IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

TRACY MILLER,	)	
	)	
Plaintiff,	)	Case No. 2019 CH 3259
v.	)	
	)	Hon. Allen P. Walker
ILLINOIS CENTRAL RAILROAD d/b/a CN, CANADIAN NATIONAL RAILWAY COMPANY, and GRAND TRUNK CORPORATION,	)	Calendar 03
	)	
Defendants.	)	

TRIAL OPINION AND JUDGMENT ORDER

This matter comes to be heard for Trial on Plaintiff, Tracy Miller's ("Miller"), Complaint for Declaratory Judgment against Defendants, Illinois Central Railroad d/b/a CN, Canadian National Railway Company, and Grand Trunk Corporation (collectively "CN"). The Court, having considered the testimony and receiving and reviewing the evidence, finds in favor of the Plaintiff.

STATEMENT OF THE CASE

Miller filed this declaratory judgment action on March 12, 2019 asking this Court to determine the enforceability of certain post-employment restrictive covenants ("Restrictive Covenants"). Miller contends that the Restrictive Covenants are both unenforceable on their face and as applied to him. CN argues that the Restrictive Covenants are forfeiture-for-competition agreements, which should not be subject to the reasonableness analysis used to review restrictive covenants and are otherwise enforceable. This Court, after considering the parties' pre-hearing briefs, stipulations of fact, evidence introduced at the hearing, hearing exhibits and the parties' respective proposed findings of fact and conclusions of law, the Court hereby makes the following Findings of Fact and Conclusions of Law:

THE PROCEEDINGS

1. Trial on the issue of liability commenced on March 22, 2021 virtually via Zoom and concluded on March 23, 2021.

2. The parties submitted their respective findings of fact and conclusions of law along with the transcript of the proceedings on May 14, 2021.

3. The parties also submitted a Joint Stipulation of Undisputed Facts ("SF") and Joint Exhibits ("JE"). Hereinafter "EH" is used to refer to the trial transcript itself.

4. Miller was represented by Anthony J. Ashley, Nicholas Anaclerio, Alex C. Weinstein, Bruce R. Alper, and Frederic T. Knape of Vedder Price.

5. CN was represented by Todd M. Church, James W. Witz, Emily A. McNee, Susan K. Fitzke, and Kate Wilson of Littler Mendelson, P.C.

6. Miller was called as a witness in his case-in-chief.

7. Chad Rolstad ("Rolstad"), Vice President of Human Resources at Canadian Pacific Railway, was called as witness in Miller's case-in-chief.

8. Francois Jauvin ("Jauvin"), Director of Total Rewards at CN, was called as a witness in Miller's case-in-chief.

9. CN also called Miller as a witness in its case-in chief and conducted cross-examination on Rolstad and Jauvin.

FINDINGS OF FACT

10. In evaluating the credibility of the witnesses, the Court considered the witness' ability and opportunity to observe, memory, manner, interest, bias, and qualifications and experience.

11. The Court found Miller to be a credible witness.

Miller's Background with CN

12. In September of 1994, Miller accepted employment at Illinois Central Railroad, which was subsequently acquired by CN and hereinafter will be referenced as CN. SF ¶ 8.

13. Miller was employed by CN for the next twenty-four (24) years, during which time he held and performed almost all management-level positions in railway transportation operations below the executive management level of Vice President. SF ¶ 32.

14. From April 2016 to September 2018, Miller worked as a General Manager in the Gulf Division of CN's Southern region, and was headquartered in Memphis, Tennessee. SF ¶ 24.

15. Miller testified that, after becoming a General Manager in 2006, CN did not promote him again, though he repeatedly expressed his desire to become Vice President of Operations and the position itself became open six different times. EH 16:22-24.

16. In September 2018, after Miller complained about not being promoted to Vice President of Operations, CN made Miller an Assistant Vice President ("AVP") of Safety. SF ¶ 29; EH 18:14-20.

17. Miller remained the AVP of Safety from September 2018 until his separation in January of 2019, when Miller received an offer of employment from Canadian Pacific Railway ("CPR"). SF ¶¶ 31, 46.

CN's Restrictive Covenants

18. While Miller was employed by CN, he participated in CN's Supplemental Employee Retirement Program ("SERP") in January 2001, Management Long Term Incentive Program ("LTIP") in January 2002, and Restricted Share Unit ("RSU") Plan, which later became the CN Performance Share Unit ("PSU") Plan (collectively referred to as the "RSU/PSU Plan"). SF ¶¶ 49–51.

19. CN used the same award letters for stock options under the LTIP as it used for RSUs or PSUs under the RSU/PSU Plan ("Award Letters"). Miller electronically acknowledged receipt of stock options in accordance with the Award Letters. SF ¶ 64.

20. Initially, CN did not include a non-compete or any other restrictive covenants in its SERP, LTIP or RSU/PSU Plan. SF ¶ 51. On January 1, 2009, however, CN amended the SERP to include restrictive covenants restraining competition, preventing use or disclosure of confidential information, and restraining customer and employee solicitation or interference. SF ¶ 52.

