

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNION WATER POWER COMPANY,)
)
 Plaintiff)
)
 v.)
)
 LOCAL UNION NO. 42,)
 INTERNATIONAL BROTHERHOOD)
 OF ELECTRICAL WORKERS,)
 AFL-CIO, et al,)
)
 Defendants)

Docket No. 99-14-P-H
(Consolidated)

RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The parties in these two consolidated cases¹ each seek summary judgment on the claims set forth in their respective complaints. I recommend that the court deny the motions.

I. Summary Judgment Standard

Summary judgment is appropriate only 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.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved

¹ The caption and docket number used on this recommended decision is that of the lead case. The other case, which has been consolidated with Docket No. 99-14-P-H, was brought by one of the defendants in the lead case against the plaintiff in the lead case, arises out of the same agreements and events, and bears the docket number 99-143-P-H.

favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

The mere fact that both parties seek summary judgment does not render summary judgment inappropriate. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* (“Wright, Miller & Kane”) § 2720 at 327-28 (3d ed. 1998). For those issues subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane §

2720.

II. Factual Background

The following undisputed material facts are included in the parties' respective statements of material fact, filed as required by this court's Local Rule 56. Union Water Power Company ("UWP"), the plaintiff in the lead case and the defendant in Docket No. 99-143-H, is a Maine corporation which engages in, among other things, utility-related construction through its On Target Division. Plaintiff, Union Water Power Company's Statement of Material Facts as to Which There is No Genuine Issue to Be Tried, etc. ("UWP's SMF") (Docket No. 22), ¶1; Defendant Unions' Opposition to Plaintiff Union Water Power Company's Statement of Material Facts as to Which There is No Genuine Issue to be Tried, etc. ("Unions' Responsive SMF") (Docket No. 33), ¶ 1. Work performed within the On Target Division includes underground electrical construction work, utility pole setting, line installation, cable splicing and electrical design. *Id.* Until September 1, 1998 UWP was a wholly-owned subsidiary of Central Maine Power Company ("CMP"), a Maine public utility engaged in the transmission and distribution of electricity. *Id.* ¶¶ 2-3. On September 1, 1998 both UWP and CMP became wholly-owned subsidiaries of CMP Group, a holding company. *Id.* ¶ 3.

Transmission and distribution employees of CMP are represented for purposes of collective bargaining by Local Union No. 1837 ("Local 1837") of the International Brotherhood of Electrical Workers ("IBEW"). *Id.* ¶ 4. Local Union No. 119 of the IBEW ("Local 119"), a defendant in the lead case and a plaintiff in Docket No. 99-143-P-H, is a labor organization that represents employees in Maine and New Hampshire who perform all phases of utility line construction work, including transmission, distribution and work on electrical substations. *Id.* ¶ 5. Local Union No. 42 of the

IBEW (“Local 42”), a defendant in the lead case and a plaintiff in Docket No. 99-143-P-H, is a construction local that provides workers for employers in Connecticut, western Massachusetts and Vermont to perform duties similar to those provided by Local 119 to employers in Maine and New Hampshire. *Id.* ¶ 12.

On August 31, 1996 CMP and Local 119 entered into a labor agreement that allowed CMP to use employees from Local 119's hiring hall to supplement CMP's Local 1837 employees when necessary (“Outside Utility Agreement”). *Id.* ¶¶ 6-7. On the same day, CMP and Local 119 also signed an amendment that modified or waived certain provisions in the Outside Utility Agreement. *Id.* ¶ 7. The Outside Utility Agreement expired by its terms on August 31, 1997. *Id.* ¶ 8.

In early January 1998 a significant ice storm hit Maine, causing substantial damage to CMP's electrical distribution system. *Id.* ¶ 9. CMP supplemented its regular line employees with every available contractor that employed lineworkers, extending as far as Virginia and Michigan, in order to restore electric power to its customers. *Id.* After electric power had been restored to all of CMP's year-round customers, it was necessary to make permanent repairs to its distribution system and to restore power to seasonal customers. *Id.* ¶ 10.

At some point representatives of CMP approached representatives of the IBEW to inquire whether the IBEW could furnish CMP and contractors working with CMP with temporary manpower to assist with post-ice storm restoration and repair work.² Deposition of John F. Fallona, submitted with Plaintiff, Union Water Power Company's Motion for Summary Judgment (“UWP's

² This statement appears in the Statement of Material Facts in Support of Plaintiff Unions' Motion for Summary Judgment (“Local 42's SMF”) (Docket No. 28), at paragraph 1. UWP has not filed a response to that statement of material facts as required by Local Rule 56(c), and, accordingly, all of the statements included in Docket No. 28 will be deemed admitted so long as they are supported by appropriate citations to the summary judgment record, Local Rule 56(e).

