

**United States District Court  
District of Columbia**

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**12 Percent Logistics, Inc.; Small Business in Transportation Coalition**, on behalf of its members;

*Plaintiffs,*

v.

**Unified Carrier Registration Plan Board**, d/b/a Unified Carrier Registration Board; **Indiana Department of Revenue**; and **Adam J. Krupp**, in his official capacity as Commissioner of Indiana Department of Revenue;

*Defendants.*

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**Civil Case No. 1:17-cv-2000-APM**

**Plaintiffs’ Motion for the Court to Find Defendant Unified Carrier Registration Plan Board in Contempt of Court Order (DE 110) and Memorandum in Support**

Despite this Court’s Order, issued on February 4, 2019, enjoining violations of the Sunshine Act insofar as it requires that the pre-meeting “‘public announcement’ and the Federal Register notice to include a description of the ‘subject matter of the meeting,’” Defendant UCR Plan Board blatantly disregarded this pronouncement and failed to provide a proper subject matter description for its March 28, 2019 meeting. (DE 110 at 1.) But to heap insult upon injury, the UCR Plan Board did not notice its most recent subcommittee meetings at all, even though it was also “enjoined from violating the Sunshine Act’s ‘public announcement’ and Federal Register disclosure requirements as to its subcommittee meetings.” (*Id.*)

The UCR Plan Board violated the Sunshine Act and the clear command of this Court when it failed to include a sufficient subject matter description for its March Board Meeting in both its Sunshine Act public announcement posted on its website, and the public notice it subsequently published in the Federal Register. The UCR Plan Board did nothing more than put their proposed

agenda into both its notices, which Plaintiffs have already proven is grossly insufficient to discharge its duty under the Sunshine Act. But the agenda contained the only information Plaintiffs were able to ascertain about Defendant's four subcommittee meetings, scheduled to be held in March and April. No public announcement or Federal Register notice of any kind was provided for these meetings.

For these reasons, and as further explained below, Plaintiffs request that this Court: **1)** find Defendant UCR Plan Board in contempt of Court for violating this Court's February 4, 2019 Order ("Order") (DE 110); **2)** order the UCR Plan Board to cancel all Board and subcommittee meetings until the UCR Plan Board can properly comply with the Sunshine Act requirements set forth in 5 U.S.C. § 552b(e); **3)** require the UCR Plan Board to provide copies of the two forms of notices to be published— **a)** public announcement, and **b)** publication in the Federal Register—to Plaintiffs for review and approval 10 days in advance prior to public distribution of the two notices; **4)** extend this Court's injunction, set to expire on February 4, 2020, for five years to February 4, 2024; and **5)** grant Plaintiff reasonable attorney fees and costs for this Motion and set a briefing schedule for Plaintiff to file a petition for attorney fees.

### **I. Standard of Review**

"[C]ourts have the inherent power to enforce compliance with their lawful orders through civil contempt." *United States v. Latney's Funeral Home, Inc.*, 41 F. Supp. 3d 24, 29 (D.D.C. 2014) (citation omitted). "The civil contempt power 'is essential to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice.'" *Id.* (citation omitted). "A court may make a finding of civil contempt when a party to a lawful court order does not obey it." *AT&T Corp. v. Petersen*, 2001 U.S. Dist. LEXIS 273, \*6, 2001 WL 45780 (citing *NOW v. Operation Rescue*, 747 F. Supp. 772, 774 (D.D.C. 1990), *aff'd*

in part, vacated in part on other grounds, 37 F.3d 646 (D.C. Cir. 1994)(internal citations omitted). “Movants for civil contempt must show by clear and convincing evidence that a court order has been violated.” *NOW*, 747 F. Supp. at 774-75 (citation omitted). The party moving must show by clear and convincing evidence that “(1) there was a clear and unambiguous court order in place; (2) that order required certain conduct by Defendants; and (3) Defendants failed to comply with that order.” *Latney Funeral Home*, 41 F. Supp. 3d at 30. “The violation need not be intentional or willful: ‘the intent of the recalcitrant party is irrelevant.’” *NOW*, 747 F. Supp. at 774-75 (citing *N.L.R.B. v. Blevins Popcorn Co.*, 212 U.S. App. D.C. 289, 659 F.2d 1173, 1184 (D.C. Cir. 1981)).

