

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

UNITED PRODUCTS CORPORATION : AUGUST TERM 2000

v. : No. 4051

TRANSTECH MANUFACTURING, INC., : **Control No. 081911**
etal.

O R D E R

AND NOW, this 9th day of November 2000, upon consideration of the verified Complaint, the petition of plaintiff United Products Corporation (“UPC”) for a preliminary injunction, the defendants’ opposition to it, the respective memoranda, and after a full hearing and oral argument and in accord with the contemporaneously filed findings of fact, discussion and conclusions of law in support of this Order, it is **ORDERED** that UPC’s petition is **Granted, in part**, and defendants are enjoined until August 3, 2001 from engaging in any business with Amtrak or SEPTA involving passenger railcar interiors or uncoupling rods. Defendants may engage in other business with Amtrak and SEPTA.

It is further **ORDERED** that UPC file a bond or deposit legal tender with the Prothonotary in the amount of \$5,000.00 in accordance with Pa.R.C.P. 1531(b).

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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**FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS OF LAW IN SUPPORT OF
ORDER GRANTING, IN PART, PLAINTIFF-PETITIONER'S PETITION FOR
PRELIMINARY INJUNCTION**

Plaintiff-petitioner United Products Corporation ("UPC") seeks to enforce restrictive covenants against its former employees, defendants-respondents Benjamin Amodei, Jr. and Mark Furry. UPC supplies modules and parts for passenger railcar interiors. Amodei and Furry resigned from UPC and started a new company, defendant-respondent, Transtech Manufacturing, Inc. ("Transtech"), to supply parts to passenger railroads, including parts for passenger railcar interiors.

UPC filed a petition for a preliminary injunction to prohibit the defendants from performing work for UPC's two biggest customers, Amtrak and the Southeastern Pennsylvania Transportation Authority ("SEPTA"). The court grants the petition, in part, and enjoins defendants from engaging in business with Amtrak and SEPTA involving passenger railcar interiors or uncoupling rods until August 3, 2001. The following findings of fact, discussion and conclusions of law support the court's contemporaneous Order.

FINDINGS OF FACT

I. UNITED PRODUCTS CORPORATION

1. UPC has its principal place of business in Trevose, Pennsylvania. (N.T. 22).
2. Egan founded UPC in 1990. (N.T. 22). Egan is the President and CEO of UPC. (N.T. 6, 210). He and his wife own 100% of UPC's shares. (N.T. 22; Exhibit P-1, Company Profile and History, Management Structure).
3. UPC is primarily in the business of providing parts for passenger railcar interiors. (N.T.25, 31; Exhibit P-1, Company Profile and History, Introduction). UPC's letterhead bears the slogan "Bright Ideas for Railcar Interiors." (Exhibit D-17B).
4. Cathy Dahl is General Manager of UPC. (N.T. 52, 209).
5. Ninety percent of UPC's business comes from Amtrak and SEPTA. (N.T. 193).
6. In 1999, UPC had about \$4 million in sales. (N.T. 122). About \$2.5 million of that came from the SEPTA Silverliner project. (N.T. 122). About \$500,000 came from the Amtrak Capstone project. (N.T. 122). The remaining \$1 million was from spare parts for SEPTA, Amtrak, other transit authorities and railcar builders. (N.T. 122; Exhibit P-1, Customer List).
7. Anyone in the transit industry could easily determine the identities of UPC's customers. (N.T. 190).
8. UPC copyrights its drawings. (N.T. 32, 92; Exhibit P-8). UPC requires many of its employees and suppliers to sign non-competition, non-solicitation and confidentiality agreements. (N.T. 89-90; Exhibits P-5, P-6). UPC has filed suit in the past against those whom

UPC believes to be infringing on UPC's intellectual property. (N.T. 93-98; Exhibits P-9, P-10 and P-11).

9. Design and production of UPC's products involves materials, methods and skills that are commonly known in the passenger railcar industry. (N.T. 366-70, 395).

II. THE KITTING PROCESS

10. The interior of a passenger railcar contains thousands of parts manufactured by 70-80 vendors. (N.T. 23-24).

11. In the 1980's, passenger railroads bought the parts directly from the vendors. (N.T. 23-27, 30). Before a railroad installed the parts, no one fitted the parts from the different vendors together to see that the parts fit properly. (N.T. 23-27, 30). The parts often did not fit together. (N.T. 23-24, 28). Problems with poorly fitting interior parts resulted in continual delays in railcar assembly. (N.T. 23-27).

12. In the 1990's Egan formed UPC and introduced the kitting process into the railcar interior supply industry to solve these delay problems. (N.T. 22-27). A "kit" is a group of 2 or more related parts tested to form fit their function before shipment to the railroad. (N.T. 29).

13. Kitting allows the railroad to do one-stop-shopping. (N.T. 28-29). Now, the railroad contracts only with UPC. UPC, rather than the railroad, chooses and contracts with the vendors for each part. (N.T. 30, 283-84; Exhibit P-6). The vendors make the parts and ship them to UPC, and UPC tests the parts for proper fit. (N.T. 270, 284). UPC packages the test-fitted parts and installation instructions into kits and ships the kits to the railroad. (N.T. 30, 270, 284, 364, 499).

14. UPC is the first and only supplier of passenger railcar interior parts to use the kitting process. (N.T. 195, 285-86, 377). Adtranz¹ purchases windshields and windshield wipers in kit form. (N.T. 377). Firms in the automotive industry use kitting. (N.T. 271).

15. The identities of these parts suppliers are generally available in the Thomas Register. (N.T. 273, 284).

III. AMTRAK AND THE CAPSTONE PROJECT

16. The Capstone project is the refurbishment of 780 Amtrak passenger railcars in the Northeast Corridor. (N.T. 48-49, 508).

17. UPC has been involved in Capstone since at least July 1998. (N.T. 50).

18. UPC's role in Capstone is supplying bag racks,² Priority Package Delivery ("PPD") modules, cafe car handrails, cafe car tables and cafe car windscreens. (N.T. 48-49, 147, 508). UPC has made about 200 drawings for Capstone parts. (N.T. 35).

19. Capstone will last about another 3 years. (N.T. 120, 507).

20. Except for the bag rack, UPC charges Amtrak by the hour for engineering of Capstone parts. (N.T. 80).

¹ Adtranz is the successor to ABB-Daimler-Benz. (N.T. 254). This opinion refers to both entities as Adtranz.

² It is not clear if the bag rack is part of Capstone or, instead, a separate project. Compare (Exhibit P-3 (purchase order for bag rack with "Capstone 2001" caption)) and (N.T. 508 (bag rack not a part of Capstone)). The resolution of this issue is not material to the issues here presented.

A. The Bag Rack

21. The bag rack is an upright shelf for holding luggage. There are two styles of bag racks -- a high-style and a low-style. (N.T. 40). The high style is five inches taller than the low style. (N.T. 40). Amtrak will put one of each style in each of the 780 railcars in the Northeast Corridor. (N.T. 42-43).

22. When Amtrak ordered the bag rack from UPC, Amtrak gave only general dimensions for the bag rack. (N.T. 44). In 7 months, UPC designed the bag rack, made a mock-up of that design, and built it. (N.T. 31-32, 44-45, 224). Development of the rack cost UPC about \$60,000. (N.T. 45). About 20 drawings comprise the bag rack design. (N.T. 32, 45). The drawings are copyrighted. (N.T. 32). Amtrak did not pay for the drawings of the bag rack. (N.T. 79-80).

23. UPC received a purchase order from Amtrak for 200 bag racks at \$1275.00 per rack, for a total of \$255,000. (N.T. 38-39; Exhibit P-3).

B. The PPD Module

24. PPD means "Priority Package Delivery." (Exhibit P-3, PPD Module Purchase Order). Amtrak will install PPD modules at one end of each of the 72 cafe cars in the Northeast Corridor. (N.T. 49, 392-93, 508-09). Amtrak will use the PPD module for delivery of small packages in the Northeast Corridor. (N.T. 49).