Motion”) (Docket No. 21), at 62-63, 66-67, 74-76. A meeting was held on March 4, 1998 attended by CMP’s business manager in charge of its floating construction crews, Catherine Thibeault; CMP’s distribution line superintendent, Ralph Howe; James D. Merrigan, an international representative for the IBEW who provided services to Local 119 on behalf of the IBEW; and James Fraser, an international representative for the IBEW who provided services to Local 42. UWP’s SMF ¶ 12; Unions’ Responsive SMF ¶ 12. At this meeting, CMP requested staffing for four line bucket trucks, involving eight personnel. Plaintiff, Union Water Power Company’s Statement of Material Facts as to Which There is a Genuine Issue to be Tried, etc. (“UWP’s Opposition SMF”) (Docket No. 30), ¶ 1; Defendant Unions’ Reply Statement of Material Facts (“Unions’ Reply SMF”) (Docket No. 46), ¶ 1.

Also during the March 4 meeting Thibeault and Howe told Merrigan and Fraser that CMP was seeking employees to work on repairs that were needed in the aftermath of the ice storm, and Thibeault said that she wanted to enter into a labor agreement between CMP and Local 199 just like the one that had been entered into in 1996. UWP’s Opposition SMF ¶ 2; Unions’ Reply SMF ¶ 2; UWP’s SMF ¶ 13; Unions’ Responsive SMF ¶ 13. At no time did Thibeault or Howe state that UWP or its On Target Division would be involved in the work at issue or that they were seeking employees for UWP. UWP’s Opposition SMF ¶ 2; Unions’ Reply SMF ¶ 2. Merrigan and Fraser insisted that any labor agreement would have to be with UWP. UWP’s SMF ¶ 13; Unions’ Responsive SMF ¶ 13. Thibeault and Howe told Merrigan and Fraser that they were not authorized to enter into any agreement on behalf of UWP and would have to submit the matter to John F. Fallona, then the managing director of CMP and the president of UWP. *Id.* ¶ 14. Merrigan and Fraser asked about the possibility of Local 119 members continuing to perform work for CMP after

the ice storm repair work had been completed, indicating that Local 119 was interested in continuing its work relationship with CMP after that date. UWP's Opposition SMF ¶ 3; Unions' Reply SMF ¶ 3.

Fraser and Merrigan proposed to Thibeault and Howe during the March 4 meeting that UWP sign Letters of Assent A with Locals 119 and 42. UWP's SMF ¶ 16; Unions' Responsive SMF ¶ 16. Letters of assent are contracts that bind a signatory employer to a designated labor agreement between a chapter of the National Electrical Contractors Association ("NECA") and a construction union local of the IBEW. *Id.* Once a letter of assent has been signed, the employer may utilize the local union's hiring hall, and employees referred from the hiring hall work under the terms and provisions of the labor agreement to which the letter of assent refers. *Id.* Thibeault told Fraser and Merrigan that she wanted to be sure that the same amendments that had applied to the 1996 Outside Utility Agreement would be continued in the contractual arrangement under discussion. *Id.* ¶ 18. Fraser agreed that the amendments would be part of the agreement under negotiation at that time and placed his initials on a copy of the amendments brought to the meeting by Thibeault and said that he would have the business manager of Local 119 sign it and return it to Thibeault. *Id.* ¶ 19. The business manager of Local 119 never did so. *Id.* ¶ 26.

There are two Letters of Assent A, one between UWP and Local 119, and one between UWP and Local 42, which had been signed by the business manager of Local 42, who was Fraser's son, before the March 4 meeting. UWP's SMF ¶ 20; Unions' Responsive SMF ¶ 20. Both letters of assent designated the Northeast Line Constructors Chapter of NECA as UWP's collective bargaining representative for all matters pertaining to the Outside Utility Labor Agreements between that chapter and Locals 119 and 42 and provided that UWP agreed to comply with and be bound by the

Outside Utility Labor Agreement effective as of March 3, 1998. *Id.* The Northeast Line Chapter is made up of contractors that perform electrical work and, among other things, negotiates labor agreements with local unions that are binding on its member contractors. *Id.* ¶ 21.

After the meeting Thibeault met with Fallona and informed him about the substance of her discussion with Merrigan and Fraser. *Id.* ¶ 23. Fallona, who had never seen a letter of assent before, signed both letters of assent. UWP's Opposition SMF ¶¶ 12, 14; Unions' Reply SMF ¶¶ 12, 14. Fraser and Merrigan had not provided Thibeault with copies of the Outside Utility Agreements with Locals 119 and 42 to which the letters of assent referred. UWP's Opposition SMF ¶ 13; Unions' Reply SMF ¶ 13. These Outside Utility Agreements were substantially identical to the Outside Utility Agreement that existed between CMP and Local 119 in 1996. UWP's SMF ¶ 25; Unions' Responsive SMF ¶ 25. The business manager of Local 119 signed the letter of assent at some time after the March 4, 1998 meeting, *id.* ¶ 24, but did not submit the amendment to the Northeast Line Chapter for its approval, *id.* ¶ 27. Pursuant to the newly-signed agreements, the IBEW locals provided UWP with manpower beginning March 9, 1998. Deposition of Catherine Thibeault, submitted with UWP's Motion, at 69-70.

