NO. 12-3348
IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL CIRCUIT

JERRY MATTHEWS; JERRY WILLIAMS; TOMMY SAMS; CYNTHIA BOYNE; and CHARLES BROWN, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs - Appellants,

v.

CHICAGO TRANSIT AUTHORITY; RETIRMENT PLAN FOR CHICAGO TRANSIT AUTHORITY EMPLOYEES; BOARD OF TRUSTEES OF THE RETIREMENT PLAN FOR CHICAGO TRANSIT AUTHORITY EMPLOYEES; RETIREE HEALTH CARE TRUST; and BOARD OF TRUSTEES OF THE RETIREE HEALTH CARE TRUST,

Defendants - Appellees.

Appeal from the Circuit Court of Cook County, Illinois
Circuit No. 11 CH 15446
The Honorable Franklin U. Valderrama, Judge Presiding

# PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING

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## POINTS AND AUTHORITIES

Plaintiffs petition for partial rehearing of the Court's February 7, 2014 opinion affirming the dismissal of current CTA employees' claims for lack of standing, because the Court misapprehended or overlooked four principal issues. First, the Court's analysis and authority cannot support denying standing to current employees who were not represented by the Transit Unions.[1] Second, if current employees, including those represented by the Transit Unions, do not have standing here, they have no effective forum to argue that their vested retirement system benefit is protected by the Retirement Benefits Clause and that the Transit Unions had no authority to waive that vested right. The Court's ruling on the vested rights of retirees suggests those claims by the current employees could also be meritorious, but for their failure to pursue breach of duty of fair representation claims against their unions. Therefore, the Court cannot avoid either (1) reaching the constitutional issue of whether the Retirement Plan Agreement granted a non-forfeitable vested right to retiree health benefits incorporated in the CTA retirement system or (2) allowing current employees standing to make that claim on remand in circuit court. Third, the Court's conclusion concerning the availability of duty of fair representation claims cannot be applicable to claims against the Retirement Plan and Health Trust and their Boards who were not party to, nor bound by, the collective bargaining agreement grievance and arbitration procedure and duty of fair representation claims would not lie against those defendants. Finally, the Court's proposed arbitral and administrative remedies would be futile because only a court has the power to declare P.A. 95-708 unconstitutional.

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[1] Capitalized terms not otherwise defined here have the meaning used in Brief of Plaintiff-Appellants, filed April 26, 2013 ("P. Br.") and Reply Brief of Plaintiffs-Appellants, filed October 25, 2013 ("P. Reply").

## ARGUMENT

### I. Employees who were not and are not represented by the Transit Unions must have standing to bring each of the claims in the Complaint.

The Court held that the current employees lacked standing because (1) the rights they claim to the retiree health benefits were subject to the grievance and arbitration procedures in the CBA, (2) only the parties to an arbitration award issued pursuant to a collective bargaining agreement (here the CTA and the Transit Unions), not individual employees, have standing to sue to vacate the award absent allegations that their union breached its duty of fair representation, and (3) the current employees' remedy here was to have filed an unfair labor practice charge against the Transit Unions. *Matthews v. CTA*, 2014 IL App (1st) 123348, ¶¶ 70-77.

These premises cannot support the dismissal of claims by plaintiffs Cynthia Boyne and Charles Brown who were not represented by the Transit Unions. Before she retired in 2009, Boyne was a member of International Brotherhood of Electrical Workers Local 9, not the Transit Unions. (R. V1, C4 (Separate Appendix to Brief of Plaintiff-Appellants ("A_"), at 38); *see also* P. Br. 3, 14.) And before he retired in 2009, Brown was an unrepresented, non-union CTA employee. (R. V1, C5 (A39).) Nonetheless, they are both participants in the Retirement Plan, and the Retirement Plan Agreement sets forth the terms of their CTA retirement system benefits, including the Section 20.12 retiree health benefits. (R. V1, C4-5, 40 (A38-39, 73), at § 4.) In its opinion, the Court stated that "Plaintiffs do not argue that CTA employees who are not members of the transit unions are treated any differently than union members." *Matthews*, 2014 IL App (1st) 123348, ¶ 68 n.6. That is true with regard to the fact that CTA employees who are not represented by the Transit Unions are nonetheless Retirement Plan participants and

entitled to the benefits detailed in the Retirement Plan Agreement. *See Bosco v. CTA,* 164 F. Supp. 2d 1040, 1044 (N.D. Ill. 2001) ("The Retirement Plan covers all CTA employees, whether union members or not, who meet its requirements.") Plaintiffs, however, argued that the Transit Unions could not act on behalf of employees they do not represent, including to waive those employees' vested rights through arbitration or collective bargaining. (P. Br. 14.)

