rice breached the agreement by failing to pay wages and benefits to some of the workers and by failing to provide information to classify the employees in their respective job categories for union purposes. (SOF 5.) IBEW demanded back wages, liquidated damages, work reports, employee classification data and attorney fees, and it requested a hearing before the Joint Labor Management Committee pursuant to provisions of the CBA governing resolutions of grievances to resolve the issues raised in

by the State of Tennessee as of March, 2001.

its grievance.³ (*Id.*) By letter dated August 15, 2001, the Joint Labor Management Committee set a hearing for August 28, 2001.

In a letter dated August 14, 2001, Abe Rice purportedly

³ The pertinent provisions of the CBA provide as follows:

LABOR MANAGEMENT COMMITTEE

Section 1.05 There shall be a Labor-Management Committee of three (3) representing the Union and three (3) representing the Chapter. It shall meet regularly at such stated times as it may decide. However, it shall also meet within 48 hours when notice is given by either party. It shall select its own Chairman and Secretary.

ADJUSTMENT OF GRIEVANCES

Section 1.06 All grievances or questions in dispute shall be adjusted by the duly authorized representative of each of the parties to this Agreement. In the event that these two are unable to adjust any matter within 48 hours, they shall refer the same to the Labor-Management Committee.

VOTING AND QUORUM

Section 1.07 All matters coming before the Labor-Management Committee shall be decided by a majority vote

Section 1.08 Should the Labor-Management Committee fail to agree or to adjust any matter, such shall then be referred to the Federal Mediation Service for adjudication. The arbitrator's decisions shall be final and binding on both parties hereto.

Section 1.09 When any matter in dispute has been referred to conciliation or arbitration for adjustment, the provisions and conditions prevailing prior to the time such matters arose shall not be changed or abrogated until agreement has been reached or a ruling has been made.

Section 1.10 The Federal Mediation Service shall have no power or authority to add to, subtract from, change, modify, or alter in any way the provisions of this agreement, or impose on either party hereto a limitation or obligation not explicitly provided for in this Agreement. Decisions of the Federal Mediation Service shall be final and binding upon the parties.

rescinded the settlement agreement, insisting that IBEW had acted fraudulently, coercing and threatening employees to become union members, which caused the CBA between IBEW and Abe Rice to be null and void *ab initio*. (SOF 9; Def.'s Mot. to Dismiss, Ex. A.) Abe Rice, through its attorney, also notified the Joint Labor Management Committee that no representative of Abe Rice would attend the hearing before the Joint Labor Management Committee on August 28, 2001. Nevertheless, on August 28, 2001, the Joint Labor Management Committee conducted a hearing on IBEW's grievance and found for IBEW on all counts; Abe Rice failed to appear at the hearing. (SOF 14; Pl.'s Compl., Ex. D).

Meanwhile, on August 27, 2001, Abe Rice filed unfair labor charges against IBEW before the NLRB alleging that IBEW willfully failed to classify some employees and threatened employees because they refused to join the union. Abe Rice insisted that the CBA was therefore not valid and no arbitration award arising from a dispute over the CBA could be valid. It requested a 10(j) injunction from any arbitration award IBEW might seek. (Def.'s Mem., Ex. D.) Abe Rice amended its charges with the NLRB against IBEW on September 25, 2001 to name specifically some of the terminated employees based on non-union affiliation. (Def.'s Mem., Ex. E.)

IBEW, in turn, filed an unfair labor charge with the NLRB on August 22, 2001, amended on October 31, 2001, alleging that Abe

Rice's withdrawal of its recognition of IBEW as the representative of the Abe Rice employees was unlawful and that Abe Rice failed to pay benefits, dues and fees to all of its employees. (Def.'s Mem., Ex. B.) On that same day, the NLRB Regional Director issued a complaint and notice of hearing against Abe Rice. (*Id.*) Abe Rice filed its answer to the NLRB complaint on November twelfth of the same year. (Def.'s Mem., Ex. C.)

The following day, November 13, 2001, the NLRB partially dismissed Abe Rice's charges against IBEW, stating that the allegations regarding union members knowingly filing false grievances and giving false testimony and regarding whether IBEW was the representative of Abe Rice's employees were unwarranted. (SOF 16; Def.'s Mem., Ex. F.) Abe Rice filed an appeal of the regional NLRB's partial dismissal of its charges with the General Counsel of the NLRB in Washington, D.C. on November 29, 2001. (Def.'s Mem., Ex. G.) On December 4, 2001, the NLRB issued an amended complaint and notice of hearing before the NLRB on the remaining charges made by Abe Rice against IBEW. (Def.'s Mem., Ex. 1.) Just recently, on March 13, 2002, the Office of General Counsel of the NLRB denied Abe Rice's appeal, ruling that the issues involving Abe Rice's withdrawal of recognition from the Union were not properly raised. (Jack Gatlin Supplemental Aff., Ex. A.)