Thomas Kenney is the manager of the Northeast Line Chapter. UWP's SMF ¶ 28; Unions' Responsive SMF ¶ 28. In that capacity, Kenney becomes involved in processing grievances under 25 to 30 labor agreements. *Id.* ¶ 29. Following the signing of the Letters of Assent, Merrigan, Fraser and the president of Local 119 informed Fallona that unless pole-setting work done by UWP was only incidental to other work, such work was covered under the terms of the 1998 Outside Utility Agreements. Deposition of Sidney A. Smith, submitted with UWP's Motion, at 85-93. By letter dated September 3, 1998 Kenney informed Fallona that charges had been filed against UWP by the

Northeast Line Chapter concerning Local 119. Letter from Thomas Kenney to John Fallona, Exh. 4 to Deposition of John F. Fallona, included in Attachment 2 to Unions' Opposition SMF. By letter dated September 11, 1998 Local 42 filed a grievance with Kenney against UWP. Letter from James G. Fraser to Thomas Kenney, Exh. 10 to Deposition of James D. Merrigan, submitted with UWP's Motion. Both charges concerned utility contracting work being performed by UWP's On Target Division. UWP's SMF ¶ 33; Unions' Responsive SMF ¶ 33.

By letter dated September 30, 1998 Kenney informed Fallona that a labor management committee meeting concerning both grievances would be held on Tuesday, October 13, 1998 in Boston, Massachusetts. *Id.* ¶ 34. Under the relevant Outside Utility Agreements, the labor management committee is the second step in the grievance procedure. *Id.* ¶ 35. The committee is made up of equal numbers of contractor representatives and labor representatives. *Id.* It is authorized to hear and decide grievances. *Id.* Fallona had previously scheduled a meeting in Augusta, Maine on that date to finalized a transition with a CMP subsidiary. *Id.* ¶¶ 38-39. By letter dated October 6, 1998 Fallona informed Kenney that he would be unable to attend the October 13 meeting and requested that it be postponed. *Id.* ¶¶ 42-43. Kenney responded by letter dated that same day, stating that the meeting would go forward and asking Fallona to send a representative. *Id.* ¶ 44.

On October 9, 1998 Fallona again wrote to Kenney stating that he would be unable to provide a representative for the meeting and again asking for a postponement. *Id.* ¶ 46. On Monday, October 12, 1998, a holiday, Kenney wrote to Fallona stating that the meeting would be held as scheduled. *Id.* ¶¶ 48-49. UWP's offices were closed on October 12 and Fallona did not become aware of this letter until October 13, 1998. *Id.* ¶¶ 49-50. No representative of UWP attending the

labor management committee meeting on October 13, 1998. [Minutes], Northeastern Line Constructors Chapter, N.E.C.A., Local Union 119, I.B.E.W., Grievance Meeting, October 13, 1998, Exh. 10 to Deposition of Thomas Kenney, included in Attachment 6 to Unions' Responsive SMF, at 1. The meeting resulted in determinations in favor of Locals 119 and 42. UWP's SMF ¶ 51; Unions' Responsive SMF ¶ 51.

On March 17, 1999 Local 119 filed a grievance regarding work being performed by UWP. Exh. 1 to Deposition of Sidney A. Smith, included in Attachment 10 to Local 42's SMF. By letters dated March 25, 1999 Fallona gave notice to Locals 119 and 42 and the Northeast Line Chapter of UWP's intent to terminate the letters of assent as of the "now current anniversary date[s] of the applicable approved labor agreement covered by the Letter of Assent, August 30, 1999." UWP's SMF ¶¶ 58, 60; Unions' Responsive SMF ¶¶ 58, 60. Kenney, on behalf of the Northeast Line Chapter, responded with letters asserting that the applicable anniversary date for the Local 119 agreement is September 1, 2001 and for the Local 42 agreement it is August 31, 2000. *Id.* ¶¶ 59, 61.

A labor management committee meeting, attended by UWP, was held October 6, 1999 with respect to Local 119's 1999 grievance, resulting in a ruling that UWP had violated the labor agreement. Exh. 11 to Deposition of Thomas Kenney ("Kenney Dep."), submitted with UWP's Motion; Deposition of John F. Fallona ("Fallona Dep."), submitted with UWP's Motion, at 179-80.

On January 22, 1999 UWP filed its complaint in the lead case, seeking rescission and a declaration of invalidity of the labor agreements at issue. Docket and Complaint (Docket No. 1). Local 42 filed its complaint for breach of the agreements in Docket No. 99-143-P-H on April 30, 1999. Docket and Complaint (Docket No. 1). Local 119 was added as a plaintiff in Docket No. 99-143-P-H by a motion for leave to amend the complaint that was granted on January 5, 2000.

Endorsement, Docket No. 23. The actions were consolidated on June 22, 1999. Endorsement, Letter requesting consolidation (lead case Docket No. 4).

