

Litigation

## Knorr Bremse, Wabtec 'No-Poach' Case Triggers Wave of Class Suits (1)

### BNA Snapshot

- Rail equipment firms Knorr-Bremse AG, Wabtec Railway Electronics Inc. face class actions after Justice Department probe
- Private suits targeting firms have been consolidated into multidistrict litigation

By Alexei Alexis

Rail equipment firms Knorr-Bremse AG and Wabtec Railway Electronics Inc. are facing a wave of class-action lawsuits after settling Justice Department allegations that they illegally agreed not to hire each other's employees.

The class actions, which were filed in different parts of the country and consolidated into multidistrict litigation this month, seek monetary damages for any workers who may have been harmed by the companies' alleged employment practices.

The suits are part of a recent flurry of legal and regulatory actions targeting such "no-poach" agreements on antitrust grounds. The DOJ's settlement with Knorr and Wabtec, announced in April, was the agency's first action under 2016 federal guidelines clarifying that no-poach agreements violate antitrust laws. DOJ antitrust chief Makan Delrahim has said similar probes are underway, and the agency is open to bringing criminal charges where appropriate.

"The big takeaway is that antitrust laws protect employees as well as consumers," Dean Harvey, an antitrust partner at Lieferr Cabraser Heimann & Bernstein LLP, told Bloomberg Law.

Harvey was a lead plaintiff's attorney in a no-poach class action against Alphabet Inc.'s Google, Apple Inc., and other technology giants. The case, which stemmed from a DOJ investigation, led to a 2015 settlement in which the companies agreed to pay more than \$400 million to compensate thousands of employee plaintiffs.

### Opportunity for Damages

Since then, the government's scrutiny of no-poach agreements has accelerated, providing new opportunities for plaintiff's lawyers to seek damages on behalf of current and former employees.

The DOJ has bolstered prospects for plaintiffs by indicating that no-poach deals are "per se illegal," Rutgers Law School Professor Michael Carrier told Bloomberg Law.

"If courts agree, then the plaintiffs would only need to show the existence of the agreement, rather than prove that its anticompetitive effects outweigh its pro-competitive justifications," he said.

Whether no-poach agreements are per-se illegal is still an open question, according to Carl Hittinger, a partner at Baker & Hostetler LLP who specializes in antitrust cases. "Until it's sorted out by the courts, it's just a trend, not the law," he told Bloomberg Law.

Paul Overby, Wabtec's vice president for corporate strategy, told Bloomberg Law the company "does not believe that it has diminished competition for talent in the marketplace and intends to contest these claims vigorously."

A Knorr spokeswoman said it's company policy not to comment on pending litigation.

Claims by former fast-food chain workers that their wages were suppressed by such agreements are piling up and likely to

continue since the DOJ and state attorneys general are investigating such practices. For example, a former Auntie Anne's employee sued the pretzel store company Aug. 7 and the franchise for including an illegal clause in franchise agreements that he said suppressed workers' wages.

"I could easily imagine that there's going to be many more cases coming," Joseph Harrington, a business economics and public policy professor at the University of Pennsylvania, told Bloomberg Law.

The pending rail equipment litigation, filed by individuals who have worked at Wabtec and Knorr, accuse the companies of fixing their employees' wages in violation of antitrust law.

Plaintiffs allege that employees received lower wages as a result of the companies' no-poach deal. Nearly two dozen separate antitrust actions naming the rail companies were filed in or transferred to the U.S. District Court for the Western District of Pennsylvania as of Aug. 23.

Wabtec and Knorr had "unilaterally withdrawn from and will not enforce" any of their previous no-poach agreements, they said at the time of the DOJ settlement.

### **Evolving Theories**

While no-poach litigation is an emerging area, the legal theories involved are closely related to those in price-fixing cases, where the law is settled, Harrington said.

"If you just substitute the word 'worker' with 'customer' and the word 'wages' with 'prices,' you'd be looking at a customer-allocation scheme, and there's plenty of case law on that," he said.

Congressional Democrats have introduced legislation that would explicitly ban no-poach agreements.

"Just as companies can't collude to fix prices, they shouldn't be allowed to collude to suppress wages," Sen. Cory Booker (D-N.J.), a lead Senate sponsor, said in an emailed statement.

Knorr and Wabtec agreed not to solicit each other's employees beginning in 2009, according to the DOJ. As the two largest rail suppliers in the world and each other's "top rivals," the two companies substantially hurt the market for specialized workers by not bidding up employees' salaries with competing offers, the complaint said.

Knorr and Wabtec's settlement with the DOJ is a big plus for the private plaintiffs alleging harm from the no-poach agreement, but it doesn't ensure them an automatic victory.

"There will inevitably be squabbling and, unless it settles earlier, probably a pretty hard-fought struggle in court over whether to certify" the class, Christopher Sagers, a Cleveland State University law professor, told Bloomberg Law. "I would guess it will be certified and then the main question will be how much the defendants will settle for."

The question of damages, if the multidistrict case gets that far, will be complex, Harvey said.

"In these cases, you're comparing the amount of compensation that class members actually received and what they would have received had the misconduct never happened."

The case is *In Re: Railway Industry Employee No-Poach Antitrust Litig.*, W.D. Pa., No. 2:18-mc-00798, Transfer order 8/13/18.

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