## **II. Argument**

The UCR Plan Board violated this Court’s Order, and are now in contempt of court. Without question, this Court’s Order was “clear and unambiguous,” and still in effect at the time of the violation. (*See infra.*) Yet, the UCR Plan Board continues to conceal the contents of their meetings without providing proper subject matter description of their meetings in their public announcement and publication in the Federal Register. Further, this Court previously ordered that the UCR Plan Board refrain “from holding subcommittee meetings of the UCR Board without first complying with the notice requirements of the Sunshine Act, 5 U.S.C. § 552b(e),” (DE 68), and did so again in its February 4, 2019 Order, (DE 110), yet just a month later, the UCR Plan Board openly defied the Court and held several subcommittee meetings without any notice at all. And, as the following section demonstrates, the UCR Plan Board failed to comply with this Court’s clear, unambiguous, valid, and enforceable Order. Therefore, this Court should enjoin the UCR Plan Board from holding any board meetings or subcommittee meetings until it can comport its meeting notices to the Sunshine Act’s notice requirements and the Order of this Court.

Plaintiffs met and conferred with Defendant on March 29, 2019, and provided a detailed account of the deficiencies now the subject of the instant motion. Defendant finally responded on April 10, 2019, and informed Plaintiffs that the UCR Plan Board “do[es] not agree with plaintiffs’ contention that the Board has violated any provision of the Court’s order.” (*First Meet and Confer Email*, attached as Ex. 4, at 1, to 3d Declaration of Amanda Narog (May 14, 2019).) Plaintiffs again requested a meet and confer upon learning the UCR Plan Board held subcommittee meetings in violation of the Sunshine Act and the Court’s Order, but Defendant’s counsel declined to meet again, and repeated the Board’s assertion that it has complied with the Court’s Order. (*Second Meet and Confer Email*, attached as Ex. 5, at 1, at 3d Decl. Narog) Because the parties could not resolve this issue without the Court’s assistance, Plaintiffs now move this Court to hold the UCR Plan Board in contempt.

**A. The UCR Plan Board Violated the Subject Matter Requirements of the Sunshine Act in Contempt of this Court’s Order.**

49 U.S.C. § 14504a(d), which created the UCR Plan Board, established a federal, statutory obligation for open meetings of the UCR Plan Board that directs “[m]eetings of the board and any subcommittees or task forces appointed under paragraph (5) shall be subject to the provisions of section 552b of title 5.” 49 U.S.C. § 14504a(d)(4)(D). The UCR Agreement, which also has the force of federal law, reinforces this obligation. (*UCR Agreement*, attached as Ex. 8, at ¶ 15(i)(5).)

5 U.S.C. § 552b—“the Sunshine Act”—requires, in relevant part, that In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting.

5 U.S.C § 552b(e)(1). Then, immediately following this public announcement,

notice of the time, place, and subject matter of a meeting, whether the meeting is open or

closed, any change in one of the proceedings, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

5 U.S.C § 552b(e)(3).

In this Court's February 4, 2019 Opinion, the Court explained that for the UCR Plan Board to comply with the Sunshine Act's notice requirements for both its public announcement and federal register notice; specifically, the notice must included a subject matter description sufficient to meet with the Sunshine Act's "specific nature" standard. (DE 109 at 23.) This Court further enjoined the Board from "violating the Sunshine Act's 'public announcement' and Federal Register disclosure requirements as to its subcommittee meetings." (*Id.* at 28.) The UCR Plan Board has contumaciously disregarded the Order of this Court, and should now be held in contempt. The UCR Plan Board, in the very first meeting it convened after being enjoined from such violations, has indeed violated the injunction by deliberately refusing to comply with the Sunshine Act's subject matter description requirement and clear mandate of this Court.