III. Discussion

A. UWP's Motion

UWP contends that it is entitled to summary judgment on its complaint because (i) the unions failed to obtain the approval from the Northeast Line Chapter of the amendment to the 1996 agreement that UWP insisted be included in the parties' 1998 agreement, and such approval was required, Plaintiff, Union Water Power Company's Memorandum of Law in Support of its Motion for Summary Judgment ("UWP's Memorandum"), attached to Plaintiff, Union Water Power Company's Motion for Summary Judgment (Docket No. 21), at 2-9; (ii) Kenney's refusal to reschedule the labor management committee meeting was arbitrary and capricious, *id.* at 9-14; and (iii) UWP properly terminated the letters of assent in 1999, *id.* at 14-20.

The unions properly point out that the first asserted ground is not mentioned in UWP's second amended complaint, the currently applicable version of its complaint. Second Amended Complaint (Docket No. 10); Defendant Unions' Opposition to Plaintiff Union Water Power Company's Motion for Summary Judgment (Docket No. 32) at 3 n.2. UWP responds that it only became aware of the facts supporting this ground through discovery, whereupon it raised this claim as an affirmative defense to the unions' second amended complaint, and that "[s]ince that Complaint raises overlapping issues with UWP's Complaint and it has been consolidated for trial with UWP's Complaint, the issue is properly before the Court." Plaintiff, Union Water Power Company's Reply to the Defendant Unions' Opposition to its Motion for Summary Judgment (Docket No. 48) at 1. To the contrary, UWP may not rely on grounds raised only as an affirmative defense to the unions'

complaint as the basis for summary judgment on its own complaint. Summary judgment may not be granted on a ground not included in the complaint. *Liberty Lincoln-Mercury v. Ford Motor Co.*, 134 F.3d 557, 570 n. 15 (3d Cir. 1998).

This issue is not raised in UWP's opposition to the unions' motion for summary judgment, Plaintiff, Union Water Power Company's Memorandum of Law in Opposition to IBEW Local Unions Nos. 42's and 119's Motion for Summary Judgment (Docket No. 29), and accordingly will not be considered further in this recommended decision.

1. Refusal to reschedule labor management committee meeting.

Count III of UWP's complaint alleges that the decision of the labor management committee in favor of the unions on their 1998 grievances under the labor agreements must be overturned because Kenney's refusal of Fallona's request to reschedule the meeting of the committee was arbitrary and capricious and denied it a fair opportunity to "know of and defend against the allegations made against it." UWP's Second Amended Complaint ¶ 22.

The parties appear to agree that federal statutes governing arbitration, 9 U.S.C. § 1 *et seq.*, apply to this claim. UWP's Memorandum at 9; Unions' Opposition at 13. The labor management committee is created by the Outside Utility Agreements to resolve "[a]ll grievances or questions in dispute." Utility Agreement Between Northeastern Line Constructors Chapter, National Electrical Contractors Association, Inc., and Local Union No. 119 of the International Brotherhood of Electrical Workers, 1998-2001 ("the Local 119 Outside Utility Agreement"), submitted with UWP's SMF, §§1.05-1.08; Outside Utility Agreement Between Northeastern Line Constructors Chapter, National Electrical Contractors Association, Inc., and Local Union No. 42 of the International Brotherhood of Electrical Workers 1997-2000 ("the Local 42 Outside Utility Agreement"),

submitted with UWP's SMF, §§ 1.05-1.08. The parties have treated the decision of the labor management committee as final and its proceedings as the equivalent of arbitration, and no reason to do otherwise is apparent from the record.

The relevant federal statute provides, in pertinent part:

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

* * *

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

9 U.S.C. § 10(a).³

UWP contends that Kenney's denial of Fallona's request that the committee meeting be rescheduled was arbitrary and capricious because it was Kenney's policy to deny any and all requests for postponements. Kenney Dep. at 43-44. However, the statute requires a case-by-case application; the party alleging misconduct bears the burden of showing that the arbitrator in its case refused to postpone the hearing upon sufficient cause shown. *See Local Union No. 251 v. Narragansett Improvement Co.*, 503 F.2d 309, 312 (1st Cir. 1974) (construing earlier version of 9 U.S.C. § 10). This is also why UWP's related argument — that the labor management committee arrangement was inherently unfair to UWP because the unions had an "absolute right" to postpone meetings of the

³ In this case, the labor management committee's "award" was made in Boston, which is located in the District of Massachusetts. However, case law interpreting this statute has held that the language laying venue in the district in which the award is made is permissive rather than mandatory and accordingly does not establish an exclusive forum for challenges to arbitration awards. *E.g.*, *Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914, 920 (5th Cir. 1997); *Delta Dental of Rhode Island v. Dental Serv. of Massachusetts, Inc.*, 918 F. Supp. 46, 47-50 (D.R.I. 1996).

labor management committee by refusing to send any representatives to sit as members of the committee while UWP could not do so because the management members of the committee were designated by the Northeast Line Constructors Chapter, UWP's Memorandum at 13 — is unavailing. No such refusal occurred in this case, and no showing of misconduct on this basis in this case can be made.