ANALYSIS

A. Standard on 12(c)(1) Motion to Dismiss

A defendant may utilize a 12(c)(1) motion to dismiss for lack of subject matter jurisdiction as a facial attack or as a factual attack on the plaintiff's case. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1998). A facial attack simply attacks the plaintiff's complaint on its face, and the court must assume the facts as alleged by the plaintiff are true. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996). The plaintiff can survive a facial attack on subject matter jurisdiction by demonstrating "any arguable basis in law for the claim made." *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996).

A factual attack, on the other hand, attacks the existence of subject matter jurisdiction in fact, apart from the pleadings. It requires that the plaintiff prove that subject matter jurisdiction exists. *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 324 (6th Cir. 1990). When the motion is a factual attack, the court has wide discretion to review "affidavits, documents and even [to hold] a limited evidentiary hearing to resolve disputed jurisdictional facts." *Ohio Nat'l Life Ins.*, 922 F.2d at 325. The court's role is to "weigh the conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does

not exist." *Id.*

Abe Rice's attack against subject matter jurisdiction in this case is a factual one, as it asserts that the basis for the grievance award - the collective bargaining agreement with an arbitration provision - was rescinded and has no legal significance. Abe Rice claims it was fraudulently induced to sign the contract based on misrepresentations on the part of IBEW and its counterparts. This subsequently calls into question the validity of the grievance procedure and award, and thus the motion attacks the factual core upon which subject matter jurisdiction in this case is based.

B. Standard on a 12(b)(6) Motion to Dismiss

A motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for failure to state a claim requires that the court look only to the pleadings filed in the case. If the court considers other documents in the case outside the pleadings, then the motion to dismiss becomes a motion for summary judgment under Rule 56. *Williams v. Sears, Roebuck & Co.*, 143 F. Supp. 2d 941, 944 (6th Cir. 2001). Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law." *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993); see also *Osborn v. Ashland County Bd. of Alcohol, Drug Addiction and Mental Health Servs.*, 979 F.2d 1131, 1133 (6th Cir. 1992) (per curiam). The party moving for summary judgment has the burden of showing that there are no genuine issues of material fact at issue in the case. *LaPointe*, 8 F.3d at 378.

Before the court can rule on a 12(b)(6) motion, the court must first decide the issue of subject matter jurisdiction. If this court is without subject matter jurisdiction, its subsequent holdings in the case would be ineffective and non-binding.

C. Timeliness of Abe Rice's Argument and Waiver

As indicated previously, the thrust of Abe Rice's argument in its motion to dismiss for lack of subject matter jurisdiction is that the CBA was void *ab initio* because IBEW fraudulently induced Abe Rice to sign the agreement. In order for this federal district court to have jurisdiction over this case under § 301(a) of the Labor Management Relations Act, Abe Rice insists that there must be a valid, enforceable contract. Hence, Abe Rice argues, because it lawfully rescinded the contract on grounds of fraud in the inducement, there was no contract, and the court therefore does not have subject matter jurisdiction under Section 301(a) of the Labor Management Relations Act.

Abe Rice also argues as part of its motion to dismiss that even if the court has jurisdiction, the arbitration award is unenforceable as it is based on an invalid contract. In other words, Abe Rice raises invalidity of the contract as an affirmative defense. Abe Rice further suggests in its brief in support of its response to IBEW's motion for summary judgment that even if the contract was not rescinded, the grievance provision in the CBA does not provide authority for a "final and binding arbitration award" to be made by the Joint Labor Management Committee, and thus this the "arbitration award" is unenforceable.

IBEW counters that Abe Rice has waited too long to raise the affirmative defense of fraudulent inducement. The IBEW insists that Abe Rice was required to either raise the affirmative defense of fraudulent inducement at the grievance hearing or file a motion to vacate the award within ninety days after the arbitration award was issued, and it failed to do either. See *Professional Administrators, Ltd. v. Koppoer-Glo Fuel, Inc.*, 819 F.2d 639, 642 n.2 (6th Cir. 1987) (holding that Tennessee applies a ninety-day limitations period to file a motion to vacate an arbitration award pursuant to Tenn. Code Ann. § 29-5-313) and *Local Union No. 38, Sheet Metal Workers Int'l Assoc. v. Hollywood Heating and Cooling Co.*, 88 F. Supp. 2d 246 (S.D.N.Y. 2000), *aff'd* 1 Fed. Appx. 30 (2d Cir. 2001) (holding that failure of an employer to attend an

arbitration hearing preceding an award constitutes a waiver of any merit-based defenses it may have had, including defenses of fraud and coercion). See also *Local 802, Associated Musicians of Greater New York v. Parker Meridien Hotel*, 145 F.3d 85, 89 (2d Cir. 1998) (holding that an employer hotel having failed to attend an arbitration hearing and having failed to move to vacate award within 90 days was time-barred from challenging the arbitrator's jurisdiction as affirmative defense in an action by the union under § 301 of the Labor Management Relations Act to enforce the arbitration award).