Because the UCR Plan Board has continuously and repeatedly violated the Sunshine Act, and now this Court's injunction, this Court must extend the injunction beyond one year to ensure proper compliance with the Sunshine Act's notice requirements, and must also effect additional safeguards to guarantee such compliance, i.e., allow Plaintiffs to review the two notices to provide feedback or challenge the notice, if necessary. Plaintiffs have expended significant time and resources to ensure that they and the public are provided the proper notice for the UCR Plan Board's meetings, as is their right under federal law, and are additionally entitled to recover attorneys fees for the instant motion. Plaintiffs, then, request this Court order briefing for a petition of award of fees.

**1. The UCR Plan Board's Public Announcement Failed to Provide The "Specific Nature" of Its Meeting In Violation of the Court Order.**

The UCR Plan Board issued a copy of its public announcement to the Federal Motor Carrier Safety Administration for publication in the Federal Register on March 18, 2019. (*March 28, 2019 Meeting Public Announcement*, attached as Ex. 1 to 3d Decl. Narog.) The public announcement of the Board's Meeting Notice did contain more information than did the woefully inadequate boilerplate language that had been its prior subject matter description praxis: "Matters to be Considered: The Unified Carrier Registration Plan Board of Directors (the Board) will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement and to that end, may consider matters properly before the Board." (Am. Verified Compl. ¶ 55.) Of course, this language was included in that notice, but just following it, the UCR Plan Board provided that "[t]he subject matter of the meeting will include . . ." after which the Board included an agenda for that meeting. And while the Court stated that an agenda "might satisfy the subject-matter notice," (DE 109 at 23), the agenda so provided was exactly as bereft of substance as was the agenda that this Court determined "supplied no information" to properly inform the public in conformity with the Sunshine Act's notice requirements. (DE 109 at 26.)

For example, the UCR Plan Board's public announcement for its March meeting, as promulgated on March 18, 2019 to the public, stated that a critical issue to be considered was "New amendments to UCR Agreement—Avelino Gutierrez. Discussion and possible Board action: Adopt amendments; Update: Revised 2020-2021 UCR Fee Recommendations." (Ex. 1 at 1.) This is nearly identical to the language this Court identified in its Opinion to highlight the Board's subject matter description deficiencies. (DE 109 at 26.) Specifically, the Court said that "even if a reader managed to find her way to the online agenda, it supplied no information as to how the Board intended to amend the UCR Agreement. The Proposed Agenda simply states that the Chair would '[r]eview proposed amendments to the UCR Agreement', offering no clue as to

how the Board contemplated doing so, let alone specifying the nature of the anticipated amendments.” (*Id.*)

Here, the UCR Plan Board has again failed to provide any of the specifics required as contemplated by the Court, i.e., “[t]he docket names or title and numbers, rather than a general statement as to the generic subjects to be discussed.” (DE 109 at 23) (citation omitted). This Court made clear the Sunshine Acts requirements for the subject matter description, yet in the first meeting held by the Board, it failed to follow the obvious instruction of the Court, and had already held a subcommittee meeting without any notice of any kind. It appears that the UCR Plan Board has deemed the mere incorporation of its agenda into the meeting notice as sufficient. While the Board has finally altered its subject matter description from its bereft boilerplate, its agenda practices are substantially the same. Again, as the Court previously noted, the agenda is not specific enough to fully inform the public of what the UCR Plan Board would consider and even vote on during its meeting.

But if the agenda so substituted for the subject matter was insufficient to inform the public about the March meeting, the Proposed Meeting Minutes fail to provide any further clarity. Plaintiffs again have no knowledge about the changes made to the law, and what’s worse, they have no way to learn this information. The draft March Meeting Minutes, subsequently posted on the website, provide only that

Jon Krueger reviewed draft amendments to the UCR Agreement covering previously approved action by the Board related to the UCR refund procedure and new treatment of school buses in UCR calculations. A MOTION was MADE and SECONDED to approve the draft amendments to the UCR Agreement as presented. THE MOTION CARRIED.