UWP also offers an extended presentation of the reasons why Fallona could not attend the scheduled meeting and why no other person could represent UWP at the meeting. *Id.* Memorandum at 10-13. However, the issues under the statute are whether UWP presented an adequate justification for its postponement request to the arbitrator, *e.g.*, *Narragansett*, 503 F.2d at 312; *Dan River, Inc. v. Cal-Togs, Inc.*, 451 F. Supp. 497, 503 (S.D.N.Y. 1978) — not whether such a justification might have existed — and whether there was any reasonable basis for the arbitrator's denial of the request, *Schmidt v. Finberg*, 942 F.2d 1571, 1574 (11th Cir. 1991). If a reasonable basis for the denial exists, “a court should be reluctant to interfere with the award.” *Intercity Co. Establishment v. Ahto*, 13 F.Supp.2d 253, 261 (D.Conn. 1998) (noting that “[a]rbitrators are to be accorded considerable discretion in exercising their judgment with respect to a requested postponement”); *Card v. Stratton Oakmont, Inc.*, 933 F. Supp. 806, 811 (D. Minn. 1996) (same).

Here, the information supplied to Kenney by Fallona in connection with his request that the meeting be rescheduled is as follows: (i) “I am unable to attend the above referenced meeting as I will be out of town and unavailable. Please furnish alternate dates,” Letter dated October 6, 1998 from John F. Fallona to Thomas Kenney, Exh. 4 to Kenney Dep; and (ii) “In reply to your letter of October 6, 1998, I am unable to forward a representative. Again, please furnish alternate dates,” Letter dated October 9, 1998 from John F. Fallona to Thomas Kenney, included in Exh. 1 to Kenney

Dep. Fallona thinks that he may have spoken to Kenney by telephone on October 13, 1998, the day on which the meeting was held, Fallona Dep. at 164, but UWP offers no evidence concerning what Fallona said during that conversation, if anything. This is simply insufficient information to justify a postponement. *See Narragansett*, 503 F.2d at 311, 312; *Schmidt*, 942 F.2d at 1574 (where significantly more information was provided to arbitrator, no sufficient cause shown under statute); *cf. Naing Int'l Enter., Ltd. v. Ellsworth Assoc., Inc.*, 961 F. Supp. 1, 3 (D. D.C. 1997) (denial of postponement cause to vacate award where reason for request was pendency of investigation by federal agency, result of which would be pertinent and material to claims and defenses presented at arbitration).

In addition, Kenney's professed reason for the denial, that he had great difficulty getting contractor representatives to attend such meetings up to 300 miles away and had determined that representatives would be available on October 13, 1998, Kenney Dep. at 70-71, is not unreasonable under the circumstances.

Accordingly, UWP is not entitled to summary judgment on Count III of its complaint.⁴

2. *Cancellation of the agreements.*

⁴ UWP also contends that it was not given sufficient advance notice of the meeting because Fallona did not see Kenney's later dated (and faxed) September 30 until October 5. UWP's Memorandum at 10. However, it is undisputed that Kenney mailed and faxed his letter to the address given by UWP on the Letters of Assent. UWP's SMF ¶ 37; Unions' Responsive SMF ¶ 37; *compare* Letter dated September 30, 1998 from Thomas Kenney to John Fallona, included in Exh. 1 to Kenney Dep., *with* Exhs. 5 & 6 to Merrigan Dep. Any delay in UWP's receipt of this letter accordingly cannot be charged to the arbitrator. In addition, the Outside Utility Agreements provided for the convening of the committee upon as little as 48 hours notice. Local 119 Outside Utility Agreement § 1.05; Local 42 Outside Utility Agreement § 1.05. Under these circumstances, two weeks' advance notice of the meeting cannot be considered to rise to the level of misconduct by the arbitrator.

Count IV of UWP's second amended complaint seeks declaratory relief to the effect that it terminated the Letter of Assent with Local 42 effective August 31, 1999 and the Letter of Assent with Local 119 effective September 1, 1999.⁵ Second Amended Complaint ¶¶ 26-27 and Prayer for Relief ¶ 4. The unions take the position that the agreements could not be terminated earlier than September 1, 2000 and August 31, 2001, respectively. Unions' Opposition at 14.

The language at issue in each of the letters of assent is as follows:

This authorization, in compliance with the current approved labor agreement, shall become effective on the 3rd day of MARCH, 1998. It shall remain in effect until terminated by the undersigned employer giving written notice to the NORTHEASTERN LINE CONSTRUCTORS CHAPTER NECA and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the applicable approved labor agreement.

