

United States District Court
District of Columbia

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.

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

Plaintiffs' Emergency Motion for the Court to Hold Defendant Unified Carrier Registration Plan Board in Contempt of Court Order (DE 68) and Memorandum in Support

Plaintiffs, by and through counsel, now files their *Emergency Motion for the Court to Hold Defendant Unified Carrier Registration Plan Board in Contempt of Court Order and Memorandum in Support* (DE 68). Pursuant to this Court's Order, issued on January 29, 2018 (DE 68), the UCR Plan Board was "enjoined to from holding subcommittee meetings of the UCR Plan Board without first complying with the notice requirements of the Sunshine Act, 5 U.S.C. § 552b(e), for all subcommittee meetings held after January 31, 2018." (DE 68.) Additionally, "[t]his injunction shall remain in effect until the D.C. Circuit resolves Plaintiffs' appeal from the court's denial of their second and third requests for injunctive relief." (*Id.*) The Circuit Court resolved the appeal on May 29, 2018 (DE 83), but the Sunshine Act violations occurred prior to

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this date.¹

The UCR Plan Board violated the Sunshine Act when: 1) it failed to include any subject matter description for any subcommittee meeting in the Sunshine Act public promulgation that was posted on its website²; and 2) it did not “immediately following each public announcement,” but “at least one week before the meeting” submit the announcement for publication in the Federal Register. 5 U.S.C. § 552b(e). One week before the first subcommittee meeting was May 27, 2018 since the subcommittee meetings are scheduled to be held on June 3, 2018.

For these reasons, and as further explained below, Plaintiffs request that this Court hold Defendant UCR Plan Board in contempt of Court for violating this Court’s January 29, 2018 injunction order (DE 68) and order the UCR Plan Board to cancel its June 3 and 5 subcommittee meetings until the UCR Plan Board can properly comply with the Sunshine Act requirements set forth in 5 U.S.C. § 552b(e).

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

¹Given the long weekend in observance of Memorial Day, Plaintiffs did not become aware of the UCR Plan Board’s failure to notice its subcommittee meetings in conformance with this Court’s Order (DE 68) until the Board’s submission of its notice for publication to the Federal Register at the close of business on May 29, 2018, nor did Plaintiffs anticipate that the Board would neglect to comply with the Sunshine Act’s notice requirements as ordered. (*See* DE 80). Considering Plaintiffs counsels’ other deadlines and client needs, Plaintiffs do, in fact, submit this motion to the Court at the earliest possible time and opportunity.

²The UCR Plan Board posted the public promulgation on its website at least by May 11, 2018, but likely before that date, as Plaintiffs noted in their *Motion to Lift Stay*. (DE 80) (stating that the subcommittee meetings were scheduled to occur on June 3 and 5 were noted on its website, UCRPlan.org.)

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’s 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.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981).

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.*) Further, the order plainly required the UCR Plan Board to refrain “from holding subcommittee meetings of the UCR Plan Board without first complying with the notice requirements of the Sunshine Act, 5 U.S.C. § 552b(e), for all subcommittee meetings held after January 31, 2018.” (DE 68.) And, as the following sections demonstrate, the UCR Plan Board failed to comply with this Court’s clear, unambiguous, and still valid Order. Therefore, this Court should hold the UCR Plan Board in contempt, enjoin the UCR Plan Board from holding any subcommittee meetings until it can comport its meeting announcements to the Sunshine Act’s notice requirements and the Order of this Court and grant any other appropriate relief.

II. Argument

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

Both the public announcement made by the agency, 5 U.S.C. § 552b(e)(1), and the publication submitted to the Federal Register, 5 U.S.C. § 552b(e)(3), must provide the subject matter of the meeting. The UCR Plan Board's announcement on its website and publication to the Federal Register provide no subject matter for its subcommittee meetings, much less the kind of specific subject matter description for each individual meeting that is required by law and order of this Court. Instead, the UCR Plan, once again, submitted for the subject matter of the meetings the same boilerplate and generalized subject matter statement it provides for every Board meeting: "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." (UCR Plan Board Sunshine Act Notice for Meetings June 3-6, attached at Ex. 1.) This subject matter description was made in a single statement for all 10 subcommittee meetings and 1 board meeting listed in the notice.

Once again, this description provides absolutely no details of the items of business to be considered, discussed, or determined at the subcommittee meetings. But the language of 5 U.S.C. § 552b(e)(2) suggests that the subject matter description be quite specific:

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. *The subject matter of a meeting*, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, *may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly*

announces such change and the vote of each member upon such change at the earliest practicable time.

(emphasis added.) Beyond the legislative intent and the crucial role the Sunshine Act legislation is to play in providing for government accountability to the public, it is obvious, given the strong language used in 5 U.S.C. § 552b(e)(2), that a thorough and particularized subject matter description must be provided for each and every meeting, which can only be altered afterward by a majority vote of the UCR Plan Board.