(*March 2019 Meeting Minutes*, attached as Ex. 3, at 2 to 3d Decl. Narog.) Plaintiffs, after a prior deficient meeting notice, sent a record request seeking the supporting documents for the November 2018 meeting from the Board. The UCR Plan Board’s Chairman Avelino Gutierrez

responded that the Board “typically only releases to non-Board members the agenda for the upcoming meeting and draft minutes of the last meeting.” (*Gutierrez Record Request Email*, attached as Ex. 6, at 1 to 3d Decl. Narog.) Even after the deficient notices and meeting minutes, the public does not know what changes were made to the UCR Agreement, let alone any other action at the meeting, but the public cannot even glean from the documents themselves what action is taken at the meeting because the UCR Board does not release the documents.

And while the proposed amendments section of the notice is nearly identical to the notice language specifically identified by the Court as being deficient in its Order, it is but one example of many rendering Defendant’s notices wholly insufficient. The additional faulty subject matter descriptions include: “Memo to Board re: Sunshine Act compliance & governance best practices” (voted on and adopted by the Board during the meeting) (Ex. 1 at 1; *Federal Register Publication for March 2019 Meeting*, attached as Ex. 2 at 1 to 3d Decl. Narog); “Update: Revised 2020-2021 UCR Fee Recommendation; Revised 2019 Budget” (voted on and adopted by the Board during the meeting) (Ex. 1 at 2; Ex. 2 at 1); “Recommended Modification to UCR State Carrier Audit Instructions” (voted on and adopted by the Board during the meeting) (Ex. 1 at 2; Ex. 2 at 1); “2019 Registration Period – REMINDER: Enforcement date is April 1” (Chair Gutierrez authorized an extension until May 1, 2019 without a vote of the Board) (Ex. 1 at 2; Ex. 2 at 1); “Education & Training Subcommittee, Discussion & possible Board action: Approve proposed travel budget for subcommittee meetings” (voted on and adopted by the Board during the meeting) (Ex. 1 at 3; Ex. 2 at 1); and “Old/New Matters Future UCR Meetings” (*Id.*). These descriptions are unqualifiedly insubstantial and do not comply with the Sunshine Act’s notice requirements, and thus, this Court should hold the UCR Plan Board in contempt.

**2. The UCR Plan Board’s Publication in the Federal Register Failed to Provide The “Specific Nature” of Its Meeting In Violation of the Court Order.**

The UCR Plan Board provided the exact same notice to FMCSA for publication in the Federal Register as it provided on its website. Because the public announcement was woefully insufficient, so is too the Federal Register notice. (Ex. 2.) As a result, this Court should hold the UCR Plan Board in Contempt.

**B. The UCR Plan Board Violated this Court’s Order by Not Providing A Public Announcement or Publication in the Federal Register for Any of Its Most Recent Subcommittee Meetings At All.**

In the February 4, 2019 Order, this Court enjoined the UCR Plan Board from “violating the Sunshine Act’s ‘public announcement’ and Federal Register disclosure requirements as to its subcommittee meetings.” (DE 110 at 1.) Noticeably absent from the Federal Register notice published for the March 28, 2019 Board Meeting is information that was provided in the proposed agenda under the header “Old/New Matters Future UCR Meetings.” (Ex. 2.) All that appears in the Federal Register notice under this heading is the following text: “A detailed agenda for this meeting will be available no later than 5:00 p.m. Eastern Daylight Time, March 18, 2019 at: <https://ucrplan.org>.” (*Id.*) But in the proposed agenda posted on the UCR Plan Board’s website, there is heading that reads “Old/New Matters” followed by approximately a quarter of a page of empty space. Then, there appears the heading “Future UCR Meetings – Avelino Gutierrez” followed by a list of future Board meetings, and *past* and future Subcommittee meetings. (*March 2019 Proposed Agenda*, attached as Ex. 7, at 3 to 3d Decl. Narog.)