Because the Transit Unions are not their exclusive representatives, Boyne's and Brown's Retirement Plan benefits cannot be subject to the Transit Union's grievance and arbitration procedures in the Transit Union WWCAs, arbitration procedures to which Boyne and Brown never agreed and had no access. *See Monmouth Pub. Schs., Dist. No. 38 v. Pullen*, 141 Ill. App. 3d 60, 64 (3d Dist. 1985) ("[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."). The Transit Unions also did not owe them any duty of fair representation. *See Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 376 n.22 (1984) ("A union's statutory duty of fair representation traditionally runs only to the members of its collective-bargaining unit, and is coextensive with its statutory authority to act as the exclusive representative for all the employees within the unit."). Therefore, to vindicate their constitutional and contractual rights, Boyne and Brown could neither bring an unfair labor practice charge for breach of the duty of fair representation against the Transit Unions nor bring an action to vacate the Benn Award alleging the Transit Unions breached a duty the unions did not owe them.

Thus, denying Boyne, Brown, and similarly situated CTA employees standing would leave them with no remedy to enforce their vested constitutional and contractual rights under the Retirement Plan Agreement. Their proper avenue for relief is to do what

they did here, bring an action in circuit court without the requirement of alleging and proving a breach of the duty of fair representation. Illinois courts routinely look to federal labor law decisions when defining the scope of the duty of fair representation and individual employee standing. *See, e.g., Stahulak v. City of Chi.*, 184 Ill. 2d 176, 184 (1998) (citing *Vaca v. Sipes*, 386 U.S. 171 (1967)). And federal courts have recognized that, where active individual employees are third-party beneficiaries of a contract, but where a union does not have representational authority for the employees, the individual employees have standing to bring a breach of contract action against their employer without pleading or proving a breach of the duty of fair representation. *See Anderson v. AT&T Corp.*, 147 F.3d 467, 473 (6th Cir. 1998) ("[W]e have recognized a number of situations in which individual plaintiffs, not personal signatories to a collective bargaining agreement, may nonetheless sue an employer for breach of a collective bargaining agreement without also suing the union. The most common is the situation in which the union owes no duty to the plaintiff because the plaintiff is not a member of the bargaining unit represented by the union.").

Thus, even if current employees represented by the Transit Unions, such as plaintiff Sams, did not have standing to bring the claims in this litigation (which they do), CTA employees whom the Transit Unions had no authority to represent, including Boyne and Brown, would still have standing. Moreover, Boyne and Brown cannot be bound by the Benn Award issued pursuant to the Transit Union WWCA or any purported agreement by the Transit Unions to reduce their retiree health benefits. (*See* R. V1, C127, C187 (A161, A220), at § 17.3 ("The decision of a majority of the arbitration committee shall be final, binding, and conclusive *upon the Union and the Authority*." (emphasis

added); P. Br. 14 ("Transit Unions had no authority to waive the rights of non-members, including Plaintiffs Brown and Boyne"). Plaintiffs Brown, Boyne, and other similarly situated CTA employees not represented by the Transit Unions must, therefore, have standing to assert their vested contractual and constitutional rights.

## II. Current employees must have standing here to argue their retiree health benefit is vested and protected by the Retirement Benefits Clause and is not subject to waiver by the Transit Unions.

The employees who were represented by the Transit Unions at the time of the Benn Award must also have standing to argue that their retiree health benefit is vested and protected by the Retirement Benefits Clause and that vested benefit is not subject to waiver by the Transit Unions or by unilateral employer or legislative action. The Court concluded that (1) the Retirement Plan Agreement vested the retiree health benefit from the Retirement Plan (*Matthews*, 2014 IL App (1st) 123348, ¶ 109); (2) that vested right might be protected by the Retirement Benefits Clause (*id.*, at ¶ 128); and (3) the Transit Union represented workers might have a claim that the Transit Unions exceeded their authority by consenting to "terms that could be unconstitutional, violated the RTA Act, and breached promises made to CTA employees" (*id.*, at ¶ 76). Those conclusions about rights that may have vested because of prior collective-bargaining agreements, Retirement Plan provisions, and years of practice are in conflict with the Court's holding that current employees do not have standing here to make those very arguments because of a subsequent arbitration award.