Letter of Assent - A [between Union Water Power Company and IBEW Local Union 119], Exh. 5 to Merrigan Dep.; Letter of Assent - A [between Union Water Power Company and IBEW Local Union 42], Exh. 6 to Merrigan Dep. It is clear from the face of each letter of assent that the "applicable approved labor agreement" is the respective Outside Utility Agreement. UWP contends that, regardless of the agreed term of either Outside Utility Agreement, each such agreement has an anniversary date at intervals of one year from its effective date. UWP's Memorandum at 15. The unions contend that neither Outside Utility Agreement has an anniversary date until one year after the expiration of its original term, which may be extended by the terms of each agreement for additional periods of one year each, making those one-year intervals the "anniversary dates." Unions' Opposition at 15-19.

⁵ This claim apparently represents only a relatively small portion of the employee work hours in dispute. See Exh. A to Affidavit of Jeffrey Neil Young (Docket No. 26).

The term “anniversary date” is not defined in the letters of assent or the Outside Utility Agreements. However, the Outside Utility Agreements do differentiate between their expiration dates and anniversary dates.

Either party or an Employer withdrawing representation from the Chapter or not represented by the Chapter, desiring to change or terminate this Agreement must provide written notification at least ninety (90) days prior to the expiration date of the Agreement or any anniversary date occurring thereafter.

Local 119 Outside Utility Agreement § 1.02(a); Local 42 Outside Utility Agreement § 1.02(a). UWP’s argument that “anniversary date” in the letters of assent necessarily means something other than “anniversary date” in the Outside Utility Agreements because the letters of assent do not simply adopt the termination provisions of the Outside Utility Agreements or use the term “expiration date” is unpersuasive. The letters of assent do not adopt the termination provisions of the Outside Utility Agreements because they set a different period for advance notice. Use of the term “expiration date” would arguably make it impossible for an employer signing a letter of assent to terminate an agreement after an outside utility agreement was automatically renewed following its initial termination date. Local 119 Outside Utility Agreement § 1.01; Local 42 Outside Utility Agreement § 1.01.

None of the case law cited by UWP requires the entry of summary judgment in its favor on this issue. Indeed, only one cited case refers to this issue at all, and the issue is treated differently, albeit both times in *dicta*, at the administrative level and by the reviewing court. In *Industrial TurnAround Corp.*, 321 NLRB 181 (1996), the National Labor Relations Board adopted the decision of an administrative law judge who noted in his opinion that a contractor’s notice of intent to withdraw from NECA and to terminate a 1990 letter of assent, dated May 6, 1993, was effective as

of August 31, 1994, the expiration date of the relevant collective bargaining agreement, which was in effect by its terms from September 1, 1992 to August 31, 1994. *Id.* at 184. The letter of assent could be terminated by its terms only on the anniversary date of the collective bargaining agreement. *Id.* n.6. In a decision that affirmed in part and reversed in part, the Fourth Circuit observed that the May 6, 1993 letter was dated “only 112 days prior to August 31, 1993, the then-current anniversary dated of the 1992-94 agreement” and accordingly not within the 150-day notice period required by the letter of assent. *Industrial TurnAround Corp. v. N.L.R.B.*, 115 F.3d 248, 255 (4th Cir. 1997).

I am not persuaded by the Fourth Circuit *dictum*. The terms of the Outside Utility Agreements certainly suggest that an “anniversary date” occurs only after the end of the initial term of those contracts. The unions here do not contend that UWP could not effectively terminate its participation by giving written notice 150 days before the end of the initial term of the Outside Utility Agreements, even though the expiration date is distinguished from any anniversary date by the language of those contracts. However the expiration date is to be treated, an anniversary of an event, by its nature, cannot occur while the event is ongoing. The “anniversary date” of a contract, not otherwise defined (*e.g.*, “the anniversary date of the signing of this agreement,” “the anniversary of the effective date of this agreement,” etc.), most reasonably is the expiration date of the contract and the expiration date of any automatic renewals of the contract that may follow. *See N.L.R.B. v. Black*, 709 F.2d 939, 940-41 & nn.1 & 3 (5th Cir. 1983) (employer providing written notice in October 1979 where Letter of Assent - A requiring 150 day notice “prior to the then current anniversary date” of underlying contract was in force bound by contract with two-year term expiring May 29, 1981); *Nelson Elec. v. N.L.R.B.*, 638 F.2d 965, 967-68 (6th Cir. 1981) (contractor that signed Letter of Assent - A with 150-day notice requirement bound by collective bargaining

agreement effective November 1, 1976 through October 31, 1978 when notice letter written February 24, 1977).

UWP is not entitled to summary judgment on Count IV of its second amended complaint.

B. The Unions' Motion

The unions seek summary judgment on all counts of their second amended complaint, which seeks enforcement of the "arbitration awards" of the labor management committee dated October 27, 1998 (as to both locals) and October 6, 1999 (Local 119 only). Plaintiff Unions' Motion for Summary Judgment, etc. ("Unions' Motion") (Docket No. 24) at [1]-3. In response, UWP relies on its affirmative defense that any contracts between the parties are invalid because Fallona's signature on the letters of assent was procured by fraud, Plaintiff, Union Water Power Company's Memorandum of Law in Opposition to IBEW Local Unions Nos. 42's and 119's Motion for Summary Judgment ("Unions' Opposition") (Docket No. 29) at 8-18, and because its request for a postponement of the labor management committee meeting on October 13, 1998 was denied, *id.* at 18-20.