21. The non-compete provision in the SERP provides (SF ¶ 55):

> The Participant shall not, within Canada, the United States or any other country in which the Company conducts business, either while employed with the Company or an Affiliate or for a period of two (2) years subsequent to the Participant's termination of employment for any reason, without the express written consent of the Chief Executive Officer of Grand Trunk Corporation or his delegate, directly or indirectly, either as an individual, or in conjunction with any other person, firm, corporation, or other entity, whether acting as a principal, agent, professional, manager, executive, director, employee, consultant or in any other capacity, engage in any Competitive Business, or in any way be employed by, associated or in any manner connected with any Competitor, in any position, role or area of responsibility similar to those for which the Participant had responsibilities in his or her last five (5) years of employment with the Company. For the purposes of this paragraph, a 'Competitive Business' or a 'Competitor' is a Class I or Class II rail carrier or railroad, or a provider or arranger of international logistics, intermodal services, or interstate or inter-provincial trucking.

22. The non-disclosure provision in the SERP provides (SF ¶ 56):

> During the course of the Participant's employment with the Company {Corporation} or one or more Affiliates (collectively referred to in this Schedule E as the 'Company'), the Participant will have had access to and will have been entrusted with confidential information relating to the Company, its customers, suppliers and employees, the disclosure of which the Company determines could be detrimental to its best interests (the "Confidential Information"). The Confidential Information is the exclusive property of the Company, and while employed by the Company and at all times thereafter, the Participant will not, without the prior written consent of the Company, (a) reveal, disclose or make known any Confidential Information to any person, or (b) use the Confidential Information for any purpose, other than for the purpose of the Participant performing his or her duties for the Company.

23. The non-solicitation and non-interference provisions in the SERP provide (SF ¶ 57):

> Non-Solicitation. The Participant shall not, either while employed with the Company or for a period of two (2) years subsequent to the Participant's termination of employment for any reason, without the express written consent of the Chief Executive Officer of Grand Trunk Corporation or his delegate, directly or indirectly, either as an individual, or in conjunction with any other person, firm, corporation, or other entity, whether acting as a principal, agent, manager, executive, director, employee, consultant or other capacity, within Canada, the United States or any other country in which the Company conducts any business for which the Participant had responsibilities in his or her last five (5) years of employment:
>
> - solicit, attempt to solicit, call upon, or accept the business of any firm, person or company who is or was a customer, client, supplier or distributor whom the Participant handled, serviced, solicited, or had responsibilities with respect to or was involved in the development of, during the twelve (12) months prior to the termination of the Participant's employment, for any purpose that does or may result in the loss of business, revenues, or business relationships by the Company;
> - solicit, attempt to solicit, or communicate in any way with any employees or consultants of the Company for the purpose of having such employees employed or in any way engaged by another person, firm, corporation, or other entity; or
> - hire or engage, whether as an employee, consultant or otherwise, any person who was employed or engaged by the

> Company during the twelve (12) months prior to the termination of the Participant's employment.
>
> Non-Interference. The Participant shall not, either while employed with the Company or for a period of two (2) years subsequent to the Participant's termination of employment for any reason, without the express written consent of the Chief Executive Officer of Grand Trunk Corporation or his delegate, directly or indirectly, either as an individual, or in conjunction with any other person, firm, corporation, or other entity, whether acting as a principal, agent, professional, manager, executive, director, employee, consultant, or other capacity, within Canada, the United States or any other country in which the Company conducts any business for which the Participant had responsibilities in his or her last five (5) years of employment:
>
> - take advantage of, derive a benefit or otherwise profit from any business opportunities of which the Participant became aware in the course of employment with the Company even if the Company does not take advantage of or exploit such opportunities; or
> - take any action as a result of which relations between the Company and its consultants, customers, clients, suppliers, distributors, employees or others may be impaired or which might otherwise be detrimental to the business interests or reputation of the Company.

24. The injunctive relief provision in the SERP provides (SF ¶ 58):

> Additional Remedies. Irreparable injury will result to the Company and to its business and properties in the event of any breach by Participant of any of the provisions of this Schedule, and Participant's continued employment is predicated on the commitments undertaken pursuant to said Schedule. In the event of any breach of any of Participant's commitments pursuant to this Schedule, the Company shall be entitled, in addition to any other remedies and damages available, to injunctive relief to restrain the violation of such commitments by Participant or by any person, or persons acting for or with Participant in any capacity whatsoever.

25. The conditional benefits provision in the SERP provides (SF ¶ 59):

> 2.14 Conditional Benefits. Notwithstanding the foregoing provisions of this Article II, a Participant's accrual of benefits under this Plan (hereafter an "Accrued Benefit") on and after July 15, 2010, and payment of any benefit to a Participant attributable to

> benefits accrued under this Plan after July 14, 2010, are conditioned on the Participant's compliance with the provisions of the Limitation Agreements set forth in Schedule E of the Plan. If the Committee determines that a Participant has violated any such Limitation Agreement, then:
>
> a) that Participant's Accrued Benefit in excess of the Participant's Accrued Benefit determined as of July 14, 2010 shall be forfeited; and
> b) any payment of a forfeited Accrued Benefit shall be repaid by reducing the amount of any benefits otherwise payable under the Plan, and, to the extent that such overpayment cannot be repaid out of non-forfeitable Accrued Benefits, such overpayment shall be repaid by the recipient (or the estate of the recipient).

26. The parties stipulated that the SERP is governed by Illinois law.

27. On January 27, 2011, CN amended the LTIP, and RSU/PSU Plan to include the same restrictive covenants as in the SERP plan. SF ¶ 61.

28. The LTIP contained an additional provision regarding reconfirmation (SF ¶ 62):

> you hereby agree to reconfirm by agreement with CN the commitments set out in Appendix A attached hereto upon request by the Company at any time throughout the term of your employment or upon termination thereof, and that failure to provide such confirmation, shall result in the immediate cancellation of all Options granted herein.