The Court has allowed the retirees to assert in circuit court that the Retirement Benefits Clause protects a vested right to the retiree health benefit and the Transit Unions had no authority to waive that right. (*Id.*, at ¶ 128.) The current employees, who were granted the same vested right before the Benn Award, must then also have standing either

to argue that the Court must reach the constitutional issue in this Court or to pursue that right in the circuit court based on current or future Illinois Supreme Court rulings. Current Transit Union-represented employees must have a remedy to protect that vested right or else it would be a right without a remedy, which is no right at all. *People ex rel. Endicott v. Huddleston*, 34 Ill. App. 3d 799, 807 (5th Dist. 1976) "[A] right without a remedy is no right at all.") Where, as here, it is undisputed that the retiree health benefits were funded by employees through contributions to the Retirement Plan and paid out of Retirement Plan assets, the benefits were a crucial part of the CTA Retirement System, and therefore current employees should have standing to raise the constitutional claim.

### A. The current employees must have standing here to argue the retiree health benefit is a benefit of the CTA retirement system and protected by the Retirement Benefits Clause.

The Court's opinion deferred ruling on whether the retirees' health benefit is protected by the Retirement Benefits Clause. Just as the retirees, the current employees must have standing here to make their case that their identical retiree health benefit is similarly protected by the Retirement Benefits Clause and that it, too, became vested, non-forfeitable, and non-waiveable by the Transit Unions after they first joined the CTA retirement system or after the benefit was made part of the Retirement Plan Agreement paid for by employee contributions to the Retirement Plan. Alternatively, as with the retirees, the Court should allow them to pursue those arguments on remand in circuit court following current and future Illinois Supreme Court guidance.

The Court correctly concluded that "the retirement plan agreement is clear that, at the very least, benefits up to the level of the December 31, 2003, amount were intended to be vested benefits. Whether benefits beyond that level were vested is a question of fact dependent on the course of conduct between the parties." *Matthews*, 2014 IL App (1st)

123348, ¶ 109. This conclusion raises the question of when that right to the retiree health benefit vested. Because the Court considered only the rights of retirees under general contract vesting principles, it did not apply the Retirement Benefits Clause vesting rule and held instead that "the rights provided under section 20.12 are vested rights that may not be changed after the CTA employee retires." *Id.* at, ¶ 108. If, however, the current employees' rights provided in Retirement Plan Agreement Section 20.12 are vested rights protected by the Retirement Benefits Clause, those rights vested not at retirement, but as soon as the participant joined the retirement system or the benefit was established as part of that system. *See Buddell v. Bd. of Trs., State Univ. Ret. Sys. of Ill.*, 118 Ill. 2d 99, 105 (1987); *Miller v. Ret. Bd. of Policemen's Annuity & Benefit Fund of Chi.*, 329 Ill. App. 3d 589, 597 (1st Dist. 2001). (*See also* P. Br. 15-16.) From that moment of vesting before the 2007 Benn Award, the current employees had a legally enforceable contractual right to their retiree health benefit that could not be diminished or impaired. *Buddell*, 118 Ill. 2d at 105-06 (holding that under Retirement Benefits Clause, change in law that occurred after participant joined system, but before he retired, could not be applied to diminish or impair his retirement system rights).

The Court's holding that the Retirement Plan Agreement vested the retiree health benefit, paid for out of the Retirement Plan assets, further supports plaintiffs' argument that the retiree health benefit is a benefit of the CTA retirement system, and therefore, protected by the Retirement Benefits Clause and its vesting rules. (*See* P. Br. 17-22; P. Reply 13-15.) Plaintiffs argued that they have standing to assert individual causes of action under the Illinois Constitution separate and apart from any breach of contract claim. (P. Br. 12-13.) And they argued that the unions had no authority to waive their

rights to those constitutional claims. (P. Br. 13 (citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009); *McDonald v. City of W. Branch*, 466 U.S. 284, 292 (1984); *EEOC v. Ind. Bell Tel. Co.*, 256 F.3d 516, 522 (7th Cir. 2001) (*en banc*)).)

The Court rejected that argument finding this case distinguishable from plaintiffs' authority because the retiree health benefit was included in the Retirement Plan Agreement incorporated into the collective bargaining agreements. *Matthews*, 2014 IL App (1st) 123348, ¶ 75. That observation, however, does not recognize that once collective bargaining benefits become vested, they are the individual vested right of the employee, no longer subject to forfeiture through the collective bargaining process or waiver by the unions. Vested retirement benefits are different from other terms and conditions in a collective bargaining agreement such as wage scales, work rules, and just cause for discipline provisions that are not vested. In the private sector Section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") gives current employees an individual right of action to confirm their vested retirement benefits. 29 U.S.C. § 1132(a) ("A civil action may be brought (1) by a plan participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.") Here in the public sector where ERISA does not apply, current employees, including employees represented by unions, have an equivalent individual right to a vested retirement system benefit and should have an individual right of action under the Retirement Benefits Clause.