Initially, the unions contend that the parol evidence rule bars UWP from submitting evidence concerning fraud in the inducement or fraud in the execution of the contracts because the letters of assent and the Outside Utility Agreements are integrated. Unions' Motion at 15-19. However, the parol evidence rule, which bars the admission of evidence to vary the terms of an integrated written contract, does not apply to evidence that is introduced to show that the contract at issue is void or voidable. *Connors v. Fawn Mining Corp.*, 30 F.3d 483, 493-94 (3d Cir. 1994). *See also In re Belmont Realty Corp.*, 11 F.3d 1092, 1099 (1st Cir. 1993) (claim of fraud in inducement not normally decided on parol evidence grounds); *All Hit Radio, Inc. v. Communications Broad.*

Affiliates, Inc., 101 F.R.D. 765, 766 (D. Me. 1984).

Because UWP's affirmative defense, if successful, would bar the unions' claims, which arise from the Outside Utility Agreements, the existence of disputed issues of material fact as to that defense would require denial of the unions' motion for summary judgment. The unions concede that evidence material to a claim of fraud in the inducement is in dispute in this case, but contend that only fraud in the execution would bar their claims. Defendant Unions' Reply to Union Water Power Company's Opposition to Unions' Motion for Summary Judgment ("Unions' Reply Memorandum") (Docket No. 42) at 2 n.2. That contention is not necessarily correct as a matter of law, and, in any event, there are disputed issues of fact in the summary judgment record material to a claim of fraud in the execution as well as to a claim of fraud in the inducement.

["Fraud in the inducement"] induces a party to assent to something he otherwise would not have; ["fraud in the execution"] induces a party to believe the nature of his act is something entirely different than it actually is. "Fraud in the execution" arises when a party executes an agreement "with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms." Uniform Commercial Code § 3-305(2)(c); *see* Restatement (Second) of Contracts § 163 (1981).

* * *

Fraud in the execution results in the agreement being void *ab initio*, whereas fraud in the inducement makes the transaction merely voidable.

Southwest Adm'rs, Inc. v. Rozay's Transfer, 791 F.2d 769, 774 (9th Cir. 1986) (citations omitted).

All of the case law upon which the unions rely involves claims by union pension funds for contributions allegedly due from employers pursuant to collective bargaining agreements. In each of those cases, the court makes clear that its holding that only fraud in the execution of the underlying agreement will bar the claim, not fraud in the inducement, is tied to the fact that the claim is made by a pension fund or its trustees. In most of the cases, the Employee Retirement Income

Security Act (“ERISA”), and specifically 29 U.S.C. § 1145, is also a basis for the limitation. Thus, in *Connors*, where the trustees of two benefit pension plans sought contributions allegedly due from an employer, the Third Circuit noted that

[t]he courts have interpreted [29 U.S.C. § 1145] as severely limiting the defenses available to an employer who has signed an agreement which commits it *to make contributions to a benefit fund*. Our review of the case law . . . revealed that an employer may not assert defects in the formation of the collective bargaining agreement, such as fraud in the inducement or oral promises to disregard the text of the agreement. . . . Claims for contributions delinquent under the terms of a collective bargaining agreement can be defeated if it is shown that the collective bargaining agreement is void *ab initio*, as where there is fraud in the execution, and not merely voidable, as in the case of fraudulent inducement.

30 F.3d at 490 (emphasis added; internal punctuation and citations omitted). In *Rozay’s Transfer*, the administrator of an employee benefit trust sought to recover allegedly delinquent contributions to the fund; relying on ERISA, the Ninth Circuit held that the employer’s failure to prove fraud in the execution of the relevant collective bargaining agreement, rather than fraud in the inducement, meant that the employer did not have a legitimate defense to the action. 791 F.2d at 773-75. *See also Iron Workers’ Local No. 25 Pension Fund v. Allied Fence & Sec. Sys., Inc.*, 922 F. Supp. 1250, 1255-58 (E.D.Mich. 1996) (applying ERISA); *Gould v. Mobile Concrete Pumping, Inc.*, 865 F. Supp. 619, 623-24 (W.D.Mo. 1994).

In the instant case, no claim for pension fund payments is made. Rather, the unions seek to enforce two arbitration-like awards that would require UWP to pay additional wages and fringe benefits to certain identifiable individuals. There is no suggestion that ERISA applies to this claim. The reasons for limiting an employer’s defenses to a claim for pension fund benefit payments do not necessarily apply to a claim for enforcement of an arbitration award. *See, e.g., Local Union 26, Int’l*

Bhd. of Elec. Workers, AFL-CIO v. CWS Elec., 669 F. Supp. 495, 498-99 (D.D.C. 1987) (employer could raise defense of fraud in the inducement in action seeking enforcement of arbitration award if defense timely raised). If fraud in the inducement is a valid defense under the circumstances of this case, the unions' concession makes it unnecessary to go further. However, it is not necessary to decide this issue because there are sufficient disputed issues of material fact concerning the existence of fraud in the execution to prevent the entry of summary judgment for the unions in this case.