29. The Award Letters used for the award of Options and RSU/PSU Plans under the LTIP also contain a severability clause (SF ¶ 60):

> If, in any jurisdiction, any provision of this Appendix or its application to the Company or Participant or circumstance is restricted, prohibited or unenforceable, the provision shall, as to that jurisdiction, be ineffective only to the extent of the restriction, prohibition or unenforceability without invalidating the remaining provisions of this Appendix and without affecting the validity or enforceability of such provision in any other jurisdiction, or without affecting its application to other parties or circumstances.

30. While the LTIP provides that it is governed by the law of Quebec, Canada, the awards are silent as to the governing law. JE 4.

31. As CN's corporate representative, Jauvin testified that CN construes its non-compete to prohibit former employees from working for a "Competitor" anywhere in Canada, the U.S., Mexico or China regardless of where they may have worked for CN. EH 434:9-20. However, Jauvin acknowledged that, as of January 2019, CN did not operate a railroad, own rail lines or run trains in China or Mexico. EH 431:4-14, 432:18-433:5. The Court finds Mr. Jauvin's testimony on these issues to be credible.

Class I and Class II Railroads

32. As of January 2019, CN conducted business in Canada, the U.S., Mexico and China. SF ¶ 33.

33. In North America, railroads are classified as either Class I, Class II, or Class III. SF ¶ 1.

34. As of 2019, a Class I railroad in the U.S. had annual operating revenues greater than $504.8 million, while a Class I railroad in Canada in 2019 had gross revenues in excess of $250 million in each of the two preceding years. SF ¶ 2; JE 71-73.

35. CN competes with all Class I freight railroads, including CPR. SF ¶ 5.

36. Seven of the largest Class I railroads in North America, including CN and CPR, account for approximately 94% of the total revenue-generating business by all railroads and 88% of the total railroad employees. SF ¶¶ 3–5.

37. As of 2019, Class II railroads in the U.S. had annual operating revenues from $40.4 million to $504.8 million. These railroads are much smaller and regionalized operations, whereas Class I railroads operate across continents or countries with substantially higher operating revenues to support their greater infrastructure. SF ¶¶ 2–4; EH 259:22-260:14.

38. Jauvin testified that CN did not provide its employees subject to the Restrictive Covenants with a list of prohibited Class I or Class II railroads. EH 452:13- 454:1. The Court finds this testimony to be credible.

39. Jauvin's testimony established that it does not operate rail tracks in Mexico or China. EH 435:4- 436:3.

40. CN did not present evidence that it competes with any Class II railroad in any country. Miller testified that CN does not compete with Class II railroads at all. EH 74:8- 12.

41. The evidence suggests CN does not compete with Class II railroads at all since CN waived the non-compete provision with respect to several former employees who left CN to work for Class II railroads. JE 63.

Miller's Access to Confidential Information

42. When Miller was a General Manager at CN, he managed transportation operations in a specific geographic location called a division. Divisions were located within one of three

regions during Miller's employment: Western (Canada), Eastern (Canada), and Southern (United States). SF ¶¶ 12–24, 32.

43. In the Transportation Department, there were five (5) General Managers in the United States. SF ¶ 22.

44. Miller testified that, as a General Manager, he was responsible for overseeing the day-to-day railroad transportation operations for his territory. EH 39:3-5. Miller was responsible for managing a budget for his region, railroad operations cost control, rail asset utilization, staffing and hiring costs, recruiting, and personnel decisions. EH 51:11- 52:20, 137:5-1.

45. As a General Manager, Miller was aware of service plans for particular CN customers and met with customers and account managers to fulfill his responsibilities to service those customers; however, Miller also testified that he was not responsible for soliciting customers, engaging in sales, marketing or business development, or negotiating customer rates or contracts for CN. EH 38:12-39:1.

46. Miller testified that he attended two off-site meetings during his last five (5) years of employment at which speakers provided an overview of how CN's North American railroad operations were performing by showing detailed financial data and other numerical operational metrics, including cost and budget figures. EH 129:1-8, 129:19- 22, 132:21-133:16.

47. However, the presentation materials distributed during these two meetings were PowerPoint decks containing hundreds of pages of information. JE 35, 39. Additionally, the parties stipulated that there was no evidence that Miller removed or improperly retained any CN confidential information in any form when he left CN in January 2019. SF ¶ 45.

48. Deposition testimony from James Thompson ("Thompson"), a CN corporate representative, established Miller did not develop any of these presentation materials, and that certain information in them was no longer confidential because it has since become stale or publicly available. Thompson Dep. 202:17-203:10.

49. No evidence was presented to demonstrate other measures CN took to protect its confidential information, other than having management-level employees sign the non-disclosure agreements and annually renewing a Code of Conduct that discusses handling of confidential information.

50. Miller testified that he treated CN information from off-site meetings and other internal business as confidential and has not shared it outside of CN. EH 44:18-45:2.

51. Miller testified that the vast majority of operational metrics and financial data upon which he relied to do his job on a day-to-day basis as a General Manager was in CN's "Data City" database. EH 45:10-23.

52. CN stipulated that none of Data City's contents was confidential. JE 62.

53. CN contends that Miller had access to confidential data related to regional matters, including email correspondence with CN's customers related to customer service issues. Specifically, CN introduced several emails outlining certain customer service issues that Miller addressed while General Manager of its Gulf Division. JE 27, 30–33.