25. UPC did most of the design engineering work for the PPD module. (N.T. 50).

26. Amtrak paid UPC for the engineering of PPD module. (N.T. 78, 80; Exhibit P-3, Purchase Order for PPD module reflecting engineering changes). Therefore, the drawings for the PPD module will become Amtrak's property at the end of the project. (N.T. 51).

27. Amtrak ordered 24 PPD modules from UPC at \$36,000 per unit. (N.T. 50, 392, 509). Amtrak may order 48 more. (N.T. 50, 392-93, 509-510).

C. Reverse Engineering

28. It would be possible to reverse engineer the bag rack, windscreen and tables. (N.T. 176, 366, 368, 395).

IV. SEPTA AND THE SILVERLINER PROJECT

29. The Silverliner project is the refurbishing of the interior of 233 SEPTA passenger railcars. (N.T. 35, 36, 256). In late 1995, SEPTA issued to UPC a purchase order for the project. (N.T. 29, 259).

30. Philip Johnson, Assistant General Manager of SEPTA, is UPC's contact at SEPTA for Silverliner. (N.T. 70-71; Exhibit P-2, Silverliner Agreement, ¶ XXV). Johnson's supervisor is Jack Leary, SEPTA General Manager. (N.T. 502-03).

31. For the Silverliner project, UPC supplies all interior parts except seats, windows, window trim, high ceiling lights and doors. (N.T. 35, 147, 282). The parts that UPC supplies are flooring, bulkhead panels, center vestibule, end panels, side ceiling, aluminum extrusions, plastic window masks, underseat lockers and some lighting. (N.T. 267). Except for modification of aluminum extrusions and assembly of the underseat lockers, UPC hired subcontractors to manufacture all of these parts. (N.T. 267-69).

32. A kit for one SEPTA Silverliner railcar interior requires 30 boxes and fills a tractor trailer. (N.T. 281).

33. SEPTA gave UPC the specifications for the interior, and UPC designed the interior. (N.T. 29, 274). It took 11 months for UPC to design the interior, develop the tooling

and install the first interior. (N.T. 29). UPC made 400 drawings for the Silverliner interior -- 200 of which are copyrighted. (N.T. 35, 38). SEPTA paid UPC about \$1 million for the engineering of the Silverliner interior. (N.T. 77-78). UPC is seeking reimbursement from SEPTA for an additional half million dollars of Silverliner engineering costs. (N.T. 81-82). Some of the Silverliner drawings will become SEPTA's property at the end of the project, and some will remain UPC's property. (N.T. 78-79, 82-83).

34. UPC has an agreement with SEPTA to supply interiors for all 233 cars. (N.T. 37; Exhibit P-2). The agreement involves four phases: Phase I was 50 cars; Phase II was 77 cars; Phase III is 77 cars; Phase IV is 29 cars. (N.T. 257; Exhibit P-2).

35. UPC has completed Phases I and II and has received a purchase order for Phase III. (N.T. 37; Exhibit P-19). As of September 25, 2000, UPC had shipped 130 Silverliner kits to SEPTA. (N.T. 35). SEPTA will issue UPC a purchase order for Phase IV when Phase III is complete. (N.T. 492).

36. Egan believes that UPC cannot lose Phase IV unless: (1) UPC breaches the agreement or (2) UPC fails to get a performance bond for Phase IV. (N.T. 492-494).

37. As of September 25, 2000 UPC had received \$7-8 million in revenue from Silverliner. (N.T. 37). UPC expects to receive \$5-6 million more over the next several years. (N.T. 37).

V. SPARE PARTS

38. Egan describes spare parts as "the high profit part" of UPC's business. (N.T. 498).

39. Spare parts are those intended to replace worn parts on railcars. UPC produces the parts using Amtrak or SEPTA drawings of the original parts. (N.T. 23, 499-500).

40. UPC supplies some spare parts in kit form. (N.T. 499-500).

41. UPC produces the following spare parts for Amtrak: the door edge kit, the door pull kit and the safety bar kit. These spare parts are not part of Capstone, and Amtrak is not committed to using UPC as the sole supplier of these parts. (N.T. 115-18, 168).

42. UPC produces the uncoupling rod kit for Amtrak and SEPTA. (N.T. 31, 109, 115, 499-501).

43. The uncoupling rod is an old item. (N.T. 500). Railroads have used the same design of uncoupling rod since the 1920's. (N.T. 500). Production of the uncoupling rod involves four vendors. SEPTA orders the uncoupling rod from UPC, and UPC subcontracts the production of the parts of the uncoupling rod to the vendors. UPC tests the fit of the parts, packages them into uncoupling rod kits, and sends the kits to SEPTA. (N.T. 499-501).

V. BEN AMODEI

44. Ben Amodei is 53 years old. (N.T. 379).

45. Before coming to UPC, Amodei worked in the railcar business for about 25 years, as an employee of the Budd Company and Adtranz and as a consultant for Amtrak. (N.T. 380-83). He worked for UPC from August 1998 to March 16, 2000. (N.T. 380, 404; Exhibit P-14).

46. Though Amodei told Egan that Amodei has a bachelor's degree in mechanical engineering, Amodei has not completed that degree. (N.T. 58-59, 383-84, 406; Exhibit P-14).

47. Effective August 24, 1998, UPC hired Amodei as a full-time employee at a salary of \$45,000. (Exhibit D-7). The first 120 days of Amodei's full time employment was a

probationary period, during which UPC paid him as a 1099 employee. (N.T. 156; Exhibit P-14).

48. On November 3, 1998, UPC changed Amodei to a regular full-time employee and increased his salary to \$55,000 per year. (N.T. 99-100, 211; Exhibit P-13).

49. When Egan met with Amodei to discuss the raise, Egan discussed having Amodei execute a restrictive covenant. (N.T. 159-60, 386-87; Exhibits P-5 and D-8). Egan told Amodei that the restrictive covenants were in exchange for the raise. (N.T. 387). Egan also told Amodei that the raise was for Amodei's having done a good job. (N.T. 387).

50. On November 12, 1998, Mr. Amodei signed an employment agreement, consisting of two parts: one titled "Agreement" ("1998 Agreement 1") and another titled "Confidentiality Agreement for UPC Employees" ("1998 Agreement 2"). (N.T. 385-87; Exhibits P-5 and D-8).

51. Amodei's 1998 Agreement 1 contained a general covenant not to compete:

As long as I am employed by the Company and for a period of two (2) years after the termination of my employment for any reason, except by the Company without cause, I shall not manage, operate or control, or act as an employee of or consultant, advisor, or contractor to, any entity which is engaged in any business in which the Company was engaged while I was employed by the Company (hereinafter "Competing Entity").

(Exhibit P-5, Amodei's 1998 Agreement 1 ¶ 1).

52. Amodei's 1998 Agreement 1 contained a non-solicitation agreement.

As long as I am employed by the Company for a period of twenty-four (24) months after the termination of my employment for any reason, voluntarily or involuntarily, I shall not, on behalf of any Competing Entity, solicit or negotiate with any person or entity which was a company customer or employee while I was employed by the Company. Further, I agree I shall not accept or solicit employment opportunities with the company's customers, vendors, consultants, sub-contractors.

(Exhibit P-5, Amodei's 1998 Agreement 1 ¶ 3).

53. Amodei's 1998 Agreement 1 contained a confidentiality agreement:

During the course of my employment with the Company, I will learn and have access to the Company's trade secrets, confidential information and proprietary materials, which may include methods, procedures, computer programs, databases, customer lists and identities, employee lists and identities, processes, premium and other pricing information, research, provider and other payment rates, methodologies, contracts and contractual forms, and other information which is not publicly available generally and which has been developed or acquired by the Company at with considerable effort and expense. I shall hold all trade secrets, confidential information and proprietary materials in the strictest confidence and shall not directly or indirectly disclose, divulge or reveal the same to any third party at any time or retain or use the same after my employment with the Company ends. I understand this provision encompasses confidential information and proprietary materials may not be trade secrets. Prior to or upon the termination of my employment with the Company, I shall return to the Company all of its property and documentation, together with all such trade secrets, confidential information and proprietary information to extent embodied in any tangible form.