The import of this language is significant: first, the UCR Plan Board must provide a specific subject matter for the particular meeting, and it cannot deviate from what it has publically stated; second, should the UCR Plan Board wish to alter or add to that subject matter after public promulgation, it must convene a meeting and hold a recorded vote “that the agency business so requires and no earlier announcement was possible;” and after holding such vote and securing a majority of the member’s assent, it must “publicly announce[] such change and the vote of each member upon such change at the earliest practicable time.” 5 U.S.C. § 552b(e)(2). Because there are such specific requirements for an agency to change the subject matter of a meeting, it is illogical that a generalized statement of the function of the UCR Plan Board, which the UCR Plan Board has consistently used since its inception, would suffice, and that the subject matter be the same for every meeting. But rather each notice should contemplate the specific action to taken at each meeting. Moreover, the subject matter must be specific enough to determine if the meeting should be opened or closed both by the public and by the Court for purposes of judicial review.

5 U.S.C. § 552b(d) & (h).

Courts have recognized the necessity of providing notice that fully informs the public and the courts about the meetings. In *Coalition for Legal Services v. Legal Services Corp.*, the court issued a temporary restraining order to enjoin an agency from holding a meeting because it failed

to provide seven days notice to the public. 597 F. Supp. 198, 199 (D.C.C. 1984). Crucial to this decision was the subject matter of the meeting, which was to be several important policy changes, one of which was not the subject of notice and comment rulemaking, rendering the enjoined meeting to be the only “opportunity for the public to render comment on the proposed ‘instruction,’ . . . [and, f]urther, this meeting was to be the public’s last chance to influence the Board’s decision on the other policy proposals.” *Id.* Thus, the D.C. Circuit Court has “recognized that language of the Sunshine Act requiring open meetings is ‘sweeping, unqualified, and mandatory.’” *Common Cause v. NRC*, 674 F.2d 921, n.18 (D.C. Cir. 1982) (citation omitted).

Unlike public employees that are compensated for meeting attendance, the average citizen has to take into consideration multiple factors—employment requirements, familial obligations, and the importance of the subject addressed at the meeting, etc.—when deciding how and when to attend such public meetings. As such, and in conformity with the ideal that the public be *thoroughly* informed, any subject matter description should provide sufficient information such that a reasonable person having an interest in the meetings of a particular entity could make an intelligent choice about whether to attend that particular meeting. But, for the subcommittee meetings at issue, in this instance, the first day of meetings are to be held on this coming Sunday morning, for which individuals must take into account a variety of other obligations to determine whether to attend these meetings, if the public learns of the subcommittee meeting at all given the late submission to the Federal Register. *See infra* II.

The UCR Plan Board provides no subject matter description of the meetings at all—specifically, there is no subject matter description of each subcommittee meetings. Instead, it simply repeated, as has been its common practice since its creation, a generalized boilerplate description of the function of the UCR Plan Board. This action violates 5 U.S.C. § 552b(e), which

this Court ordered the UCR Plan Board to comply with. So the UCR Plan Board is in contempt of Court. And as this Court has done in the past, this Court should order the 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.

B. The UCR Plan Board Violated the Federal Register Requirements of the Sunshine Act in Contempt of this Court's Order.

“In the case of each meeting, the agency shall make public announcement, at least one week before the meeting . . . ,” 5 U.S.C. § 552b(e)(1), and “[i]mmediately following each public announcement required by this subsection . . . shall also be submitted for publication in the Federal Register,” 5 U.S.C. § 552b(e)(3). The UCR Plan Board, then, was required to have submitted its publication in the Federal Register immediately following when it publicly announced its meeting on its website, which was at least by May 11. *See Supra* Fn.2. Nor did the UCR Plan Board submit for publication in the Federal Register “at least one week before the meeting.” 5 U.S.C. § 552b(e)(1). In order to meet the one week requirement, the UCR Plan Board would have had to submit its notice for publication in the Federal Register no later than May 27, 2018. The Federal Register publication, however, was submitted on May 29, 2018, and published May 31, 2018. (*See Ex. 1, at 2.*) This action violates 5 U.S.C. § 552b(e), which this Court ordered the UCR Plan Board to comply with. As such, the UCR Plan Board is in contempt of Court.

Conclusion

Because the UCR Plan Board has repeatedly frustrated the public's ability to observe its meetings or acquire the necessary information for those interested to fully participate, it is incumbent upon this Court to exercise its proper authority and enforce its clear, unambiguous,

and valid Order. For these reasons stated above, the UCR Plan Board violated this Court's Order of January 29, 2018. As a result, Plaintiffs request that this Court 1) hold the UCR Plan Board in contempt of Court; 2) order the UCR Plan Board to cancel its subcommittee meetings scheduled to be held on June 3 and 5; and 3) grant any other necessary and appropriate relief.

Date: May 31, 2018

Respectfully Submitted,

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* Pro Hac Vice granted October 10, 2017

Certificate of Service

I certify that on May 31, 2018, 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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