In Hollywood, the plaintiff, Sheet Metal Workers Local Union 38, brought an action under Section 301 of the Labor-Management Relations Act to confirm three arbitration awards rendered under the parties' collective bargaining agreement. The collective bargaining agreement provided that a grievance not settled between the employer and the union representative could be appealed to the Local Joint Adjustment Board and that a decision of the Local Joint Adjustment Board shall be final and binding. Hollywood's president was present for the first grievance hearing but failed to appear for the second. At each hearing, the board found in favor of the union and issued an award of damages which Hollywood refused to pay. Hollywood repeatedly insisted that it had repudiated the agreement because the union representative had fraudulently induced

it to sign the agreement. It also raised a defense of impartiality on the part of the arbitrator. The court found that Hollywood waived its defenses of fraudulent inducement, coercion, and impartiality by failing to appear at the hearing and by failing to seek a vacatur of the award. In addition, the court found that Hollywood's repeated oral and written statements of repudiation did not conform to the clearly-specified procedures for termination of the collective bargaining agreement, and therefore did not serve to terminate the agreement. *Id.* at 24.

Hollywood, while factually similar in many ways to the case at bar, has one distinct difference: the defendant company Hollywood did not dispute the existence of an agreement between the parties to submit to binding arbitration by the Local Joint Adjustment Board. Hollywood sought to attack the substance of the arbitration award, but not the authority of the National Joint Adjustment Board to issue a final and binding arbitration award in the first place. *Hollywood*, 88 F. Supp. 2d at 254. The court noted that the collective bargaining agreement in Hollywood reflected the unambiguous intent of the parties to be bound by the Board's decision.

In *Corey v. New York Stock Exchange*, the Sixth Circuit stated that arbitration awards are binding on parties absent a motion to vacate or modify the award, "[u]nless [a party] challenge[s] the

underlying contract to arbitrate. . . ." *Corey*, 691 F.2d 1205, 1212 (6th Cir. 1982). In addition, the Sixth Circuit has made clear that failure to move to vacate an arbitration award does not preclude an employer from raising at the arbitration award enforcement proceeding a jurisdictional defense that no agreement to arbitrate existed. *Sheet Metal Workers Assoc. v. Dane Sheet Metal*, 932 F.2d 578, 580 n.2 (6th Cir. 1991) (pointing out that its statements in *Corey* were consistent with this position). Because a party does not waive a jurisdictional defense that no agreement to arbitrate existed, "[a] party that contends that it is not bound by an agreement to arbitrate can therefore simply abstain from participation in the proceedings, and raise the nonexistence of a written contractual agreement to arbitrate as a defense to a proceeding seeking confirmation of the arbitration award without the [90-day] limitation. . . .," according to the First Circuit. *MCI Telecommunications Corp. v. Exalon Industries, Inc.*, 138 F.3d 426, 430 (1st Cir. 1998).

Likewise, the Ninth Circuit upheld a dismissal of an action to enforce an arbitration award under Section 301 of the Labor Management Relations Act for lack of subject matter jurisdiction, finding that at the time the union invoked arbitration under the collective bargaining agreement, the agreement was no longer in effect. *Sheet Metal Workers Int'l Assoc., Local Union No. 150 v.*

Air Systems Eng'g, Inc., 948 F. 2d 1089 (9th Cir. 1991). Pointing out that subject matter jurisdiction cannot be waived, the Ninth Circuit rejected the union's argument that Air Systems had waived all defenses, including subject matter jurisdiction, by failing to file a timely motion to vacate the award. *Id.* at 1091 n. 1. Implicit in the Ninth Circuit's opinion is that the existence of a collective bargaining agreement pursuant to which the parties agree to be bound by arbitration is a prerequisite to the federal court's subject matter jurisdiction under § 301. *Id.* at 1091.

And similarly, the Seventh Circuit recognized that if an issue involves the existence of subject matter jurisdiction, it can be raised at any time during litigation and is not waived if it is not brought within the limitations period to vacate arbitration awards. *International Union of Operating Engineers v. Rabine*, 161 F.3d 427, 429 (7th Cir. 1998). The Seventh Circuit went on to hold in *Rabine*, however, that the absence of a statutory "employer" capable of entering into a collective bargaining agreement is not jurisdictional and does not prevent a federal court from hearing a claim to enforce an arbitral award under the collective bargaining agreement. *Id.* at 430.