(Exhibit P-5, Amodei's 1998 Agreement 1 ¶ 4).

54. Amodei's 1998 Agreement 2 also contained a general covenant not to compete, a confidentiality agreement and an agreement not to solicit UPC's employees. (Exhibit P-5, Amodei 1998 Agreement 2 ¶¶ 1(a)-(g), 3(a)).³

55. Egan chose a two year duration for the agreements because his attorneys advised that two years was reasonable. (N.T. 150-51).

56. Amodei was UPC's point man for Amtrak's Capstone project. (N.T. 59-60, 211-212). As point man, Amodei fielded complaints from Amtrak and from vendors, attended Capstone weekly progress meetings at Amtrak's facilities in Bear, Delaware and prepared minutes of those meetings. (N.T. 53-54, 388-90).

³ UPC does not seek to enforce the agreement not to solicit UPC's employees.

57. Amtrak complained weekly to Amodei about delivery delays. (N.T. 389-90).

58. Amodei had access to UPC's kits and drawings, including kits and drawings for the uncoupling rod, the door edge, the door pull and the safety bar. (N.T. 114-118). He participated in work on the Amtrak bag rack, PPD modules, the tables, handrails and doors. (N.T. 392, 418-419).

59. Amodei was a good employee and Egan told him so. (N.T. 387, 404). Amodei worked long hours -- 60-70 hours per week -- such that Egan once asked him, "Where's your cot?" (N.T. 404-405; Exhibit P-9) (where Egan refers to Amodei's long hours). UPC promoted Amodei to engineering manager. (N.T. 211). In late 1999, UPC increased Amodei's salary to \$65,000. (N.T. 405, Exhibits P-1 and P-14).

60. As engineering manager, Amodei supervised five engineers and was responsible for organization of the engineering department, coordination of drawings and development of parts. (N.T. 54, 59, 114-15, 211).

61. Nonetheless, by January 2000, relations between Amodei and Egan had soured. (N.T. 403). Several incidents touched off -- or resulted from -- these soured relations.

62. First was the door incident. In or about January 2000, Amodei made drawings for UPC's new facility and mistakenly forgot to erase a door from the drawings. (N.T. 399, 401).

63. Second was the TV news crew incident. (N.T. 399, 400). In January 2000, a TV news crew was headed to UPC to do a story. When giving directions to the news crew, Amodei gave them the wrong street number. Because of the wrong address, the news crew arrived late. Afterward, Egan wrote Amodei a scathing letter describing Amodei's conduct as "reprehensible and unacceptable," giving Amodei a second chance and offering to accept Amodei's resignation

should he choose not to accept the second chance. (N.T. 184-86, 399-400; Exhibit D-9).

64. Third was the doctor's note incident. On or about February 3, 2000, Amodei had a mild heart attack and took a sick leave. (N.T. 182-84). Amodei returned to work on March 1, 2000. (N.T. 402). When he returned, Egan asked for a doctor's note from Amodei. (N.T. 182; Exhibit D-10). Egan says that he requested the doctor's note to be sure that Amodei was healthy enough to return to work. (N.T. 183-84). Amodei thought that Egan did not believe Amodei was sick.

65. Fourth was the Todco incident. TODCO was a UPC vendor for the Capstone project. In March 2000, after Amodei returned from his heart attack, Amodei and Amtrak had discussion about delays in the delivery of a certain part. Amodei told Amtrak that the delay was attributable to TODCO. (N.T. 187, 402; Exhibits D-11 and D-12). When Egan learned that Amodei revealed TODCO's identity to Amtrak, Egan became angry. (N.T. 402). Egan told Amodei that Amodei was no longer permitted to talk to vendors or customers. (N.T. 402).

66. In a handwritten letter dated March 16, 2000, Mr. Amodei resigned from UPC. (N.T. 106; Exhibit D-13).

67. Amodei did not work on SEPTA contracts while at UPC. (N.T. 383, 388). Amodei did not meet SEPTA's Philip Johnson until after leaving UPC. (N.T. 383).

VI. MARK FURRY

68. Mark Furry is 52 years old. (N.T. 248).

69. Furry has a college degree in accounting. (N.T. 249). He worked in accounting and financing with several manufacturing firms before UPC hired him. (N.T. 249-53). Some of these firms were involved with fabrication of metal parts. (N.T. 249-53).

70. Furry began working for UPC as a part-time consultant in March or April of 1995. (N.T. 251, 253).

71. Furry helped prepare UPC's bid for the Silverliner project, and he is familiar with the Silverliner specifications. (N.T. 255, 257).

72. On May 30, 1996, Furry executed an agreement ("1996 Agreement") containing non-competition, non-solicitation and confidentiality agreements. (N.T. 87; Exhibit P-16).⁴

73. Furry's final salary as a consultant was \$56,000 per year. (N.T.102; Exhibit P-15).

74. On November 2, 1998, UPC hired Furry as a fulltime employee, promoted him to Vice President of Finance and Projects, and increased his salary to \$62,000. (N.T. 102, 210, 216; Exhibit P-15). The change was effective retroactively to 3 weeks before November 2, 1998. (N.T. 142-43; Exhibit P-15).

75. In November 1998, around the same time that Amodei signed his non-competition agreement, Furry signed the same employment and confidentiality agreements that Amodei signed. (N.T. 87, 130, 197, 215-22).

76. From September 24, 1997 until his resignation, Furry was UPC's point man with SEPTA for technical and pricing matters on the Silverliner project. (N.T. 66-68, 210, 265).

77. Furry's duties as Silverliner point man included participating in and running

⁴ UPC does not seek to enforce Furry's 1996 Agreement. (N.T. 129-30).

SEPTA's Silverliner meetings in Philadelphia and being the "sounding board" for SEPTA's complaints concerning quality and timeliness. (N.T. 112-13, 212, 266-67, 275; Exhibit P-15).

Furry received calls from SEPTA approximately every other week. (N.T. 267).

78. Egan was present at Silverliner meetings. (N.T. 113).

79. From January 1, 2000 to July 28, 2000, Furry met with SEPTA representatives four or five times. (N.T. 327). He had 20 to 30 telephone conversations with SEPTA representatives. (N.T. 327).

80. Furry had access to all of UPC's records, including personnel files; drawings, bids, and financial, pricing, inventory, engineering and vendor records. (N.T. 107-08, 110, 210-11, 307). Furry had access to Egan and Dahl's offices. (N.T. 211).

81. Furry was UPC's liaison with vendors and with performance bond companies. (N.T. 111-13).

82. After Amodei left UPC, Furry assumed Amodei's duties as point man for Capstone, attended the weekly Capstone meetings and prepared minutes of those meetings. (N.T. 55, 210, Exhibit P-4).

83. Furry suffers with Crohn's Disease -- an inflammation of the intestinal tract. (N.T. 296). Furry missed seven weeks of work due to a flare-up of this condition. (N.T. 296-97). Furry also missed time from work when he had pneumonia. (N.T. 345). Disputes over Furry's absences due to illness and his pay during those times led to tension between Furry and Egan. (N.T. 346).

84. On July 12, 2000, Furry submitted his resignation letter effective July 28, 2000. (N.T. 67, 202, 203; Exhibit P-15). Furry's last day at UPC was August 2, 2000. (Exhibit P-16). On that day, he met with Dahl and Egan and signed an Exit Interview form, which stated, among other things that

I . . . re-affirm my promise that company proprietary and confidential information as noted in our Agreement between myself and United Products Corporation is in force and has not and will not be violated.

(N.T. 203-204, 222, 288; Exhibit P-16).

VII. MARIO VERZILLI

85. Mario Verzilli was a design engineer for UPC. He was a key designer for the Amtrak bag rack and the PPD module. He was project engineer and SEPTA liaison on the Silverliner project. (N.T. 363-67).

86. Verzilli worked for UPC from December 1996 to October 1999. (N.T. 361-62).

87. Before coming to UPC, Verzilli worked for over 40 years in the passenger railcar business with the Budd Company and with Adtranz. (N.T. 362).