**B. Unions cannot waive the already vested benefits of workers they represent, even if those benefits were established in a collective bargaining agreement.**

Moreover, it is well established that unions have no authority to waive the vested

benefits of their members, and current employees must have standing to challenge a union's *ultra vires* action in doing so. In contrast to this rule, the Court's denial of standing to current employees implicitly allows the Transit Unions to waive their members' individually vested, Retirement Benefits Clause rights, which they have no power to do. (*See* P. Br. 13-14.)

Once vested, benefits originally conferred through collective bargaining belong to the individual employee and are no longer subject to the collective bargaining process or collective waiver by a union. As one court explained:

> Once created, vested rights become the non-forfeitable property of the employee and pass from the collective bargaining process. . . . [O]nce vested rights are granted, they cannot be affected by later bargaining. It is implicit in the notion of vesting that the parties intended to make such rights the permanent and inalienable property of the recipient. The hard-earned benefits and expectations of employees must be protected. In the limited situations where vested rights have been created, neither an employer nor a collective bargaining agent has the power to terminate those rights without consent.

*Bell v. Purolator Prods., Inc.*, Nos. 87-6475, 87-6172, 1989 U.S. Dist. LEXIS 6857, at *9-10 (E.D. Pa. June 19, 1989) *aff'd sub nom. Bokunewicz v. Purolator Prods., Inc.*, 907 F.2d 1396, 1401 (3d Cir. 1990) ("If the rights were vested, the union and Purolator were without power to bargain those benefits away."). *See also Hauser v. Farwell, Ozmun, Kirk & Co.*, 299 F. Supp. 387, 393 (D. Minn. 1969) ("[W]hereas a [u]nion may bargain as to prospective matters such as seniority rights, future conditions of employment, etc., it cannot bargain away the accrued or vested rights of its members. So without explicit authority or a power of attorney from the individual members, the [u]nion in this case could not bargain away the vested rights of its membership."); *Stoker v. Milwaukee County*, 2013 WI App 144, ¶ 38 (Wis. Ct. App. 2013) (rejecting argument that participants' union had "ability to consent on behalf of the employee through collective

bargaining" to change in vested retirement benefits); *Welter v. City of Milwaukee*, 571 N.W.2d 459, 464 (Wis. Ct. App. 1997) ("The City's argument that the officers should be deemed to have consented to the modification of their vested retirement-system rights because the concessions were agreed-to by their unions ignores that a union may not bargain away the vested rights of its members without the express consent of those members."); *Yeomans v. Union Labor Life Ins. Co.*, No. 235, 1987 Tenn. LEXIS 993, at *5 (Tenn. Oct. 12, 1987) ("Plaintiff had a vested right in the insurance policy at the time of his hospitalization. It would appear by analogy to the cases cited above that once a right vests in an employee, that right may not be bargained away by the union.")

Illinois cases are in accord with the rule that unions and employers cannot divest current employees of already vested rights, even when those rights are originally established through collective bargaining. *See Haake v. Bd. of Educ. for Township High Sch. Glenbard Dist. 87*, 399 Ill. App. 3d 121, 137-39 (2d Dist. 2010) (holding teachers had vested right to retiree health benefit under early retirement option that could not be divested by subsequent bargaining between union and employer before teachers retired); *Lawrence v. Bd. of Educ. of Sch. Dist. 189*, 152 Ill. App. 3d 187, 196-98 (5th Dist. 1987) (holding individual employee had vested right to accrued sick leave compensation under prior collective bargaining agreement despite union and employer bargaining to eliminate right in later agreement before employee's retirement).

*Ballentine v. Koch*, 674 N.E.2d 292 (N.Y. 1996) and *In re Ahr v. City of N.Y.*, 663 N.Y.S.2d 34 (N.Y. App. Div. 1997), cited by the defendants, are inapposite. In both cases, a union negotiated a supplemental benefit that would have been part of their members' retirement system and protected by New York's comparable Retirement

Benefits Clause, except for the fact that the union agreed when the benefit was first negotiated that it would not be part of the pension or retirement system. The courts held that this waiver of constitutional protection for a newly created benefit was within the power of the unions to negotiate. *Ballentine*, 674 N.E.2d at 295-96; *In re Ahr*, 663 N.Y.S.2d at 34 (following *Ballentine*). The union, in other words, was free to waive constitutional protection for a new benefit prospectively, before it was added to the retirement system, and thus, before it was a vested benefit of any individual participant.