The UCR Plan Board did not provide the public announcement or the required publication in the Federal Register for any of its March 13, April 11, April 18, and April 30 meetings. (Ex. 7 at 4.) The first meeting date provided for the Audit Subcommittee is March 13, 2019—a full two weeks before the March 28, 2019 UCR Plan Board meeting was held. The March 28, 2019 Board

Meeting Minutes, however, do reveal that the Audit Subcommittee presented a proposal to the Board during the meeting:

Mike Hoeme reviewed a proposal from the Audit Subcommittee to modify requirements to the annual carrier audits performed by participating states. Following discussion, the Board agreed to modify the proposal by requiring it to become effective as of July 1, 2019 and for the requirements to come the previous 12 month period. A MOTION was MADE and SECONDED to adopt the recommendations as amended and to amend the UCR Agreement appropriately. THE MOTION CARRIED.

(Ex. 3 at 3.) The information provided in the Meeting Minutes contains no information about the proposal mentioned or adopted by the UCR Plan Board, to say nothing of the fact that the Audit Subcommittee met in what was effectively a closed meeting to draft a proposal that neither the UCR Plan Board's notices or meeting minutes provide, but has now been voted upon and adopted by the Board. The UCR Plan Board cannot be permitted to hide within unnoticed subcommittee meetings exactly the information and decisions that are properly subject to the Sunshine Act's notice requirements, and then be permitted to compound the injury through the deliberate concealment of those details in its own notices and meeting minutes.

Three additional subcommittee meetings were also listed: the Registration Subcommittee meeting on April 11; Finance Subcommittee meeting on April 18; and the Procedures Subcommittee meeting on April 30. (Ex. 7 at 4.) Not a single subcommittee meeting was noticed either on the UCR Plan Board's website or in the Federal Register. Plaintiffs must believe the subcommittee meetings occurred as scheduled in their UCR Plan Board meeting agenda, although no subcommittee agenda or meeting minutes were posted on the website or otherwise provided to the public. Defendant refused to meet and confer with Plaintiffs a second time to discuss Plaintiffs' concerns regarding unnoticed subcommittee meetings.<sup>1</sup> And as this Court has

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<sup>1</sup> Plaintiffs emailed to inquire "whether proper notice was given for the UCR Board Subcommittee meetings held in March and April." (Ex. 5 at 2.) Defendants responded that "the Board does not agree that it has in any way violated the Court's order or that a contempt motion is ap-

done in the past for such Sunshine Act violations, (DE 68), this Court should order all subcommittee meetings to be cancelled until it complies with the subject matter requirement of the Sunshine Act so that the public may be properly informed of the subject of the meetings.

### **Conclusion**

Because the UCR Plan Board is unaccountable to any authority, and endeavors at every opportunity to frustrate the public's ability to observe its meetings or acquire the necessary information to fully participate, it is incumbent upon this Court to exercise its proper authority and enforce its clear, unambiguous, and valid Order. For the reasons detailed herein, the UCR Plan Board violated this Court's February 4, 2019 Order. Plaintiff's request that this Court **1)** Defendant UCR Plan Board in contempt of Court for violating this Court's February 4, 2019 Order ("Order") (DE 110); **2)** order the UCR Plan Board to cancel all Board and subcommittee meetings until the UCR Plan Board can properly comply with the Sunshine Act requirements set forth in 5 U.S.C. § 552b(e); **3)** require the UCR Plan Board to provide copies of the two forms of notices to be published— **a)** public announcement, and **b)** publication in the Federal Register—to Plaintiffs for review and approval 10 days in advance prior to public distribution of the two notices; **4)** extend this Court's injunction, set to expire on February 4, 2020, for five years to February 4, 2024, and **5)** grant Plaintiff reasonable attorney fees and costs for this Motion and set a briefing schedule for Plaintiff to file a petition for attorney fees.

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propriate. We do not believe a further meet and confer is necessary." (*Id.* at 1.)

Date: May 14, 2019

Respectfully Submitted,

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**Certificate of Service**

I certify that on May 14, 2019, a copy of the foregoing was filed electronically using the Court's CM/ECF system, sending notice to the following parties who may access this filing using the Court's system:

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