88. Egan fired Verzilli because Verzilli was a reference on the application of another UPC employee -- Jeff Chappelle -- for a job at Amtrak. (N.T. 370-72).

VIII. JOHN MORONG, JR.

89. UPC's new point man for both SEPTA and Amtrak is John Morong, Jr. (N.T. 442).

90. Morong -- UPC's Quality Control manager and the person currently in charge of production -- has worked for UPC for 5 years. (N.T. 443-444).

91. Egan testified that he has confidence in Morong, that he is comfortable with Morong's relationship with SEPTA, that he is comfortable with Morong's handling Capstone, that Morong is "keenly aware of all aspects" of the SEPTA and Amtrak projects, and that Morong can handle the spare parts business. (N.T. 443, 498, 506-07).

IX. THE MISSING 1998 FURRY AGREEMENTS

92. Dahl keeps UPC's personnel records -- including the originals of employee agreements -- in looseleaf binders. (N.T. 213-14; Exhibit P-5). The binders sit on a bookcase in Dahl's office. (N.T. 86, 214).

93. Dahl's office is unlocked during business hours. (N.T. 144).

94. In or about November 1998, Dahl printed two copies of 1998 Agreement 1 and two copies of 1998 Agreement 2 -- a set of copies for Amodei to sign and a set of copies for Furry to sign. When she got the agreements back from Amodei and Furry, she punched holes in them and inserted them in the binders. (N.T. 214-17, 219, 385-87). Furry's 1996 Agreement was in the binders too. (N.T. 219).

95. Dahl later saw Furry's agreements when she put other employee's agreements in the bonders. (N.T. 217-18).

96. Only Egan, Dahl, Furry and Melissa Marshall -- UPC's executive assistant -- had access to Dahl's office. (N.T. 86-87).

97. After Furry resigned, Dahl and Egan searched for Furry's agreements. (N.T. 88). Neither Furry's 1996 Agreement nor his 1998 Agreements were in the binders. (N.T. 218).

98. A week or two after Furry left UPC, Egan found a No. 10 envelope underneath Furry's desk in Furry's former office. (N.T. 88, 125). Folded up inside the envelope was the

original of the 1996 Agreement. (N.T. 88-99, 219). The looseleaf holes in the 1996 Agreement were torn. (N.T. 89, 219).

99. Furry denies removing his 1996 Agreement or any other agreement from the binders and denies knowing the location of the binders. (N.T. 435-36).

X. TRANSTECH

100. In January 2000, Amodei and Furry talked about starting a business together. (N.T. 319, 324). They were dissatisfied with UPC; and because of their ages, they felt it would be difficult to find positions with other employers. (N.T. 320, 404).

101. In April 2000, Furry and Amodei discussed their venture with attorneys. (N.T. 324).

102. Amodei and Furry founded Transtech. Amodei and Furry are 50/50 owners of Transtech. (N.T. 318). Furry is President of Transtech. (N.T. 279). Amodei is Vice President. (N.T. 380).

103. Transtech is in the business of supplying parts -- including railcar interior parts -- to the passenger railroads. (Exhibit P-17).

104. In May or June 2000, after Amodei quit UPC, Amodei visited Amtrak to introduce Transtech. (N.T. 426-27). Amtrak asked Amodei to submit a bid for bag racks. (N.T. 335, 426). In or about June or July 2000, while Furry still worked for UPC, Transtech gave Amtrak a quote for 50 high-style bag racks and 50 low-style bag racks. (N.T. 40, 424; Exhibit P-17). Transtech's prices on the bag racks were 10% lower than UPC's prices. (N.T. 40-41; Exhibit P-17). Furry participated in the preparation of the bid. (N.T. 425).

105. Furry and Amodei incorporated Transtech on July 13, 2000 -- the day after Furry submitted his resignation letter. (N.T. 324; Exhibit P-17).

106. Transtech's office is at Mr. Amodei's home address in Bensalem, Pennsylvania. (N.T. 379-80; Exhibit P-17).

107. Amodei sent a letter, dated July 25, 2000, soliciting business from Amtrak on behalf of Transtech. (Exhibit P-17).

108. In August 2000, Egan received a copy of Transtech's July 25 letter and the bag rack quote. (N.T. 41). UPC then lowered its bag rack prices to about \$1000 per unit. (N.T. 41-42). Though Egan attributed the lowering of the prices in part to the Transtech quote, Egan stated that he would have lowered the prices anyway because UPC's engineering costs had decreased and because UPC had purchased new equipment. (N.T. 41-42).

109. Amtrak has not ordered any bag racks from Transtech. (N.T. 341-43).

110. Transtech has not bid on the PPD module or any other part of the Capstone project. (N.T. 344).

111. In or about August 2000, Amodei and Furry met with Philip Johnson of SEPTA to solicit business for Transtech. (N.T. 329).

112. Transtech sent bids to SEPTA. (N.T. 331-32, 334). One bid was for an anchor bolt for securing rail to tie. (N.T. 334).

113. UPC does not supply anchor bolts to SEPTA. (N.T. 334).

114. As of September 26, 2000, Transtech had received no orders from Amtrak, SEPTA or any other company. (N.T. 279, 341-43).

115. There is no evidence that Amodei or Furry took any drawings or other property from UPC. (N.T. 163, 405, 423-24).

X. DELAYS IN SILVERLINER

116. UPC is behind schedule in the Silverliner project. (N.T. 73). The delay arose in part from a dispute over UPC's performance bond. In January 2000, UPC was to begin the third and largest of the four phases of Silverliner. UPC's bonding company refused to issue a bond until SEPTA issued a purchase order for that phase. SEPTA refused to issue a purchase order until the bonding company issued the bond. UPC refused to begin work on Phase III until there was a bond and a purchase order. Someone must have blinked, for the bonding company issued the bond, SEPTA issued a purchase order and UPC began work. But UPC fell behind in delivery of the kits. (N.T. 71-73, 259-60, 276-78; Exhibit P-15). In letters between the parties, UPC blames SEPTA for the delays, while SEPTA appears to blame UPC. (N.T. 454-78, Exhibits 17 A-H and 18A-B).

117. In August 2000, Philip Johnson of SEPTA began "aggressively pressing" UPC to speed up delivery of the Silverliner kits. (N.T. 71). Johnson contacted UPC's performance bond company to complain of the delays. (N.T. 72). A representative of the bonding company visited UPC to investigate the delays. (N.T. 72). Egan testified that his meeting with the bonding company's representative "went very well." (N.T. 72).

118. Egan attributes Johnson's dissatisfaction with UPC to Furry and Amodei's visit to Johnson. (N.T. 458). But Egan admits to personal differences with Johnson in the past. (N.T. 468). Egan admits that Johnson's dissatisfaction might stem from an incident in 1995 where

UPC asked the inspector general to investigate SEPTA's actions regarding a UPC bid. (N.T. 474-75).

119. SEPTA has had problems with UPC in the past regarding improperly fitting parts and late delivery. (N.T. 366-67).

120. In spite of UPC's dispute with Johnson and the performance bonding company, UPC is on good terms with SEPTA and with Johnson's supervisor Jack Leary. (N.T. 502-505).

120. Egan fears that current tension between SEPTA and UPC might cause the bonding company to refuse to issue performance bond for Phase IV. (N.T. 493).

DISCUSSION

UPC asks the court to enjoin Amodei and Furry from doing any business with Amtrak and SEPTA for 2 years. The court grants the requested relief, in part, and enjoins Amodei and Furry from doing any business with Amtrak and SEPTA involving passenger railcar interiors or uncoupling rods until August 3, 2001.