54. The individual emails presented did not appear to contain any confidential information, as the emails reflected CN customer service issues in the Gulf Division where CPR does not operate its trains. EH 64:19-24.

55. CN representatives, including the testimony from Rolstad and Jauvin, indicated that they have no reason to believe Miller used or relied upon CN's confidential information during his CPR employment. EH 293:23-294:3. The Court finds Mr. Rolstad's and Mr. Jauvin's testimony on this issue to be credible.

56. Miller also testified that he has not disclosed, used, or relied upon any such CN information since working for CPR. EH 71:8-13; 239:24-240:4. The Court finds Miller's testimony on this issue to be credible.

57. While CN argued that Miller has confidential information regarding CN's Precision Scheduled Railroading ("PSR"), a method of running a railroad for maximum asset utilization by which freight movements are scheduled and managed at the individual carload level, Miller testified that he had not received any formal training regarding PSR. EH 72:9-11.

58. In fact, Hunter Harrison ("Harrison"), the originator of PSR, was CN's Chief Executive Officer until 2012, at which point he himself transitioned to CPR and implemented PSR. In 2017, Harrison transitioned to CSX, another Class I railroad, and implemented PSR. SF ¶¶ 38-42.

59. Rolstad testified that both CN and CPR use PSR principles. EH 291:18-22. Rolstad also testified that he was not aware of anything Miller did to modify or alter the way CPR applies PSR's management principles or to implement new methods of applying PSR at CPR. EH 292:10-22. The Court finds Mr. Rolstad's testimony to be credible.

Miller's Employment Offer from CPR

60. On January 8, 2019, CPR's Chief Executive Officer, Keith Creel, contacted Miller asking whether he was interested in joining CPR as Vice President of Operations. SF ¶ 74.

61. Miller received a formal offer letter from CPR for the Vice President of Operations position on January 17, 2019. SF ¶ 75.

62. On January 21, 2019, Miller exercised all of his vested stock options, at a total vested value of $718,525.74. SF ¶ 81.

63. On January 28, 2019, Miller notified CN that he was resigning. SF ¶¶ 77–78.

64. On January 31, 2019, Miller informed CN's Vice President of HR, Kim Madigan ("Madigan") that he had accepted the position of Vice President of Operations with CPR and asked to be released from CN's non-compete. SF ¶ 79.

65. Miller testified that Madigan refused Miller's acceptance of the role as Vice President of Operations at CPR, and asked Miller if he was prepared to sit at home for two (2) years. EH 20:14-21:4.

66. On February 1, 2019, Robert Byman ("Byman") of Jenner & Block LLP, wrote Miller alleging violations of the non-compete and demanded that Miller refrain from further breaches, specifically by not "directly or indirectly, in any capacity whatsoever, engaging in a Competitive Business, or in any way being employed by a Competitor ..." Byman's letter also demanded Miller repay $1,063,677 Miller received from exercising his vested stock options. The letter did not advise Miller that if he returned the value of these stock options that he could accept the position at CPR. SF ¶¶ 80–81, JE 19.

67. On February 4, 2019, Miller withdrew acceptance of the CPR employment offer. SF ¶ 82.

68. Miller then filed this action on March 12, 2019, seeking a declaration that the Restrictive Covenants are unenforceable, and separately sued CN in the U.S. District Court for the Western District of Tennessee in Memphis, alleging that CN illegally denied him promotions and treated him differently than others who left CN for competitors because of his race in violation of 42 U.S.C. § 1981.

CN Allows Miller to Accept Competitive Employment with CPR

69. After initiating this action and the Tennessee case, Miller sought CN's consent to working as CPR's Vice President of Corporate Risk in March 2019, which was a different role than what CPR originally offered him. SF ¶ 83.

70. Although CN had stated in early February that it would "pursue all available remedies, including injunctive, monetary and punitive relief" if Miller worked for CPR in any capacity, CN did not object to Miller accepting this position with CPR. CN did not propose or impose any conditions or restrictions on Miller's CPR duties to further protect any of CN's confidential information or business interests. SF ¶ 84; JE 19; EH 26:8-12.

71. Miller started working for CPR as Vice President of Corporate Risk on March 18, 2019. SF ¶ 84.

72. On May 23, 2019, CPR informed Miller in writing that it could not hold the Vice President of Operations position open for him beyond July 8, 2019. Accordingly, in a letter dated June 20, 2019, Miller so informed CN, asking whether it would seek to enjoin Miller from working for CPR as its Vice President of Operations on or before July 8, 2019 if he accepted that job. SF ¶ 85; JE 12.

73. On July 3, 2019, CN's counsel confirmed in writing that CN would not seek to enjoin Miller from serving as CPR's Vice President of Operations, but would "reserve their rights and

remedies regarding repayment/forfeiture of any compensation owed or paid to Plaintiff and any other damages relating to breaches of Plaintiff's covenants." SF ¶ 87, JE 13.

74. Miller thereafter began working as Vice President of Operations for CPR on July 8, 2019. EH 289-90.

75. CPR subsequently promoted Miller to Senior Vice President of Operations for its Southern and Eastern Region in September 2019, where he currently oversees CPR's railroad operations within the U.S. and Eastern Canada. EH 309-310.

76. Miller testified that he has not solicited or recruited any CN employee to join CPR, nor is there any evidence that he has disclosed, used, or relied upon any information relating to CN's strong performing employees since leaving CN. EH 245:4-247:7.