It is akin to the Illinois General Assembly's power to exempt a new benefit from Retirement Benefits Clause protection when it is first created, but lack of power to diminish a retirement system benefit retroactively that it had previously enacted and in which participants already had a vested right. (*See* P. Br. at 22-23, 41 (discussing 40 ILCS 5/7-199.1(f), 5/8-164.2(b) & 5/11-160.2(b).) The New York cases do not hold that unions could retroactively waive a member's right to a retirement system benefit that had previously been negotiated and thus had already vested. And to the extent that they could be over-read to so hold, this Court should decline to follow them as against the general rule against union waiver of vested and constitutional rights. (*See* P. Br. 13; P. Reply 12.) If the unions had no authority to waive their vested constitutional rights, then the current employees' must have a remedy to block the deprivation of their rights whether by the union, an arbitrator, or the Retirement Plan and Health Trust Boards.

### C. Because balancing the collective interests of their members is not intentional misconduct or arbitrary, discriminatory, or bad faith action by the Transit Unions, current employees could never establish a breach of the duty of fair representation to vindicate their vested constitutional rights.

The Court concluded that, to remedy their rights, current employees could have filed an unfair labor practice charge against the Transit Unions for breach of the duty of

fair representation for agreeing to terms that violated their constitutional rights or for failing to sue to vacate the Benn Award. *Matthews*, 2014 IL App (1st) 123348, ¶ 76. That, as discussed above, was not possible for the current employees, including plaintiffs Boyne and Brown, who the Transit Unions did not represent and did not owe a duty of fair representation. For different reasons, the Court's proposed remedy is equally illusory for the workers the Transit Unions do represent.

A Transit Union member theoretically could have filed an unfair labor practice charge against his union for a breach of the duty of fair representation. But restricting them to that avenue of relief unduly and unjustly restricts their constitutional rights, leaving those rights subject to an illusory remedy, waiver by the Transit Unions, and nullification by the Retirement Plan and Health Trust Boards. First, unfair labor practice charges are subject to a short statute of limitations. Current employees would have had to file the charge within 6 months of the union's final action, in this case the Transit Union's acquiescence to, or failure to sue to vacate, the Benn Award. 5 ILCS 315/11(a). The statute of limitations for an employee suit to vacate the Benn Award under the Illinois Public Labor Relations Act ("IPLRA") and Uniform Arbitration Act ("UAA"), alleging a breach of the duty of fair representation is even shorter, 90 days. 710 ILCS 5/12(b); *Ill. Dep't. of CMS v. AFSCME*, 298 Ill. App. 3d 640, 642-43 (4th Dist. 1998).

By the time current employees could have known how the legislature and defendants would implement the Benn Award and P.A. 95-708 to diminish their vested rights, the statutes of limitations for an unfair labor practice charge or an action to vacate the arbitration award under the IPLRA had long run. The Benn Award was issued on June 26, 2007. (R. V1, C213 (A246).) P.A. 95-708 was not effective until January 18,

2008, more than 6 months later, authorizing the Health Trust to cut the value of the retiree health benefit, charge retirees for that benefit, and tax active employees not less than 3% of their salaries to pay for that diminished benefit. (R. V1, C16 (A50).) And the Retirement Plan and Health Trust Boards did not implement the retiree health plan with its substantial deviation from the CTA's group plan for active employees and premium structure until 2009, some two years after the Benn Award. (R. V1, C18 (A52).) It was, therefore, not until two years after the Benn Award that current members would have known that the Boards would charge them for their retiree health benefit. By that time, the window of opportunity for a duty of fair representation action was closed.

But, even if that window were tolled and left open, the exceptionally deferential standard for reviewing union action for a breach of the duty of fair representation renders that procedure an illusory protection for members' constitutionally protected, vested retirement system rights. A union commits an unfair labor practice "only by intentional misconduct in representing employees." 5 ILCS 315/10(b)(1)(ii); *Murry v. AFSCME, Local 1111*, 305 Ill. App. 3d 627, 632-33 (1st Dist. 1999). To rise to a breach of the duty of fair representation under that standard, "1) the union's conduct must be intentional and directed at the employee; and 2) the union's intentional action must have occurred because of and in retaliation for some past activity by the employee or because of the employee's status (such as his or her race, gender or national origin) or animosity between the employee and the union's representatives (such as that based upon personal conflict or the charging party's dissident union practices)." *Casanova*, 17 PERI ¶ 3004 (Ill. Lab. Bd. Local Panel Dec. 21, 2000). Perhaps incorrectly following the federal, rather than the statutory Illinois standard for a breach of the duty of fair representation,

cases have held that to have standing to vacate an arbitration award under the IPLRA, an individual union member must plead and prove his union's action was "arbitrary, discriminatory, or in bad faith." *Stahulak*, 184 Ill. 2d at 181.