I. STANDARD FOR PRELIMINARY INJUNCTION

In determining whether to grant a preliminary injunction, a court may consider the averments of the pleadings and petition, affidavits of the parties or third parties, or any other proof. Pa.R.C.P. 1531. "[A] preliminary injunction is a most extraordinary form of relief which is to be granted only in the most compelling cases." Goodies Olde Fashion Fudge Co. v. Kuiros, 408 Pa.Super. 495, 597 A.2d 141, 144 (1991). "The purpose of a preliminary injunction is to preserve the status quo as it exists or previously existed before the acts complained of, thus preventing irreparable injury or gross injustice." Maritrans GP, Inc. v. Pepper, Hamilton &

Scheetz, 529 Pa. 241, 602 A.2d 1277, 1286 (1992). The court may grant the injunction only if the moving party establishes the following elements:

- (1) relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages,
- (2) greater injury will occur from refusing the injunction than from granting it,
- (3) the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct,
- (4) the wrong is actionable and the plaintiff's right to relief is clear, and
- (5) the injunction is reasonably suited to abate that wrong.

School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n, 542 Pa. 335, 667 A.2d 5, 6 n.2 (1995);

New Castle Orthopedic Assocs. v. Burns, 481 Pa. 460, 392 A.2d 1383, 1385 (1978). These requisite elements "are cumulative, and if one element is lacking, relief may not be granted."

Norristown Mun. Waste Auth. v. West Norriton Twp. Mun. Auth., 705 A.2d 509, 512 (Pa.Comm. 1998).

In this case -- as in most cases dealing with restrictive covenants and trade secrets -- the main issue is whether there is a clear right to relief for an actionable wrong. See Bell Fuel Corp. v. Cottalico, 375 Pa.Super. 238, 544 A.2d 450, 456 n. 4 (1988). To satisfy this prong, UPC must show that enforceable agreements or protectible trade secrets exist. Id.

II. FURRY SIGNED EMPLOYMENT AND CONFIDENTIALITY AGREEMENTS IDENTICAL TO AMODEI'S AGREEMENTS IN OR AROUND NOVEMBER 1998.

There is a fundamental factual dispute whether Furry signed the restrictive covenants. UPC alleges that Furry signed the agreements in November 1998 and that Furry

removed those agreements and the 1996 agreement around the time that he resigned. Furry denies having seen or signed the restrictive covenants and denies having removed them from UPC. The court finds that Furry signed employment and confidentiality agreements in or around November 1998 identical to Amodei's agreements.

To enforce a lost instrument, a party must prove by clear and convincing evidence: (1) the existence of the instrument, (2) an unsuccessful, diligent, bona fide and thorough search for the instrument in places it was likely to be found, and (3) the contents of the instrument. In re Greggerson's Estate, 344 Pa. 498, 25 A.2d 711, 713 (1942); Hera v. McCormick, 425 Pa.Super. 432, 625 A.2d 682, 687 (1993); Hacker v. Price, 166 Pa.Super. 404, 71 A.2d 851, 853 (1950).

UPC has met this burden. First, Dahl's testimony constitutes clear and convincing evidence that the document existed. This court found Dahl to be a credible witness. She testified that she printed two sets of restrictive covenants -- one for Amodei and one for Furry. She testified to getting back the agreements, punching holes in them, inserting them into the looseleaf binder and telling Egan they she had the agreements. She remembered seeing Furry's employment agreements in the binder on later occasions. Egan testified that Furry signed agreements similar to Amodei's "virtually the same week" that Amodei signed his. Thus, Dahl and Egan were surprised when, after Furry resigned, Furry's 1996 and 1998 agreements were not in the binders.

Furry denied seeing or signing the 1998 agreements or removing the 1996 or 1998 agreements from Dahl's office. Furry's testimony might seem plausible in that other UPC employees had no restrictive covenants. But, the credible and unequivocal testimony of Dahl

coupled with Egan's having found the torn-out, folded-up copy of the 1996 agreement in Furry's office suggests to the court that Furry's recollection of events is less than complete. Similarly, Furry's testimony on other matters was such as to suggest a less than perfect recollection. For example, when discussing the SEPTA anchor bolt bid, Furry testified that he did not know whether Transtech had submitted other bids to SEPTA. The court finds it difficult to believe that Furry -- who is the President and half-owner of Transtech and who has a background in preparing bids -- would be unsure whether Transtech had submitted other bids to SEPTA. The court finds that Furry signed the 1998 agreements.

Second, Egan and Dahl made a diligent, bona fide and thorough search for the agreements. Dahl searched the looseleaf binders in which she kept employee agreements, and Egan searched Furry's office.

Third, there is clear and convincing evidence of the contents of the agreement. Dahl testified that Furry's employment agreement was identical to Amodei's: she printed two sets of the agreements at the same time -- one for Amodei and one for Furry.

In summary, then this court finds that Furry signed agreements in November 1998 and that the terms of those agreements were identical to those of Amodei's 1998 Agreements.

III. UPC HAS A CLEAR RIGHT TO RELIEF UNDER THE NON-COMPETITION AND NON-SOLICITATION AGREEMENTS BUT NOT UNDER THE CONFIDENTIALITY AGREEMENTS.

Having found that Furry signed agreements identical to Amodei's agreements, the court must next determine whether UPC is entitled to relief under those agreements. The agreements contain three provisions: a non-competition agreement, a non-solicitation agreement and a confidentiality agreement.

A. Because UPC Failed to Establish the Existence of Trade Secrets, UPC Does Not Have A Clear Right to Relief Under the Confidentiality Agreement or the Common Law of Trade Secrets.

UPC alleges that its kitting process, products, customer and supplier information and other business information are trade secrets protectible under its confidentiality agreements. Even without the confidentiality agreements, UPC may protect such information under the common law of trade secrets. The confidentiality agreements do not create or broaden the protection, but are evidence of the confidential nature of the data involved. Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 136 A.2d 838, 843 n. 5 (1957). Bell Fuel Corp., 544 A.2d at 461. See also Christopher M's Hand Poured Fudge, Inc. v. Hennon, 699 A.2d 1272, 1275 (1997) (stating that one factor relevant to trade secret determination is the extent of employer's measures to guard the secrecy of the information).

The court finds, however, that UPC failed to meet its burden of showing that trade secrets are at issue. Pennsylvania has adopted the following definition of a trade secret:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

Restatement (First) of Torts § 757, cmt. b at 5 (1939), quoted in Tyson Metal Prods., Inc. v. McCann, 376 Pa.Super. 461, 546 A.2d 119, 121 (1988). See also Felmlee v. Lockett, 466 Pa. 1, 351 A.2d 273, 277 (1976). Trade secret status is an issue of fact, and UPC, as the plaintiff, bears the burden of proof. Christopher M's Hand Poured Fudge, 699 A.2d at 1275; West Mountain

Poultry Co. v. Gress, 309 Pa.Super. 361, 455 A.2d 651, 652 (1983). Several factors are relevant to that issue:

(1) the extent to which the information is known outside the owner's business; (2) the extent to which it is known by employees and others involved in the owner's business; (3) the extent of measures taken by the owner to guard the secrecy of the information; (4) the value of the information to the owner and to his competitors; (5) the amount of money expended by the owner in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Christopher M's Hand Poured Fudge, 699 A.2d at 1275.

Trade secrets must be the particular secrets of the complaining employer, not general secrets of the trade in which he is engaged. Bettinger v. Carl Berke Assoc., 455 Pa. 100, 314 A.2d 296, 299 (1974). Trade secret protection does not extend to the employee's general knowledge, experience, aptitude, skill, dexterity, manual and mental ability or other such subjective knowledge obtained in his employment with the plaintiff. Van Products Co. v. General Welding & Fabricating Co., 419 Pa. 248, 213 A.2d 769, 776-77 (1965); Christopher M's Hand Poured Fudge, 699 A.2d at 1275.

UPC offered evidence of several classes of products that it thought were trade secrets: (1) the Silverliner interior, which consists of the entire railcar interior except for seats, windows, window trim, high ceiling lights and doors, (2) the Capstone interior, which consists of bag racks and four cafe car parts: the PPD module, the handrail, the table and the windscreen, and (3) spare parts, which consists of the uncoupling rod, the door edge kit, the door pull kit and the safety bar kit.