77. In the two (2) years Miller has been employed by CPR, he has not been responsible for developing any new business. EH 45:4-14, 64:2-6.

78. CN stipulates there is no evidence that Miller has solicited any CN customer since leaving CN, or that it has lost any customers or revenue due to Miller's CPR employment, and there is no evidence that CN has suffered any actual harm as a result of Miller joining CPR. SF ¶¶ 47–48.

Evidence of Lack of Enforcement of the Restrictive Covenants

79. Since 2011, CN has allowed thirty-eight (38) employees subject to its Restrictive Covenants (not including Miller) to work for CPR and other Class I or Class II railroads in similar competitive roles or positions. JE 63.

80. Jauvin testified that CN permitted Creel, CN's former Chief Operating Officer, to leave and immediately work for CPR in the identical role. JE 63; EH 369:6-14. Creel had substantially greater access to CN's confidential information and customer relationships than did Miller and was bound by the same restrictive covenants as Miller. EH 356:4-6; 371:9-372:13. However, CN released Creel from the non-compete and stipulated in its settlement agreement with Creel that it would not assert any future claim against Creel that his employment with CPR in the same role he had at CN would result in his inevitable disclosure or use of CN's confidential information. JE 114; EH 373:17-20, 374:20-375:7.

81. In 2007, CN similarly permitted Jamie Boychuk ("Boychuk"), a General Manager in railroad operations like Miller, to accept competitive employment with CSX, another Class I railroad. EH 384:4-15. Like Miller, Boychuk learned CN's application of PSR while at CN, and had access to the same type of confidential information Miller had. EH 393:21-23; 394:13-17. CSX made Boychuk its Vice President of PSR Implementation within the first two years of his CSX employment. EH 393:21-394-7. CN sent Boychuk cease and desist letters but did not sue him or seek injunctive relief to protect any claimed business interests, despite evidence suggesting that Boychuk may have solicited several CN employees to work at CSX. JE 69; EH 394:9-12.

82. Jauvin also testified that CN let Tom Tisa ("Tisa"), CN's former Director Business Development, leave CN to join CSX in March 2019 as its Head of Marketing and Strategic Development. EH 398:23-34. Although Tisa had access to CN's confidential information, including highly sensitive acquisition plans, was directly responsible for business development at CN and joined a direct CN competitor in a substantially similar role, CN did not sue Tisa or seek to enjoin him from working for CSX. EH 416:23-417:4.

83. Since 2011, CN has not filed a lawsuit seeking injunctive relief to enforce any of its Restrictive Covenants against any separating employee other than Miller, instead relying upon cancelling the former employee's outstanding or unvested stock options under the LTIP and RSU/PSU Plan and, in limited instances, vested retirement benefits under the SERP. JE 63.

CONCLUSIONS OF LAW

I. Waiver of Restrictive Covenants

84. As a threshold matter, Miller has argued that even if this Court should find the Restrictive Covenants enforceable, CN has waived its right to enforce them. Thus, this Court must first address the issue of waiver.

85. "The determination of whether a restrictive covenant is enforceable is a question of law." *Coady v. Harpo, Inc.*, 308 Ill. App. 3d 153, 155 (1st Dist. 1999). Waiver, which is defined as an intentional relinquishment of a known right, can either be express or implied from the conduct of the party that has allegedly waived its right. *Wagner Excello Foods v. Fearn Int'l*, 235 Ill. App. 3d 224, 232 (1st Dist. 1992). "The waiver of a contractual provision may be established by conduct indicating that strict compliance with the provision will not be required." *Id*. Regarding restrictive covenants, courts may find waiver occurred if a party indicated by its words or conduct that compliance with a particular provision was not required. *Midwest Builder Distrib. v. Lord & Essex*, 383 Ill. App. 3d 645, 674 (1st Dist. 2007). Those facts indicating waiver and the knowing relinquishment of such right must be proven by clear and convincing evidence. *SKF USA, Inc. v. Bjerkness*, 636 F. Supp. 2d 696, 706-07 (N.D. Ill. 2009).

86. Miller argues that CN expressly consented to Miller accepting two different positions at CPR. With respect to the former position, testimony confirmed that Miller advised CN that he was accepting the Vice President of Corporate Risk position with CPR, and CN did not object (as it had done previously). With respect to the subsequent position, CN's counsel confirmed in writing that Defendants "do not intend to seek injunctive relief to prevent Mr. Miller from working for CPR in the Vice President of Operations position, including should he begin working in that position on or about July 8, 2019." (SF ¶ 87). Miller contends that, especially in light of CN's arguments regarding the Restrictive Covenants equating forfeiture-for-compensation agreements, CN cannot seek forfeiture of compensation or other damages based on the exact same conduct it expressly permitted. Miller also argues that CN, knowing that CPR was its competitor, waived all arguments as to the non-

disclosure agreement and that CPR would somehow be improperly obtaining and disclosing confidential information.

87. CN argues that no waiver was given. CN asserts that a waiver occurs only where a party knowingly relinquishes a known contractual right. *Intaglio Service Corp. v. J.L. Williams & Co*., 95 Ill. App. 3d 708, 714 (1st Dist. 1981). CN contends it did not knowingly relinquish any right relating to the Restrictive Covenants. Rather, CN argues that its counsel's July 3, 2019 communication expressly reserved "all rights and remedies regarding repayment/forfeiture of any compensation owed or paid to Mr. Miller and any other damages relating to breaches of Mr. Miller's covenants/contracts and based on their other claims." Here, CN made no assurances that it would not pursue injunctive relief against Miller if he accepted the position with CPR, then turn around and sue Miller for noncompliance. Nor did CN ever make assurances that it would not seek clawback or forfeiture of the compensation paid to Miller pursuant to the SERP, LTIP, and RSU/PSU Plan.