The relevant facts concern what was said at the March 4, 1998 meeting attended by Thibeault and Howe from CMP and Merrigan and Fraser from the unions, and Fallona's knowledge when he signed the letters of assent following that meeting. Thibeault testified that she told Fraser and Merrigan that any agreement that UWP might enter into with the unions would have "nothing whatsoever to do with the existing businesses at On Target, Union Water and [CMP's] other division, On Target" and that Fraser and Merrigan did not object, Deposition of Catherine Thibeault ("Thibeault Dep."), submitted with UWP's SMF, at 25-26, 44; that Fraser or Merrigan told her that UWP would have to sign a letter of assent with Local 42 because Local 119 had no apprentices available and the apprentices would come from Local 42, *id.* at 26, 37, a statement that was not true, Deposition of Sidney A. Smith, submitted with UWP's SMF, at 67-70; and that she told Fraser and Merrigan that CMP could not make any commitments to provide work for union members after the ice storm repair work had been completed, Thibeault Dep. at 32-33. Fallona testified that he had never seen a letter of assent before and did not know what one was, Fallona Dep. at 103; that no copies of the Outside Utility Agreements had been provided to him before he signed the letters of assent, *id.* at 110; that at the time he signed the letters of assent he believed that the agreement was

to be limited to CMP's work involving ice storm repairs, *id.* at 116-117; and that he signed the letters of assent because he needed eight workers to start on March 9, 1998, the next Monday morning, *id.* at 105. The unions deny many of these assertions.

The unions argue that UWP cannot establish a defense of fraud in the execution because Fallona was "an experienced labor relations manager who had reasonable opportunity to review the Letters of Assent and the underlying outside utility agreements before signing the Letters of Assent" and because "UWP insisted upon and received the same terms and conditions which CMP and Local 119 had agreed to in 1996." Unions' Reply Memorandum at 1. However, a "reasonable opportunity to review" the letters of assent gained Fallona very little, because they merely incorporate by reference the Outside Utility Agreements. Exhs. 5 & 6 to Merrigan Dep. Fallona signed the letters of assent on March 4, 1998. *Id.* Fraser "believes" that he provided Thibeault with a copy of the Local 42 Outside Utility Agreement on March 4, 1998, based on what his son has told him since the meeting, Affidavit of James D. Fraser (Docket No. 44) ¶¶ 4-5, but that fact is clearly in dispute. The fact that the agreements subsequently proved to be substantially similar does not prove that Fallona had an opportunity to review them before he signed the letters of assent. Nor does the fact that CMP insisted that the same amendments that had applied to its 1996 agreement with Local 119 apply to any agreement in 1998 mean that Fallona was aware of the substance of the Outside Utility Agreements when he signed the letters of assent.

The unions' argument that they "did not place any pressure upon Fallona to sign the contract," Unions' Reply Memorandum at 5, is disingenuous. It is not only pressure by one party upon another that is evidence of fraud in the execution. Events can supply that pressure, so long as both sides are aware of it. *E.g., Connors*, 30 F.3d at 492. Here, UWP has presented evidence that

Merrigan and Fraser were aware that CMP needed eight workers to start within four days of the March 4, 1998 meeting.

The disputed evidence submitted by UWP would allow a factfinder to conclude that Fallona was “excusabl[y] ignoran[t] of the contents of the writing signed,” *Rozay’s Transfer*, 791 F.2d at 774, and that the Outside Utility Agreements were essentially different from the agreement Fallona thought he was entering into, which was to be limited to the time necessary to repair ice-storm damage. It is possible to conclude that UWP never manifested assent to be bound beyond that period, which it expected to be four to six weeks, Thibeault Dep. at 33-34, or to be bound for work to be performed in Local 42’s area, *Gould*, 865 F. Supp. at 624. *See also Iron Workers’ Local No. 25 Pension Fund v. Nyeholt Steel, Inc.*, 976 F. Supp. 683, 690 (E.D.Mich. 1997) (fraud in execution found where employer led to believe by union representative that he was signing a “one-job” agreement). Fallona’s admitted experience in negotiating labor agreements, while a factor to be considered by a factfinder, is not enough to outweigh the other evidence of fraud in the execution as a matter of law.

Accordingly, because a factfinder could conclude that UWP’s participation in the contracts at issue was induced by fraud in the execution, the unions are not entitled to summary judgment on their complaint. *See generally Connors*, 30 F.3d at 492-93.

IV. Conclusion

For the foregoing reasons, I recommend that the parties’ motions for summary judgment be **DENIED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 16th day of February, 2000.

*David M. Cohen
United States Magistrate Judge*