Under either standard, it would be impossible for current employees represented by the Transit Unions to prove the Transit Unions' actions here were a breach of their duty of fair representation. Even under the (slightly) less deferential federal standard, the U.S. Supreme Court has long recognized that a union does not breach its duty of fair representation "in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another." *Humphrey v. Moore*, 375 U.S. 335, 349 (1964). In not suing to vacate the Benn Award or in subsequently agreeing to its terms (as defendants claim they did), the Transit Unions balanced their diverse membership's interests in just that way. They took a position adverse to the vested retirement system benefits of their members hired on or before September 5, 2001, but they did so in a good faith (if *ultra vires*) effort to balance the competing interests of members hired after that date to obtain retiree health benefits for the first time, and to secure funding (through bonding) for the retirement system. As this Court stated rejecting plaintiffs' fiduciary duty claims, "we cannot find that plaintiffs have stated a claim that the defendant Boards were not acting in the best interests of the beneficiaries and participants of the Retirement Plan as a whole." *Matthews*, 2014 IL App (1st) 123348, ¶ 149. If that is so, the same must be true under the even more deferential duty of fair representation review standard for the Transit Unions representing their memberships as a whole.

Thus, even if current employees have meritorious claims for vested rights under

the Retirement Benefits Clause, they could never overcome the deferential breach of the duty of fair representation standard to challenge the Transit Union's compromise of those rights in favor of the unions' good-faith view of the collective good. The Court's assumed remedies, therefore, leave enforcement of current members' constitutionally protected retirement benefits to the discretion of the Transit Unions with the power to sacrifice those rights for the benefit of other members. This is wholly inadequate protection for individually vested constitutional rights.

Deciding that the current employees here do not have standing to assert their vested retirement system rights without proving the Transit Unions breached their duty of fair representation, the Court effectively insulates the Transit Unions from review, allowing them to bargain away those vested rights, and releases the Retirement Plan and Health Trust Boards from any responsibility for determining whether participants had vested rights to retiree health benefits under the Retirement Plan Agreement previously negotiated by the Transit Unions. That result cannot be squared with the rule that unions cannot retroactively bargain away vested rights.

The inequity of that result is made starkly clear if the Court considers the impact of its ruling not just on the retiree health benefit here (for which Retirement Benefit Clause protection is disputed), but also on pension annuities themselves. Under the Court's analysis, current CTA employees would also not have standing to challenge a cut to their pension annuities, which were similarly established through collective bargaining and detailed in the Retirement Plan Agreement. (R. V1, C46-75 (A80-110).) If the Transit Unions and CTA negotiated a new collective bargaining agreement cutting the pension annuities of the unions' members in exchange for a wage increase for the whole

membership, the adversely impacted members would have no remedy. The inequity that could result is clear: a current employee one year from retirement could receive a token wage increase but lose a lifetime retirement benefit when that agreement became effective, and he would not have standing to sue to protect his constitutionally vested right to his annuity without proving a breach of the duty of fair representation against the Transit Unions. That, he could not do. The Transit Unions would not have breached their duty of fair representation by trading his pension annuity to get a wage increase for the benefit of all of their members.

Thus, one year from retirement and after decades of service, this CTA employee could see his pension gutted with no recourse. In the private sector, ERISA prevents this undeniably inequitable result and provides participants individual standing to sue to enforce their vested pension rights. 29 U.S.C. §§ 1132(a) (participant right of action), 1054(g)(1) ("The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . .."). For Illinois public retirement systems, not covered by ERISA, the Retirement Benefits Clause must provide that protection for vested retirement system rights. For it to do so effectively, courts must allow union-represented employees to sue to protect vested retirement system rights even if originally established in a collective bargaining agreement and to do so without the insurmountable hurdle of proving a breach of the duty of fair representation. Thus, all current employees here, including those represented by the Transit Unions, must have standing to make their case that the retiree health benefit is protected by the Retirement Benefits Clause.

## III. The Court's analysis does not support denying current employees standing to bring claims against the Retirement Plan, Health Trust, and their Boards.

For independent reasons, the Court's analysis also cannot justify denying standing

to current CTA employees, including Transit Union members, for their claims against the Retirement Plan, the Health Trust, and their Boards. The Court's conclusions that the CTA has no statutory or contractual obligation for the retiree health benefit, and that it is the Retirement Plan which is responsible for the vested Section 20.12(a) retiree health benefit (*Matthews*, 2014 IL App (1st) 123348, ¶¶ 86, 109) further compel this result.

Decisions holding that employees represented by labor unions do not have individual standing to sue their employer for breach of a collective bargaining agreement or to vacate an arbitration award without pleading and proving a breach of their union's duty of fair representation are universally cases involving just that, suits by individual employees *against their employer*. *See, e.g., Stahulak*, 184 Ill. 2d 176 (1998); *Casanova v. City of Chi.*, 342 Ill. App. 3d 80 (1st Dist. 2003). They are not suits against retirement benefit funds, like the Retirement Plan and Health Trust defendants, by fund participants for promised benefits under a retirement plan.