UPC has failed to meet its burden of showing that the designs of its products are trade secrets. A design is not a trade secret if it is in public view and susceptible to reverse-

engineering. Van Products Co., 213 A.2d at 779-80, discussed in S.I. Handling Systems v. Heisley, 753 F.2d 1244, 1262 (3d Cir. 1985) and Henry Hope X-Ray Products v. Marron Carroll, Inc., 674 F.2d 1336, 1341 (9th Cir. 1982). SEPTA has installed 130 Silverliner interiors in its railcars. Amtrak has installed bag racks, PPD modules and tables in its cars. The designs of these products are in public view. They are susceptible to duplication by a competitor upon inspection, disassembly and measurement. There is no allegation that these products use secret materials or combinations of materials that are not discernible upon inspection. Certainly, UPC spent time, effort and money to design these parts. But the products are now in open view and can be copied by any competitor. They are not trade secrets. Van Products, 213 A.2d at 779-80.

Similarly, the designs of UPC's spare parts are not trade secrets. Spare parts are replacement parts. By definition, some third party must first design and produce the original of a part before the part wears out and needs replacement. For example, numerous third parties have manufactured the uncoupling rod for 80 years. The design is not secret and is not UPC's design. Apart from Egan's unclear statement that spare parts production involves discussions in the field and "concurrent engineering," UPC offered no evidence that it improves any spare parts; that it employs secret production processes, machinery or tools to manufacture spare parts; or that it imparts any other form of novelty to the parts beyond supplying them in kit form.⁵ UPC has failed to show that its production of these parts involves trade secrets. Pittsburgh Cut Wire Co. v. Sufrin, 350 Pa. 31, 38 A.2d 33, 34 (1944) (holding that design of machine for manufacture of paper clips was not a trade secret where machine had been in use throughout industry for 50

⁵ Egan testified that UPC might make additional drawings for spare parts, but he produced none of these drawings and did not try to otherwise explain how UPC's drawings were different than the customers' drawings.

years and there was nothing unusual about mechanical parts of machine).

Kitting is not a trade secret. Though a secret process may constitute a trade secret, see e.g., Air Products and Chemicals, Inc. v. Johnson, 296 Pa.Super. 405, 442 A.2d 1114, 1121 (1982), kitting is known in the transit and the automobile industries. UPC offered no evidence that kitting, as applied to passenger railcar interiors, involves any secret nuances not used by other companies. Because UPC failed to show that its kitting process is a secret, the restrictive covenants are not enforceable to protect the kitting process. See Spring Steels, Inc. v. Molloy, 400 Pa. 354, 162 A.2d 370, 372 (1960) (finding that steel manufacturing process was not a trade secret process where other firms besides plaintiff used the process).

Though confidential customer data is sometimes entitled to protection as a trade secret, “customer lists [are] at the very periphery” of trade secret law. Renee Beauty Salons v. Blose-Venable, 438 Pa. Super. 601, 652 A.2d 1345, 1347 (1995) (affirming order denying protection of employer’s customer lists). See also Carl A. Colteryahn Dairy v. Schneider Dairy, 415 Pa. 276, 203 A.2d 469, 473 (1964) (stating that “[customer] lists are generally not the type of secrets which require equitable preservation.”); Fidelity Fund, Inc. v. DiSanto, 347 Pa. Super. 112, 500 A.2d 431, 436 (1985); Bettinger, 314 A.2d at 299. Customer lists are not entitled to trade secret protection if the customer identities “would be generally known to all firms in the same business as” the employer. Harsco Corp. v. Klein, 395 Pa.Super. 212, 576 A.2d 1118, 1121 (1990).

The identities of SEPTA and Amtrak are widely known throughout the trade. Even a layman would know that Amtrak and SEPTA are in the market for railcar interiors. Furthermore, more particular information about these customers -- for example, individual needs,

names of contacts and price information -- is not a trade secret because it is available simply by asking SEPTA and Amtrak. Fidelity Fund, 500 A.2d at 437 (holding that the policy expiration dates of insurer's customers was not protectible because a competitor would "merely need to contact the customers to get such information."); Van Products Co., 213 A.2d at 776 (holding that the knowledge of the need, use and demand for a product is not a trade secret); Renee Beauty Salons, 652 A.2d at 1349-50 (holding that lists of hair salon's customers' names, telephone numbers and styling preferences were not protectible trade secrets because the information was easily obtainable through a number of sources); S.I. Handling Systems, 753 F.2d at 1259 (holding that customer information about the needs of a single prominent buyer is not a trade secret).

Likewise, the identities of railcar parts suppliers cannot be trade secrets because they are available through the Thomas Registry and would be easily obtainable by others in the industry. Den-Tal-Ez, Inc. v. Siemens Capital Corp., 389 Pa.Super. 219, 566 A.2d 1214, 1229 (1989) (holding that "information like the identity of [plaintiff's] material suppliers is not considered a secret since it can readily be learned in any productive industry."); Carl A. Colteryahn Dairy 203 A.2d at 473 (holding that "[e]quity will not protect mere names and addresses easily ascertainable by observation or reference to directories."). More particular information about each supplier -- for example, particular price and product information -- cannot be a secret because it is already in the hands of a third party, the supplier, who has every incentive to disclose the information and to sell to as many customers as possible. Van Products Co., 213 A.2d at 776 (holding that suppliers and accounts payable are not trade secrets). Since UPC's customer and supplier information is widely known throughout the industry or readily

ascertainable, it is not a trade secret.

UPC offered little concrete evidence of any detailed information about itself -- for instance, profit margins, business plans or outstanding bids -- that may qualify as a trade secret and to which Amodei or Furry had access. See e.g., Air Products and Chemicals, Inc. v. Johnson, 296 Pa. Super. 405, 442 A.2d 1114, 1121 (1982) (affirming trial court's holding that business plans, bidding procedures and financial projections not generally known in the industry were protectible as trade secrets); Robinson Elec. Supervisory Co. v. Johnson, 397 Pa. 268, 154 A.2d 494, 495 (1959) (affirming order enjoining defendants from competing with plaintiff, their former employer, where defendants, "through their employment relationship with plaintiff, became familiar with the special problems and details of many potential customers' business establishments" and after leaving the plaintiff's employ, used this information to compete with the plaintiff); Den-Tal-Ez, Inc., 566 A.2d at 1230 (holding that projections, unit costs and product-by-product profit margins were protected as trade secrets). Instead, UPC chose to rely on mere assertions that such information exists. These assertions cannot satisfy UPC's burden of proving that trade secrets exist.

B. The Noncompetition and Nonsolicitation Agreements Are Enforceable to Protect the Relationships With Amtrak and SEPTA that Amodei and Furry Established and Maintained on UPC's Behalf.

1. The non-competition and non-solicitation agreements would prohibit defendants from soliciting or performing work for passenger railcar interiors and uncoupling rods, only, from Amtrak and SEPTA.

In the non-competition agreements, Amodei and Furry agreed not to work for a “competing entity” or “competitor.” (Exhibit P-5, 1998 Agreement 1 ¶ 1; 1998 Agreement 2 ¶ 1(f)). A “competing entity” is “any entity which is engaged in any business in which the Company was engaged while I was employed by the Company.” (Exhibit P-5, 1998 Agreement ¶ 1). Similarly, in the non-solicitation agreements, Amodei and Furry agreed not to solicit UPC’s customers on behalf of a competing entity. (Exhibit P-5, 1998 Agreement 1 ¶ 2).

UPC seeks to bar defendants from performing any work at all for Amtrak and SEPTA, regardless of whether UPC performs that work or not. It is clear, however, that the agreements, if enforceable, would not support such a broad prohibition. UPC’s field is passenger railcar interiors. UPC’s letterhead bears the slogan “Bright Ideas for Railcar Interiors.” Of the numerous UPC products about which the parties testified, only one -- the uncoupling rod -- was a non-interior item. As long as Transtech does not engage in business with Amtrak or SEPTA involving passenger railcar interiors or uncoupling rods, Transtech is not a competing entity of UPC. In such situation, the fact that Furry and/or Amodei while working for Transtech solicit Amtrak or SEPTA on Transtech’s behalf would not violate the agreements.

Therefore, if the non-competition and non-solicitation agreements are enforceable, they would prohibit defendants from engaging in business with Amtrak and SEPTA involving only passenger railcar interiors and the one non-interior item that UPC manufactures -- the uncoupling rod.