88. In considering whether CN waived the restrictive covenant in the present case, this Court finds *SKF USA, Inc. v. Bierkness* as instructive. 636 F. Supp. 2d at 707. In *SKF USA*, the court held that a successor employer waived the non-compete in an employment agreement between the former employees and their predecessor employer, which was executed before a merger. *Id*. The former employees were specifically told by corporate representatives that the non-compete was no longer in effect after the merger, and that a subsequent agreement without a non-compete governed their post-employment activities. *Id.* at 703, 707. The former employer argued that a waiver needed to be in writing and that the corporate representatives were not capable of effecting a waiver. The *SKF USA* court rejected these arguments because, while there was conflicting testimony, it found by clear and convincing evidence that a company official and human resources contact told the employees that the employment agreement containing the non-compete was superseded and replaced by a subsequent agreement. *Id.* at 707. According to the *SKF USA* court, these statements constituted a knowing relinquishment of the non-compete, and the employer could not pursue any remedies for its alleged breach. *Id.* at 707–08.

89. Similarly, here, CN's actions demonstrate a waiver. CN expressly consented to Miller's employment at CPR. CN, a sophisticated party represented by counsel, was well aware of the type of business that its competitor, CPR, may handle. CN, thus, was aware that Miller potentially might be able to share confidential information in that position, and yet, CN decided to allow Miller to work in that position. This Court, therefore, finds that CN knowingly waived any arguments pertaining to enforcement of the injunctive relief provision, as well as enforcement of the non-disclosure agreements.

90. Notwithstanding this Court's finding that CN waived enforcement of the non-disclosure agreements, this Court finds that Miller did not breach the non-disclosure agreements. The parties stipulated that Miller did not acquire any CN confidential information that he would inevitably use or rely upon as Vice President of Operations for CPR. SF ¶ 45-46. Jauvin also testified that he agreed that much of CN's information concerning the company, its

customers, suppliers and employees is publicly available because CN is a public company traded on two different stock exchanges. EH 460:1-461:7.

91. Although both parties acknowledged that Miller had attended two off-site meetings where PowerPoint presentations containing confidential information were presented, Miller testified that he did not share any information from these off-site meetings outside of CN. EH 44:18-45:2. The evidence also established that, due to the length of these presentations and the large breadth of information involved, it would be difficult for any person to recall any specific information without access to the actual materials. EH 293:23-294:3.

92. Regarding Miller's access to confidential information in email communications relating to regional matters, Miller testified that he would receive hundreds of emails per day and that recalling any one email would, indeed, be quite difficult. EH 63:19-64:1. None of the emails provided by CN at trial showed a specific benefit to CPR if Miller did happen to recall them, as the emails related to customer service issues in the Gulf Division, which CPR did not operate its trains. EH 64:19-24.

93. Regarding Miller access to confidential information relating to CN's PSR, Rolstad testified that both CN and CPR use similar PSR and he was not aware of anything Miller did to modify or alter the way CPR applies PSR's management principles or to implement new methods of applying PSR at CPR. EH 292:10-22.

94. In the letter allowing Miller to work for CPR, CN "reserve[d] their rights and remedies regarding repayment/forfeiture of any compensation owed or paid to Plaintiff and any other damages relating to breaches of Plaintiff's covenants." This Court finds that while CN waived seeking any injunctive relief from Miller accepting his new position at CPR and knew of any potential confidentiality risks in allowing Miller to work for its competitor, CN did not knowingly waive their right to pursue a claim for damages related to the return of Miller's stock options. Therefore, this Court will turn to the enforceability of the Restrictive Covenants.

II. ***The Nature of the Restrictive Covenants***

95. Miller proposes that the Restrictive Covenants are subject to a reasonableness analysis, as restrictive covenants are only enforceable where they are both reasonable and necessary to protect an employer's legitimate business interest. *Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871, ¶ 18. CN, however, contends that the Restrictive Covenants are, in fact, forfeiture-for-competition agreements. *Viad Corp. v. Houghton*, 2010 U.S. Dist. LEXIS 17447 at *4 (N.D. Ill. Feb. 26, 2010).

96. This Court does not find the Restrictive Covenants are forfeiture-for-competition agreements. Typically, forfeiture-for-competition agreements condition an employee's receipt of certain benefits (such as stock options) on that employee's promise not to compete with the former employer. *Tatom v. Ameritech Corp.*, 305 F.3d 737, 744 (7th Cir. 2002). While not analyzed by the Illinois Supreme Court or the Illinois Appellate Court, forfeiture-for-competition agreements have been distinguished by federal courts from traditional

restrictive covenants which prevent an employee from working for a competitor for a certain amount of time. *Id*. The idea being that forfeiture-for-competition agreements "leave the ex-employee free to make a living as he chooses." *Schlumberger Technology Corp. v. Blaker*, 859 F.2d 512, 516.