The critical, and very thorny, issue is whether Abe Rice's claim that it rescinded the contract based on fraudulent inducement is an issue that relates to subject matter jurisdiction or merely

an issue that relates to an affirmative defense or failure to state all the elements of a claim under § 301. If the issue is a jurisdictional one, it can be raised at any time during the proceeding and is not subject to any time limits. *Rabine*, 161 F.3d at 429. If the issue is not jurisdictional, it is subject to the ninety-day filing requirement and waiver rule. The issue of rescission is inextricably intertwined with the merits of this litigation.

Abe Rice claims it unilaterally rescinded the CBA on August 14, 2001, in advance of the hearing scheduled before the Joint Labor Management Committee for August 28, 2001, based on fraudulent inducement. Abe Rice thus contests that a contract and arbitration clause binding it to the decision of the Joint Labor Management Committee existed between the parties at the time of the hearing. Based on the authority of *Corey*, *Dane*, *Air Systems*, and *Exalon*, the court holds that whether Abe Rice effectively rescinded the settlement agreement binding it to the collective bargaining agreement is a jurisdictional issue. Thus, Abe Rice's defenses of fraudulent inducement and unenforceable arbitration award are not waived by failure to attend the hearing or barred by any time limits.

In addition, Abe Rice also asserts that even if a binding collective bargaining agreement existed between the parties at the

time of the hearing, the arbitration provision contained in the agreement does not provide that "final and binding" arbitration awards may be made by the Joint Labor Management Committee. If Abe Rice is correct on either issue, then the award itself is void and/or not binding and is not within the purview of this court. The Sixth Circuit agreed with this assertion in *Corey, supra*, as did the Ninth Circuit in *Air Systems, Inc.*, 948 F.2d at 1091.

The court cannot resolve the jurisdictional issue on the basis of the affidavits submitted by the parties thus far. As this is a factual attack on jurisdiction, the court will hold an evidentiary hearing to determine: (1) if Abe Rice effectively rescinded the contract based on fraudulent inducement; and (2) whether the "arbitration provision" as it is written in the CBA gives authority to the Joint Labor Management Committee to issue final and binding arbitration awards. See *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 324 (6th Cir. 1990). The parties should be prepared to fully brief and argue both issues to the court. All the other pending motions, save the issuance of a stay in the proceedings, shall be taken under consideration until this court ascertains that it has subject matter jurisdiction over this matter.

D. Stay of Proceedings

In the alternative, Abe Rice asks the court to stay the proceedings in the current case until the NLRB adjudicates the

pending related disputes currently before it. While the issues for which the parties seek resolution before the NLRB are factually similar, the legal issues the parties have asked the NLRB to resolve are not identical to the ones before this court. The issues before the NLRB involve unfair labor practices and do not involve the arbitration award issued by the Joint Labor Management Committee. According to § 301 of the Labor Management Relations Act, parties look to the district court to enforce money judgments. See 29 U.S.C. § 185(b).

Abe Rice cites *Serrano v. Jones and Laughlin Steel Co.* for the proposition that the NLRB rather than the district court should hear claims of bad faith in the contractual negotiations between labor unions and employers. *Serrano*, 790 F.2d 1279, 1283 (6th Cir. 1989). In *Serrano*, however, the plaintiff union asserted a cause of action claiming bad faith on the part of the employer when the parties were negotiating the terms of a collective bargaining agreement *Id.* at 1282. In the case at bar, the IBEW filed a suit to enforce an arbitration award. Fraudulent inducement and rescission were raised by Abe Rice as defenses to the enforcement of the award. The Supreme Court has expressly stated that such a defense in a proceeding involving a collective bargaining dispute is allowed. *Textron Lycoming Reciprocating Engine Div., AVCO Corp. v. United Autoworkers*, 523 U.S. 653, 657-58 (1998) (holding that a

defendant may raise the defense of invalidity of the collective bargaining agreement to a plaintiff's contractual violation claim and the court may adjudicate the defense in accordance with § 301).

The parties have not asked the NLRB to enforce the arbitration award and the Board has declined to hear Abe Rice's argument of rescission of the collective bargaining agreement. (See NLRB General Ruling, p.1). As these issues are not before the NLRB in the pending unfair labor practices claims by the parties, it would not be duplicative for this court to rule on those issues, provided that this court, based on the discussion *supra*, has subject matter jurisdiction over IBEW's claims. Accordingly, Abe Rice's motion to stay proceedings before this court is denied.

CONCLUSION

For the reasons set forth above, this court denies Abe Rice's motion to stay proceedings pending resolution of the grievances before the NLRB and orders an evidentiary hearing to be held on Monday, June 24, 2002, at 9:30 a.m. to determine if a contract between the parties existed and whether the arbitration provision in the contract gave the Joint Labor Management Committee the authority to issue a final and binding arbitration award. The parties should submit briefs on these issues by Friday, June 14, 2002, at 5:00 p.m.

IT IS SO ORDERED May 21, 2002.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