2. Standard for enforceability of non-competition and non-solicitation agreements.

Non-competition and non-solicitation agreements are enforceable at equity only if: (1) they are ancillary to an employment relation, (2) they are reasonably limited in duration and geographic scope, and (3) enforcement is necessary to protect a legitimate business interest of the employer without imposing an undue hardship on the employee.⁶ John G. Bryant Co. v. Sling Testing & Repair, Inc. 471 Pa. 1, 369 A.2d 1164, 1168 (1977); Boldt Machinery & Tools, Inc. v. Wallace, 469 Pa. 504, 366 A.2d 902, 906 (1976); Sidco Paper Co. v. Aaron, 465 Pa. 586, 351 A.2d 250, 252 (1976); Thermo-Guard, Inc. v. Cochran, 408 Pa.Super. 54, 596 A.2d 188, 193 (1991). The court must consider the facts and circumstances on a case-by-case basis. Insulation Corp. of America v. Brobston, 446 Pa.Super. 520, 667 A.2d 729, 733-34 (1995). If the restrictive covenant is broader than necessary to protect UPC, the court may limit enforcement to those restrictions in the covenant that are reasonably necessary to protect the employer. Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 136 A.2d 838, 848 (1957); Insulation Corp. of America, 667 A.2d at 737.

3. The covenants are ancillary to Amodei's and Furry's employment with UPC.

To be enforceable, the restrictive covenants must be ancillary to employment. Amodei signed his 1998 Agreement months after first joining UPC as a consultant; Furry signed his 1998 Agreement years after first joining UPC as a consultant. When the parties execute a restrictive covenant after the employee's service begins, the restrictive covenant is not "ancillary"

⁶ The confidentiality agreement is not subject to these standards. Bell Fuel Corp. v. Cottalico, 375 Pa.Super. 238, 544 A.2d 450, 458 (1988).

unless it is supported by new consideration “in the form of a corresponding benefit or a beneficial change in employment status.” Insulation Corp. of America v. Brobston, 446 Pa.Super. 520, 667 A.2d 729, 733 (1995). Amodei’s \$10,000 raise and promotion from 1099 consultant to fulltime employee was new consideration for Amodei’s covenants. Furry’s \$6,000 raise and promotion from 1099 consultant to fulltime employee was new consideration for Furry’s covenants. See Morgan’s Home Equip. Corp., 136 A.2d at 845 (holding that change from provisional to fulltime status was adequate consideration for restrictive covenant); Modern Laundry & Dry Cleaning Co. v. Farrer, 370 Pa.Super. 288, 536 A.2d 409, 411-12 (1988) (same). That Amodei and Furry did not sign the covenants until some days after they received raises and promotions does not make the covenants invalid. Beneficial Finance Co. of Lebanon v. Becker, 422 Pa. 531, 222 A.2d 873, 876 (1966) (holding that restrictive covenant was ancillary to the taking of employment when all of the plaintiff’s employees were required to sign restrictive covenants, the defendant signed the contract two days after he started working for plaintiff, and the plaintiff signed the contract nine days after that); Harsco Corp. v. Klein, 395 Pa. Super. 212, 576 A.2d 1118, 1122 n. 4 (1990). Courts have interpreted the term ancillary broadly to include restrictive covenants executed several days after the change in employment status. Beneficial Finance Co., 222 A.2d at 876. As long as the covenants were auxiliary to the raises and promotions and not after-thoughts to impose additional burdens on unsuspecting employees, they are enforceable. Id. That Egan discussed the covenants with Amodei at the same time that he discussed the raise and that UPC routinely required its employees to execute restrictive covenants shows that the covenants were not impermissible after-thoughts and that Amodei and Furry were not unsuspecting. Id.

4. Enforcement of the covenants is necessary

**only to protect the customer goodwill that
Amodei and Furry established on behalf of UPC.**

The covenants are necessary to protect UPC's legitimate business interest in customer goodwill that Amodei and Furry created on UPC's behalf. "[T]rade secrets of an employer, customer goodwill and specialized training and skills acquired from an employer are all legitimate interests protectible through a general restrictive covenant." Thermo-Guard, Inc., 596 A.2d at 193-94. See also Sidco Paper Co., 351 A.2d at 252-54 and Morgan's Home Equip. Corp., 136 A.2d at 846. UPC has failed to show that trade secrets are at issue here. Likewise, UPC has offered no evidence of specialized training or skills that Amodei and Furry acquired from UPC. The court finds that the only interest at stake here is the customer goodwill that Amodei and Furry established on UPC's behalf. Therefore, the covenants are enforceable to prohibit Amodei and Furry from soliciting from, discussing with, or performing passenger railcar interior business for, Amtrak and SEPTA.

The Pennsylvania Supreme Court has repeatedly recognized the employer's right to protect, by non-competition and non-solicitation agreements, interest in customer goodwill acquired through the efforts of the employee. See e.g., John G. Bryant Co., 369 A.2d at 1167; Sidco Paper Co., 351 A.2d at 252-53; Morgan's Home Equip. Corp., 136 A.2d at 846; Robert Clifton Assocs. v. O'Connor, 338 Pa.Super. 246, 487 A.2d 947, 951-52 (1985); Wainwright's Travel Service v. Schmolck, 347 Pa.Super. 199, 500 A.2d 476, 478 (1985). See also Harlan Blake, Employee Agreements Not to Compete, 73 Harv.L.Rev. 625, 653-54 (1960). Because UPC seeks to bar defendants from performing work for Amtrak and SEPTA, the court need only

consider UPC's right to protect its goodwill with these two customers.⁷

The testimony of witnesses from both sides shows that the execution of the Capstone and Silverliner projects has embroiled UPC in numerous disputes with Amtrak and SEPTA concerning delays, cost overruns and quality control. As UPC's liaisons to Amtrak and SEPTA, Amodei and Furry's jobs were to resolve these disputes and keep the customers happy. Certainly the establishment of good relationships with their Amtrak and SEPTA counterparts would have been crucial to Amodei's and Furry's success as point men. But these relationships do not belong to Amodei and Furry. They belong to UPC. UPC has a right to protect these relationships through enforcement of the covenants until other UPC employees are able to establish their own relationships with Amtrak and SEPTA. John G. Bryant Co., 369 A.2d at 1168 (affirming issuance of a preliminary injunction enforcing a restrictive covenant where "the interest sought to be protected . . . was that relationship which had been established on behalf of [plaintiff's] companies through the efforts of the former employee . . ."); Robert Clifton Assocs., 487 A.2d at 952.

5. The noncompetition and nonsolicitation agreements are reasonably limited in geographic scope, but enforcement for one year is sufficient to protect UPC's goodwill.

Amodei and Furry bear the burden of showing that the time and geographic extent of the restrictive covenants are not reasonable. See John G. Bryant Co., 369 A.2d at 1169 ("The

⁷ Because UPC's legitimate business interests extend no further than protecting the goodwill that Amodei and Furry established on UPC's behalf, the non-competition and non-solicitation agreements would be too broad. John G. Bryant Co., 369 A.2d at 1168. There is no evidence that Amodei and Furry had relationships with any customers besides Amtrak and SEPTA. There being no trade secrets or customer relationships at issue, it is doubtful that the covenants would be enforceable as to any other customers. Because UPC does not seek such broad enforcement, the court need not address this issue.

law is clear that the burden is on him who sets up unreasonableness as the basis of contractual illegality to show how and why it is unlawful."). Because the only legitimate business interest at issue is the goodwill that Amodei and Furry established on UPC's behalf, the duration of the covenants is reasonable if it is no longer than necessary for UPC to put a new employee on the job and for the new employee to have a reasonable opportunity to demonstrate his effectiveness to UPC's customers. Robert Clifton Assocs., 487 A.2d at 952.