97. Because Illinois courts tend to disfavor non-compete provisions in employee contracts, more employers have chosen to implement forfeiture-for-competition agreements instead. See *Tatom*, 305 F.3d at 745 ("Illinois disfavors noncompete provisions in employee contracts."). Because federal courts have not viewed forfeiture-for-competition agreements as restraints on trade, federal courts have suggested that forfeiture-for-competition agreements may be subject to a lesser degree of scrutiny, one not subject to a reasonableness analysis. See *Viad Corp. v. Houghton*, 2010 U.S. Dist. LEXIS 17447 at *4 (N.D. Ill. Feb. 26, 2010) ("Although Illinois law remains unclear on forfeiture provisions...the majority view in this country seems to be that a forfeiture for competition clause in an employment agreement is enforceable without regard to the reasonableness of the restraint on the former employee").

98. However, federal courts, as well as the Seventh Circuit, recognize that even where certain agreements are described a forfeiture-for-competition agreements, the agreements can still operate for all practical purposes as non-compete agreements. See *Sarnoff v. Am. Home Prods. Corp.*, 798 F.2d 1075, 1083 (7th Cir. 1986)(" [I]f the forfeiture is big enough it may prevent the employee from competing just as the covenant would do."); see also *Tatom*, 305 F.3d at 745 ("we acknowledged the possibility that an Illinois court might likewise 'pierce the formal wrappings' of a stock option forfeiture provision and deem it the equivalent of an anti-competitive provision.").

99. Here, the Court chooses to "pierce the formal wrappings" of the alleged forfeiture-for-competition provisions. First the plain language of the Restrictive Covenants at issue does not indicate that the repayment of the stock options is in exchange for the ability to work for a competitor. The language in the Restrictive Covenants reads:

> The Participant shall not, within Canada, the United States or any other country in which the Company conducts business, either while employed with the Company or an Affiliate or for a period of two (2) years subsequent to the Participant's termination of employment for any reason, without the express written consent of the Chief Executive Officer of Grand Trunk Corporation or his delegate, directly or indirectly, either as an individual, or in conjunction with any other person, firm, corporation, or other entity, whether acting as a principal, agent, professional, manager, executive, director, employee, consultant or in any other capacity, engage in any Competitive Business, or in any way be employed by, associated or in any manner connected with any Competitor, in any position, role or area of responsibility similar to those for which the Participant had responsibilities

> in his or her last five (5) years of employment with the Company.

100. There is no language that indicates a violation of the covenant can be cured by a repayment of the stock options or revocation of the stock options. Certainly, further down in the Restrictive Covenants, the paragraph describing CN's alleged right to obtain injunctive relief against employees working for competitors does not suggest that these restrictions are tied to any forfeiture of benefits either.

101. Second, Miller himself testified that he was not aware that the Restrictive Covenants would allow him to work for a competitor if he surrendered his stock options. Rather, the evidence of record suggests quite the opposite. CN repeatedly threatened Miller when he notified them that he had received an offer to work for CPR. Indeed, CN's Vice President of HR, Kim Madigan ("Madigan") refused Miller's request to work for CPR and asked Miller if he "was prepared to sit at home for two years." SF ¶ 79. No one told Miller that if he forfeited his stock options that he could go work for CPR. In fact, the next day, CN's outside counsel, Byman, wrote Miller alleging Miller had violated the non-compete and demanded that Miller refrain from further breaches, specifically by not "directly or indirectly, in any capacity whatsoever, engaging in a Competitive Business, or in any way being employed by a Competitor." JE 19. The letter did not advise Miller that he could compete if he returned the value of exercised stock options. JE 19. At no time after Miller informed CN that he had accepted CPR employment did CN propose that Miller could be CPR's Vice President of Operations if he agreed to return the value of his exercised stock options. Instead, the testimony at trial showed that it was only after Miller's counsel spoke to CN's counsel that a separate deal was arranged wherein CN agreed not to seek injunctive relief to prevent Plaintiff from accepting the Vice President of Operations position with CPR. Thus, this Court declines to construe the Restrictive Covenants as forfeiture-for-competition agreements.

III. ***Enforceability of the Restrictive Covenants***

102. Illinois courts generally find post-employment restrictions enforceable if the covenants are no greater than required to protect the employer's legitimate business interests, do not impose undue hardship on the employee, and do not injure the public. *Reliable Fire Equip Co. v. Arredondo*, 2011 IL 111871, ¶¶ 16–17.

103. First, Miller argues that the Restrictive Covenants are facially invalid. Miller contends that the industry-wide bar that existed in the Restrictive Covenants inherently precludes employees from working within the occupation which they are trained and best suited. *Dryvit Sys., Inc. v. Rushing*, 132 Ill. App. 3d 9, 15 (1st Dist. 1985). Miller argues that the terms "Competitive Business" and "Competitor" are vague and indeterminate terms which are only defined as consisting of Class I or Class II railroads—no specific railroads are listed. Evidence at trial also established that seven of the largest Class I railroads in North America, including CN and CPR, account for approximately 94% of the total revenue-generating business by all railroads and 88% of the total railroad employees.

104. Further, Miller contends that the non-compete prohibits him from "acting as a principal, agent, professional, manager, executive, director, employee, consultant or in any other capacity" working for a Class I or Class II railroad. Miller argues that this provision does not allow him to take any role at a Class I or Class II railroad simply because CN is part of the same industry, which he argues is an unenforceable blanket prohibition. See also *Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc*., 378 Ill. App. 3d 437, 452 (1st Dist. 2007) (holding that a blanket bar on all activities for competitors is excessive and that trial court did not err in finding non-compete unenforceable as a matter of law); *Arpac Corp. v. Murray,* 226 Ill. App. 3d 65*,*77–79 (1st Dist. 1992) (non-compete that prohibits an employee from working in any capacity in the industry nationwide is unenforceable). Thus, Miller argues because the non-compete would bar him from even taking a janitorial position at a Class I or Class II railroad for a period of two years after terminating his employment with CN, the non-compete is unreasonably overbroad and unenforceable on its face.