Restrictions on union-represented employee standing in suits against their employer for breach of a collective bargaining agreement derive from requirements that such claims must usually be exhausted through the collective bargaining agreement's grievance and arbitration procedures that only the union and employer are parties to and have the authority to invoke. *See Vaca v. Sipes*, 386 U.S. 171, 184 (1967) ("[I]t is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement."); *Stahulak*, 184 Ill. 2d at 180 (holding that based on IPLRA and UAA, only a "party" to the collective bargaining agreement may sue to vacate an arbitration award). Therefore, where "the collective bargaining agreement does not provide that the grievance and arbitration procedure is the

exclusive and final remedy for breach of contract claims, the employee may sue his employer" without exhausting the arbitration procedure or alleging and proving a breach of the duty of fair representation. *Daigle v. Gulf State Util. Co., Local Union No. 2286*, 794 F.2d 974, 977 (5th Cir. 1986) (citing *Vaca*, 386 U.S. at 183). *See also Vaca*, 386 U.S. at 184 n.9 ("If a grievance and arbitration procedure is included in the contract, but the parties do not intend it to be an exclusive remedy, then a suit for breach of contract will normally be heard even though such procedures have not been exhausted.")

It follows that an employee has standing to sue a retirement benefit fund that is not a party to, nor bound by, the grievance and arbitration procedure in a collective bargaining agreement, even if the terms of the retirement plan were originally established through collective bargaining between a union and employer. Here, the Retirement Allowance Committee was never bound by the grievance and arbitration procedure in the WWCAs, nor are its Retirement Plan and Health Trust Board successors.

The WWCA Articles 16 & 17 grievance and arbitration procedure that the Court points to for the proposition that "it is the union representing the employee that participates in the grievance process" (*Matthews*, 2014 IL App (1st) 123348, ¶ 70) expressly does not apply to those other entities. The grievance procedure applies only to grievances "between the Authority and its employees or the duly constituted bargaining agent," not between employees and the Retirement Plan or Retirement Allowance Committee. (R. V1, C127, C186 (A161, A219), at art. 16.) And the arbitration award at the end of that grievance procedure is "final, binding, and conclusive upon the Union and the Authority" only, not the Retirement Plan or Retirement Allowance Committee. (R. V1, C127, C187 (A161, A220), at § 17.3.) Disputes between an employee and the

Retirement Plan are, therefore, not subject to that grievance and arbitration procedure.

The Court concluded otherwise because the Retirement Plan Agreement was generally incorporated into the collective bargaining agreements. *Matthews*, 2014 IL App (1st) 123348, ¶ 77. Even if that were true for claims between employees and the CTA (which plaintiffs dispute), the language from those procedures quoted above demonstrates that it cannot be the case for plaintiffs' claims against any entity other than the CTA. Claims for benefits under the Retirement Plan Agreement were instead brought to the Retirement Allowance Committee which had the power "to decide any questions arising in the administration, interpretation and application of this Plan." (R. V1, C42 (A76), at § 5.6(2). *See also* P. Br. 14.) In other words, the inclusion of a specific procedure in the Retirement Plan Agreement for disputes concerning participants' rights under that agreement demonstrates the parties' intent that the general WWCA grievance and arbitration procedure between the Transit Unions and CTA does not apply to Retirement Plan Agreement disputes. *See Teamsters Local Union No. 783 v. Anheuser-Busch, Inc.*, 626 F.3d 256, 262 (6th Cir. 2010) (concluding "grievance for rights under the Pension Plan is not arbitrable" where collective bargaining agreement incorporated plan documents that included an "alternate procedural framework for resolving pension disputes"); *Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 10 v. Waukesha Engine Div.*, 17 F.3d 196, 198 (7th Cir. 1994) ("[T]he fact that the Plan expressly provides for an alternative review procedure indicates that the parties did not intend to arbitrate disputes concerning the denial of benefits.")

If, for example, plaintiff and Transit Union member Sams asked his union to pursue a grievance and arbitration to confirm his vested right to the Retirement Plan

Agreement Section 20.12(a) health benefit, the arbitration would be binding only on the CTA itself, not the Retirement Plan. (R. V1, C127, C187 (A161, A220), at § 17.3.) Therefore, even after a successful arbitration, the Retirement Plan could still deny Sams the retiree health benefit. Similarly, if Sams, through his union, were to grieve the Health Trust Board's decision to tax him 3% of his salary and its stated intent to charge him for his retiree health benefit, the Health Trust Board would not be bound by an arbitration decision under the WWCA. And, of course, if the arbitrator agreed with this Court that the CTA itself had no contractual obligation for the retiree health benefit (*Matthews*, 2014 IL App (1st) 123348, ¶ 86), Sams could get no relief from the CTA either. *See also Water Pipe Extension, Bureau of Eng'g Laborers' Local 1092 v. City of Chi.*, 318 Ill. App. 3d 628, 634 (1st Dist. 2000) ("[U]nder the provisions of the [UAA], as well as the common law, the arbitrator may not change or alter the terms of the collective bargaining agreement, but is authorized only to interpret its existing provisions.")