UPC's choice of a two-year term for the covenants appears to be unrelated to protection of any legitimate business interests; rather, Egan chose two years simply because his attorneys said two years was reasonable. Other evidence indicates that one year will be sufficient. First, Egan has his own relationship with Amtrak and SEPTA. He attended the weekly Capstone meetings and he is on first name basis with SEPTA general manager Jack Leary. Therefore, UPC was not relying solely on Amodei and Furry to establish relationships with Amtrak and SEPTA. And in spite of the recent disputes between Egan and SEPTA's Philip Johnson, UPC still has a good relationship with SEPTA.

Second, UPC has already moved UPC's Quality Control manager, John Morong, into position as Amtrak and SEPTA point man. Egan testified that Morong is "keenly aware" of all aspects of UPC's SEPTA and Amtrak programs and Egan is confident that Morong can handle the Silverliner, Capstone and spare parts programs.

Third, the frequency of Amodei's and Furry's contact with SEPTA and Amtrak indicates a shorter term is sufficient. In industries involving frequent client contact, the new employee generally needs less time to demonstrate his effectiveness. Boldt Machinery & Tools, 366 A.2d at 907. Amodei met with Amtrak weekly and telephoned Amtrak often. Furry met

with SEPTA at least every other month and telephoned SEPTA at least every other week.

Therefore, the point man position for Amtrak and SEPTA involves frequent customer contact.

Given Morong's experience and the frequent contact that he will have with Amtrak and SEPTA, the court holds that a one year term of enforcement is sufficient to protect UPC. The court will measure that year from Furry's last day at UPC -- August 2, 2000.

The restrictive covenants contain no explicit geographic limitations. Because the court will enjoin Amodei and Furry only from dealing with SEPTA and Amtrak, the geographic scope of the covenant as enforced will be inherently reasonable. See Boldt Machinery & Tools, 366 A.2d at 908 (stating that an employer's legitimate business interest in enforcing a restrictive covenant extends no further than the employee's sales territory).

In summary, then, the non-competition and non-solicitation agreements prohibit defendants for one year commencing August 2, 2000, from engaging in business with Amtrak and SEPTA involving passenger railcar interiors and the one non-interior item UPC manufactures -- the uncoupling rod.

IV. AMODEI AND FURRY FAILED TO SHOW THAT UPC CONSTRUCTIVELY TERMINATED THEM.

Defendants argue that Egan's conduct forced them to resign, such that UPC constructively terminated them. See Pennsylvania Labor Relations Board v. Sand's Restaurant, 429 Pa. 479, 240 A.2d 801, 803 (1968) (stating that, under the Pennsylvania Labor Relations Act, 43 P.S. §211.1 et seq., a constructive discharge occurs only where the employer makes working conditions so intolerable that the employee is forced to resign); Kroen v. Bedway Sec. Agency, 430 Pa.Super. 83, 633 A.2d 628, 633-34 (1993) (holding that employer who constructively

discharges an at-will employee may be liable in tort for wrongful discharge). The defendants ask the court to hold that an employer who constructively terminates his employee may not enforce a restrictive covenant against that employee. See Insulation Corp. of America v. Brobston, 446 Pa.Super. 520, 667 A.2d 729, 734-737 (Pa. Super. 1997).

This argument has been recognized by our courts. In Insulation Corporation of America, our Superior Court held that an employer who terminates an employee for poor performance cannot enforce a restrictive covenant against that employee.

The employer who fires an employee for failing to perform in a manner that promotes the employer's business interests deems the employee worthless. Once such a determination is made by the employer, the need to protect itself from the former employee is diminished by the fact that the employee's worth to the corporation is presumably insignificant. Under such circumstances, we conclude that it is unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded as worthless to its legitimate business interests. . . . [T]he circumstances surrounding [the employee's] termination [affect] both the legitimacy of the employer's interests and the degree of hardship imposed upon the departing employee.

Id. at 735-737. See also All-Pak v. Johntson, 694 A.2d 347, 352 (Pa.Super. 1997) (stating that Insulation Corporation rule applies only where the employee is fired for poor performance).

The court is aware of no case in which a Pennsylvania court extended the Insulation Corporation rule to constructive termination. The court need not decide whether to extend the Insulation Corporation rule. Though the testimony of Amodei, Furry and Verzilli certainly undermined Egan's quixotic assertion that UPC is a happy place to work, the court cannot find on this record that working conditions at UPC were so intolerable as to force Amodei and Furry to resign.

V. UPC IS ENTITLED TO A PRELIMINARY INJUNCTION ENFORCING THE NON-COMPETITION AND NON-SOLICITATION AGREEMENTS IN PART.

Having determined that UPC has a clear right to enforcement of the non-competition and non-solicitation agreements for one-year, the court must still determine whether UPC satisfied the other prongs of the preliminary injunction test. Harsco Corp. v. Klein, 395 Pa.Super. 212, 576 A.2d 1118, 1122 (1990) (affirming order denying preliminary injunction without deciding whether restrictive covenant was enforceable, because plaintiff failed to show likelihood of immediate and irreparable harm); Rollins Protective Services Co. v. Shaffer, 383 Pa.Super. 598, 557 A.2d 413, 602-03 (1989) (same). The court concludes that UPC has shown the remaining elements for a preliminary injunction.

UPC has shown that relief is necessary to prevent imminent, irreparable harm that money damages cannot compensate. The knowing solicitation of a former employer's customers in violation of a restrictive covenant can be an "unwarranted interference with customer relationships that is unascertainable and not capable of being fully compensated by money damages." John G. Bryant Co., 369 A.2d at 1167. Transtech submitted bids to Amtrak and SEPTA. At least one of these bids involved a part manufactured by UPC -- the bag rack. The evidence of these solicitations satisfies the irreparable harm requirement. Id.; Robert Clifton Assocs., 487 A.2d at 952 (finding irreparable harm where employee resigned from his employer, started a new company to compete with employer, and solicited his employer's clients).

Greater injury will occur from refusing the preliminary injunction than from granting it. If the court refuses to enforce the injunction at all, Amodei and Furry will be free to exploit customer relationships -- which are UPC's assets -- to UPC's detriment. If the court grants the preliminary injunction, Morong can fairly re-establish relationships with Amtrak and

SEPTA on UPC's behalf and UPC can continue to supply those companies with railcar interiors. Amodei and Furry can still make a living selling anything but railcar interiors and uncoupling rods to Amtrak and SEPTA, and selling anything at all to other transit companies.

UPC has a clear right to partial enforcement of the non-competition and non-solicitation agreements because those agreements are enforceable to protect customer relationships that Amodei and Furry established on UPC's behalf. A one year preliminary injunction is reasonably suited to abate any harm from defendants' interference with those relationships.

Finally, a preliminary injunction prohibiting Amodei and Furry from engaging in any business involving passenger railcar interior parts or uncoupling rods with Amtrak or SEPTA will restore the parties to the status quo that existed before the defendants solicited such work from those firms.

CONCLUSIONS OF LAW

1. UPC will suffer imminent, irreparable harm not compensable by monetary damages if defendants solicit or perform work for passenger railcar interiors or uncoupling rods at Amtrak or SEPTA.
2. Greater injury will occur from denying the preliminary injunction than from granting it.
3. A preliminary injunction will restore the parties to the status quo.
4. Defendants' solicitation of passenger railcar interior and uncoupling rod business from Amtrak and SEPTA is an actionable wrong for which UPC has a clear right to relief.
5. UPC has shown that a preliminary injunction barring defendants for one year from

August 2, 2000 from engaging in any business with Amtrak and SEPTA involving passenger railcar interiors and uncoupling rods is reasonable to abate any harm to UPC.

Based on all matters of record and in accord with the reasons set forth here, this court will enter a contemporaneous order granting, in part, the petition for preliminary injunction and enjoining defendants from engaging in any business⁸ involving passenger railcar interior parts or uncoupling rods with Amtrak or SEPTA until August 3, 2001.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

Dated: November 9, 2000

⁸ At the hearing, the defendants made a half-hearted argument that their bidding on the bag rack was not a solicitation because Amtrak had asked for the bid. The court reminds defendants, however, that the term “engaging in any business” as used in the court’s contemporaneous order is a broad term that includes but is not limited to asking for business, bidding on jobs, contracting for jobs, manufacturing parts, selling parts, supplying parts and installing parts.