105. Second, Miller argues the Restrictive Covenants are unenforceable as applied to him as well. CN employed Miller for 24 years exclusively in railroad transportation operations, and for more than the last five years of his tenure as a General Manager only within the U.S. in Chicago and Gulf Divisions. Yet, the non-compete would prohibit him not just from working in the operations or safety departments of a Class I railroad, such as CN, or even a Class II railroad (though there is no evidence CN competes with Class II railroads); it also bars Miller from being a general manager in any department of any railroad or in any other line of business that competes with CN in the U.S., Canada, Mexico and China in international logistics, intermodal services or interstate or inter-provincial trucking, CN businesses in which Miller never worked.

106. CN argues that the geographic scope of the non-compete provision is reasonable. CN argues that Illinois courts generally look to whether or not the restricted area is "co-extensive" with the area in which the employer does business. *Midwest TV v. Oloffson*, 298 Ill. App. 3d 548, 557 (3d Dist. 1998). Additionally, CN contends that the two-year restriction is reasonable because of Miller's access to three-year and five-year capital and financial planning information. CN also responds that the correct reading of the non-compete only limit Miller from working in a position or role similar to those in which he had responsibilities for the last five (5) years of his employment in a Class I or Class II railroad. CN suggests that Miller's reading of the non-compete provision is not the correct and most natural reading of the provision.

107. As written, this Court finds Miller's reading of the non-compete to be the most natural reading. This Court agrees that the non-compete, as it currently reads, would prevent a former CN mechanical engineer who worked in the CN's railroad Operations Department from working as an accountant, a janitor, or in any other capacity in the operations department of any Class I or Class II railroad.

108. CN's proposed construction also contradicts the position it staked out in correspondence to Miller and his counsel just days after Miller's separation from CN, when CN's counsel demanded that Miller immediately desist in "directly or indirectly, in any capacity whatsoever, engaging in a Competitive Business, or in any way being employed by a

Competitor." JE 19. It also contradicts Madigan's statement to Miller that he was obliged to sit home for two years. At best, the non-compete is ambiguous in this regard (as CN's own competing constructions show), so the Court must construe ambiguities against CN as the employer that drafted the Covenants. *Virendra S. Bisla, M.D., Ltd. v. Parvaiz,* 379 Ill. App. 3d 567, 574 (1st Dist. 2008); *Bishop v. Lakeland Animal Hosp., P.C*., 268 Ill. App. 3d 114, 117 (2d Dist. 1994) ("An ambiguous contract as a matter of law must be construed against the drafter of the contract.").

109. This Court also finds that the non-compete is unenforceable on its face. First, the non-compete does not specify competitors, but rather, includes all Class I and Class II railroads. CN also places a restriction that is not only applicable to the United States, but worldwide. Jauvin confirmed this construction and application of CN's Non-Compete:

> Q. If an employee worked only in the United States, is it the company's position that that employee cannot go [to] work for a competitor in Canada?
> A: Yes.
> Q. And in Mexico?
> A. Yes.
> Q: And in China?
> A: I would say, yes.
> Q. Is that correct?
> A. That's correct.

(EH 434:9-20)

110. As the evidence pointed out, Class I and Class II railroads consist of almost all the railroads for which Miller would be qualified to transition into, and if extending worldwide, substantially affect Miller's ability to work anywhere for a period of two years after terminating his employment with CN. Additionally, the non-compete encompasses all capacities within those railroads—including janitorial positions—which the Court finds is unnecessary to protect any legitimate business interest CN might have.

111. Additionally, the sweeping restriction are also unreasonable as applied to Miller, because it restrains him from working in places and business lines in which CN never employed him. *Assured Partners*, 2015 IL App (1st) 141863, ¶ 36 ("Both the geographic scope of section 3(a) and the scope of activities it seeks to suppress clearly exceed that which is necessary to protect [plaintiff] from threats against its business interest ...."). Therefore, the Court finds the non-competes to be unenforceable on their face and as applied to Miller. Because the Court would need to identify geographic, temporal, and capacity limitations, the Court declines to modify the Restrictive Covenants. See *Arcor, Inc. v. Haas*, 363 Ill. App. 3d 396, 406 (1st Dist. 2005) (declining to blue pencil restrictive covenants where changes would amount to writing a new agreement); *Oce N. Am., Inc. v. Brazeau,* No. 09 C 2381, 2010 U.S. Dist. LEXIS 25523, at *3 (N.D. Ill. Mar. 18, 2010) (refusing to modify restrictive covenants that would require drastic modifications to render them reasonable).

CONCLUSION

Judgment is entered in favor of Plaintiff, and against Defendants on Plaintiff's Complaint for Declaratory Judgment. The Court finds that Plaintiff did not breach the non-disclosure agreement, Defendants waived the ability to seek enforcement of the injunctive relief provision, and the non-compete agreement and the requested return of Miller's stock options is unenforceable. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court expressly finds that this is a final order and that there is no just reason for delaying the enforcement of this Judgment or appeal thereon.

DATED: November 30, 2021

ENTERED:

Allen Price Walker
Associate Judge

Nov. 30, 2021

Circuit Court - 2071

Allen P. Walker, Judge Presiding