As noted above, if this were a private-sector retirement plan, rather than invoking a collective bargaining agreement arbitration procedure, Sams would have standing to bring an action against the benefit funds under ERISA Section 502(a). 29 U.S.C. § 1132(a)(1)(B). In fact, under ERISA, only the participants themselves have standing, and unions have only associational standing premised on their individual members' standing. *See S. Ill. Carpenters Welfare Fund v. Carpenters Welfare Fund of Ill.*, 326 F.3d 919, 921-22 (7th Cir. 2003). Indeed, some courts have held that unions do not even have associational standing under ERISA, and only the individual employees themselves may sue a benefit fund to argue that benefits created in a collective bargaining agreement are vested under ERISA. *Int'l Union, UAW v. Auto Glass Ee's Fed. Credit Union*, 858 F.

Supp. 711, 714, 721-22 (M.D. Tenn. 1994). CTA employees do not have an ERISA claim against their public-sector Retirement Plan. In the absence of ERISA, they must have standing to bring their claims here against the Retirement Plan and Health Trust defendants for benefits due under the Retirement Plan Agreement and violation of the Retirement Benefits Clause. If not, they are left with no remedy against the entities that this Court concluded were obligated to provide the retiree health benefit.

## IV. Without standing to bring a Retirement Benefits Clause claim, current employees are without a remedy to block the application of P.A. 95-708.

Finally, the Court's proposed remedies for current CTA employees are inadequate protection for their Retirement Benefit Clause rights because they cannot provide relief from the terms of P.A. 95-708 itself. Once P.A. 95-708 was enacted, for example, the Health Trust was required to tax active employees at least 3% of salary. 40 ILCS 5/101B(b)(6). (*See also* R. V1, C17 (A51).). Even in the impossible scenario that the current employees could successfully prove the Transit Unions breached their duty of fair representation and were able to successfully vacate the Benn Award under the IPLRA, P.A. 95-708 would still be on the books requiring the Health Trust to tax the current employees for a reduced retiree health benefit. The Illinois Public Labor Relations Board and contract arbitrators, of course, have no authority to declare a statute unconstitutional. Thus, any resort to that administrative agency or exhaustion of contractual remedies would be futile and is, therefore, not required. *See Canel v. Topinka,* 212 Ill. 2d 311, 321 (2004) (holding "exhaustion is not required if the administrative remedy is inadequate or futile"); *Vail v. Raybestos Prods. Co.*, 533 F.3d 904, 908-09 (7th Cir. 2008) ("This Court has the discretion to hear disputes concerning the terms of a collective bargaining agreement notwithstanding the failure to exhaust when: . . . the internal procedures are

inadequate 'either to reactivate the employee's grievance or to award h[er] the full relief [s]he seeks.'") (quoting *Clayton v. Int'l Union, UAW*, 451 U.S. 679, 689 (1981). (*See also* P. Br. 14.) To protect their vested constitutional rights current employees' must have individual standing before a tribunal that has the power to declare P.A. 95-708 unconstitutional. They must, therefore, have standing in the circuit court.

## Conclusion

For the foregoing reasons, plaintiffs respectfully petition the Court for rehearing and request the Court to reverse the trial court's dismissal of the current employees' claims for lack of standing.

Respectfully submitted,

One of Plaintiffs-Appellants' Attorneys

Dated: February 28, 2014

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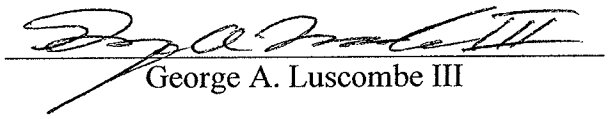
## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 22 pages.

Dated: February 28, 2014



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CERTIFICATE OF SERVICE

I, George A. Luscombe III, an attorney, certify that on February 28, 2014, I caused to be served a copy of the attached *Plaintiffs-Appellants' Petition for Rehearing* by U.S. Mail, postage prepaid on the following:

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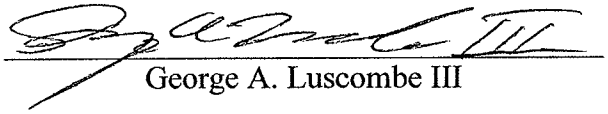

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