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Canadian Railways Battle in U.S. Over Manager's Noncompete

By Erin Mulvaney

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- Noncompete agreement sparked lawsuit against competitor's CEO
 - Railroad seeking \$1 million in stock and equity from former worker
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Tracy Miller helped make the trains run on time with Canadian National Railway for 24 years, steadily climbing the ladder as he moved his family a dozen times. He said he felt committed to growing with the company until he retired.

But he said his trajectory eventually stalled. He stayed in the position of general manager, where he focused on keeping train operations safe and efficient, from 2006 to 2019 and was passed up for a promotion at least five times, he claims. Earlier this year, his employer's rival, Canadian Pacific Railway, offered him the promotion he had sought for more than a decade.

The decision to accept the job at Canadian Pacific in January 2019 has spawned a complex dispute that involves three separate lawsuits across three states with two of the railroad industry's largest players. Canadian National enforced a noncompete agreement meant to keep workers from moving to competitors within two years, and it prompted the wave of legal actions in Illinois, Tennessee, and Minnesota.

"Tracy was a middle manager in operations. He's one employee that is not a competitive risk and all of this litigation has come from it," Bruce Alper, an attorney with Vedder Price in Chicago, said. "Now there are CEOs of two large railroad companies going after each other and it's still escalating."

In the latest legal action, filed in Minnesota state court, Montreal-based Canadian National under CEO Jean-Jacques Ruest is accusing Calgary-based Canadian Pacific and its CEO Keith Creel of conspiracy in hiring Miller for knowingly trying to evade the noncompete agreement's terms. The lawsuit says Creel wrongfully interfered with the noncompete provisions by offering to hire Miller and assisting him in exercising his stock options before he resigned.

Miller, who currently lives in Minneapolis, said his objective from the start has been to have an Illinois state court determine whether the noncompete provision is legally enforceable. A general manager position, such as Miller's, isn't a typical target of a noncompete agreement, said Alper, who represents Miller in the Illinois case.

In July, Canadian National agreed to let Miller take the new position before a hearing was held in September. But it's still seeking stock and equity Miller earned during his tenure at the company, alleging breach of contract, fraudulent misrepresentation, and unjust enrichment stemming from the violation of the noncompete.

Miller, who is black, also separately sued for racial discrimination, alleging that the company passed him over for promotion in favor of white employees. In that case, the company is pursuing counterclaims and seeking more than \$1 million in stock and equity.

A Canadian National spokesperson declined to comment. Littler Mendelson represents the company in the cases. The company argues that if confidential information were acquired by competitors, its business would be put at an unfair disadvantage. It says it constructs contracts with employees that say they will forfeit stock and benefits as an incentive to stay.

Miller said he moved his wife and children to several states to pursue the dream of moving up in the company.

"That never came around. I got to the point where I realized after 12 relocations, watching opportunity go by, that it was time to do something different. I finally decided to leave," Miller told Bloomberg Law. "When I got the threat of legal action, it totally caught me off guard."

Noncompetes Scrutinized

Employers rely on noncompete agreements to protect company information from unfair competition by former employees and competitors. Such agreements have been scrutinized in recent years by the Justice Department, which targeted tech companies as well as railroads. A spate of legal actions have also been brought in states against fast-food chains that have such agreements for their low-wage workers.

Lawmakers and courts have increasingly been limiting the power of such contracts. Several states, such as California, Montana, North Dakota, and Oklahoma, ban noncompete agreements except in limited circumstances.

Other states have proposed legislation in recent years that similarly would limit or ban noncompete agreements, including Massachusetts, Idaho, and New Jersey. A federal bill also was introduced in January by Sen. Marco Rubio (R-Fla.). It would have banned any company engaged in interstate commerce from forcing an employee to sign a covenant not to compete.

These agreements can vex employers, as the laws vary across so many states and jurisdictions.

There are a few recent examples of companies and courts taking a closer look at contract provisions, including against Google, which recently stopped enforcing a contract provision that banned former employees from trying to hire away their ex-colleagues a year after leaving the company. The company cited the new policy in a court filing that came in response to a lawsuit challenging the company's employment agreements and practices.

In another recent case, a federal court in Kansas said Edelman Financial Engines can't proceed with its lawsuit against two former employees who allegedly violated noncompete clauses. The attorney for the workers in that case said it followed a string of similar rulings in other states.

In another recent case in New Jersey, a judge ruled that a payroll company didn't violate the state's antitrust laws by conditioning some stock options on noncompete agreements, but the court is poised to decide if some of their terms were overbroad. The U.S. Court of Appeals for the Third Circuit upheld the agreements on principle, but it acknowledged that the agreements may be more restrictive than necessary.

CEOs Clash

Miller worked in operations at Canadian National during his entire career and he said he had no plans to leave until he was repeatedly passed over for promotions. He was promoted to general manager in 2006 and stayed in that position until he left in 2019. The state court dispute in Illinois is set to determine whether the noncompete should stand. Trial is set in Illinois for Dec. 3 and Dec. 4.

The legal action in Minnesota, though, targets his new employer directly. In the state court case, Creel and Canadian Pacific will request that the challenge be either dismissed entirely or stayed for the other two related cases. The hearing will be Nov. 25.

The lawsuit alleges that Miller's hiring was a plot by Canadian Pacific and Creel that showed a "total disregard of valid restrictive covenants." It says Miller and the company conspired with one another to defraud Canadian National and wrongfully allow its former employee to keep \$1 million in stock options.

The complaint says Creel sent a text message to Miller offering him a new position and claims Creel acknowledged restrictions on Miller's contract, writing: "I need to understand what it would take to make you whole financially as possible to join us because we both know CN will kill everything. ... If you want to be considered. I love you like a brother forever regardless."

Miller's attorneys told the court that the Minnesota lawsuit "unnecessarily and vexatiously multiples the litigation relating to Miller's hire."

"This case presents an obvious danger of wasteful, piecemeal litigation with contradictory results," Alper and his fellow attorneys told the Minnesota court in October.

Miller filed a lawsuit in March 2019 in federal court in Tennessee and claimed he was denied promotions because of his race. The same month, Miller filed a separate lawsuit in state court in Chicago, and asked the court to rule on the enforceability of the noncompete provision that kept him from the job. That case is in discovery.

He alleges that he was passed over for the next level promotion, vice president of operations, at least five times, despite positive performance ratings. After a manager with less experience than him received the job, he received the offer to work for Canadian Pacific and he accepted.

The noncompete agreement, issued in 2009 according to court documents, required Miller to not work for a competitor in the railway industry for two years after leaving Canadian National, according to court documents. Throughout his career, Miller worked for Canadian National in several states, including Kentucky, Mississippi, Illinois, and Tennessee.

The cases are Ill. Cent. R.R. Co. v. Soo Line R.R. Co., Minn. Dist. Ct., No. 27-CV-19-15391; Miller v. Ill. Cent. R.R., Ill. Cir. Ct., No. 2019-CH-03259; and Miller v. Canadian Nat'l Ry. Co. & Ill. Cent. R.R. Co., W.D. Tenn., No. 2:19-cv-02152.

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