

United States District Court
District of Columbia

12 Percent Logistics, Inc.
4520 NE 18th Avenue, Suite 300
Fort Lauderdale, FL 33334;

Small Business in Transportation Coalition, on
behalf of its members,
1775 Eye Street, NW, Suite 1150
Washington, D.C. 20006;

Plaintiffs,

v.

Unified Carrier Registration Plan Board, d/b/a
Unified Carrier Registration Board,
c/o Avelino Gutierrez
Chairman, UCR Plan Board
Staff Counsel/Legal Division
1120 Paseo De Peralta, Room 536
Santa Fe, NM 87501

c/o Attorney General Jeff Sessions
Office of the Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Indiana Department of Revenue;
c/o Attorney General Curtis Hill
Office of the Indiana Attorney General
Indiana Government Center South
302 W. Washington St., 5th Floor
Indianapolis, IN 46204

and **Adam J. Krupp**, in his official capacity as
Commissioner of Indiana Department of Revenue
Office of Commissioner
Indiana Department of Revenue
M.S. 101
100 N. Senate Ave., Room N248
Indianapolis, IN 46204;

Defendants.

Civil Case No. _____

Verified Complaint for Declaratory and Injunctive Relief

Plaintiffs complain as follows:

Introduction

1. The Unified Carrier Registration (“UCR”) program is a Congressionally-created, state-administered registration program for motor carriers, brokers and freight forwarders established in 2005. *See* Unified Carrier Registration Act of 2005, 49 U.S.C. § 14504a. States join the UCR program by entering into the UCR Agreement. Under the UCR Agreement, motor carriers, brokers and freight forwarders must register and pay UCR fees, beginning October 1st through December 31st, for the upcoming year. The Unified Carrier Registration Plan Board (“UCR Plan Board”), however, on September 14, 2017, voted to delay the opening of the UCR Renewal Period to November 1, 2017, without any public notice and legal justification. The Indiana Department of Revenue (“INDOR”), which, under contract with the UCR Plan Board, administers the UCR program for most states, has likewise delayed the opening of the UCR Renewal Period until November 1, 2017, contrary to the requirements of the UCR Agreement.

2. This case involves violations of the Sunshine Act, 5 U.S.C. § 552b (“Sunshine Act”), the Administrative Procedure Act, 5 U.S.C. § 706 (“APA”) and the UCR authorizing statute, 49 U.S.C. § 14504a, committed by UCR Plan Board, and a violation of UCR Agreement by the INDOR, in delaying the opening of the UCR Renewal Period until November 1, 2017.

Jurisdiction and Venue

3. This Court has subject matter jurisdiction under 5 U.S.C. § 552b(h), 5 U.S.C. § 702, and 28 U.S.C. § 1331.

4. Venue is proper in this Court under 5 U.S.C. § 552b(h), 5 U.S.C. § 703, and 28 U.S.C. §

1391.

Parties

5. Plaintiff 12 Percent Logistics, Inc. (“12PL, Inc.”) is a broker company located in Ft. Lauderdale, Florida, that has registered and paid the UCR fees since 2008. Plaintiff 12PL, Inc. intends to register and to pay the 2018 UCR-related fees with the Defendant INDOR on October 2, 2017, or as soon thereafter as the INDOR begins accepting UCR registrations and fees for 2018.

6. Plaintiff Small Business in Transportation Coalition (“SBTC”) is a trade organization located in Washington, D.C. SBTC has over 8,000 members and represents, promotes, and protects the interests of small businesses in the transportation industry. It has members that are Carriers that have registered and paid UCR-related fees beginning in 2008. Many SBTC members intend to register and to pay UCR-related fees for 2018 with the INDOR beginning on October 1, 2017. SBTC asserts the interests of its members, seeking declaratory and injunctive relief on their behalf.

7. Defendant UCR Plan Board is an agency of the United States government and is established to administer the UCR Plan. 49 U.S.C. § 14504a(d).

8. Defendant INDOR is an Indiana government agency which, under contract with the UCR Plan Board, has been registering Carriers and collecting the UCR-related fees from UCR registrants since 2008. (*See 2008 Memorandum of Understanding (“MOU”)*, attached as Ex. 1, at A3-A6.). Under the agreement with the UCR Plan Board, INDOR operates a comprehensive website for UCR information, UCR registration, and payment of UCR-related fees. *Id.* Available at <https://www.ucr.in.gov/ucrHome.html>.

9. Adam J. Krupp is the Commissioner of Defendant INDOR and is its chief administrative officer. The Commissioner is appointed by the Indiana governor. Ind. Code § 6-8.1-2-2. Defendant Krupp is sued in his official capacity.

UCR Background

10. The UCR program is a Congressionally-created, state-administered registration program for motor carriers, brokers and freight forwarders. *See* 49 U.S.C. § 14504a.

11. Each year, motor carriers, brokers and freight forwarders must register and pay UCR-related fees, as authorized by the UCR authorizing statute. *Id.* at § 14504a(f)(4). The UCR authorizing statute and the UCR Agreement require any UCR fees to be set by the Secretary of Transportation, *id.* at § 14504a(d)(7)(B), based on recommendations of the UCR Board. *Id.* at §§ 14504a(d)(1)(A), 14504a(d)(7)(A). (*UCR Agreement*, attached as Ex. 2, at 14.)

12. When setting the UCR fees:

The Secretary shall set the initial annual fees for the next agreement year and any subsequent adjustment of those fees-

- (i) within 90 days after receiving the board's recommendation under subparagraph (A); and
- (ii) after notice and opportunity for public comment

49 U.S.C. at §14504a(d)(7)(B).

13. The Secretary of Transportation set the UCR fee in 2010, 49 C.F.R. § 367.30, which is applicable for the 2018 registration year and will be charged during Renewal Period beginning on October 1, 2017.

14. The period between October 1 through December 31 ("Renewal Period") is the renewal period for registration and payment of UCR fees for 2018. The Renewal Period is set by the UCR Agreement. (*UCR Agreement*, Ex. 2, at 3.) October 1 is the Opening Date of UCR Renewal Period.

15. INDOR has entered into three Memoranda of Understanding with the UCR Plan Board, (2008 MOU, attached as Ex. 1; 2013 MOU, attached as Ex. 3; 2016 MOU, attached as Ex. 4), and has registered and collected UCR-related fees from motor carriers, brokers and freight forwarders from many states since 2008.

Legal Context

16. The UCR Plan Board is authorized to change the terms of the UCR Agreement, including the October 1st opening date for the Renewal Period. (*UCR Agreement*, Ex. 2, at 18.)

17. In order for the UCR Plan Board to change the terms of the UCR Agreement, the UCR Plan Board must utilize the following procedures:

Any recommendation for changes to the UCR Agreement shall be made in writing to the chairman of the Board. Upon receipt of the request, copies may be provided to each Board member and may be placed on the next Board agenda. Changes to the UCR Agreement can only be made with a majority vote from the Board.

(*UCR Agreement*, Ex. 2, at 18.)

18. Both the UCR authorizing statute and the UCR Agreement require meetings of the UCR Plan Board to be open to the public and make them subject to the provisions of The Sunshine Act, 5 U.S.C. § 552b. 49 U.S.C. § 14504a(d)(4)(D). (*UCR Agreement*, Ex. 2, at 13.)

19. The Sunshine Act defines a meeting as “the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business.” 5 U.S.C. at § 552b(a)(2).

20. For 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. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

Id. at § 552b(e)(1).

21. Additionally, immediately following each 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 preceding, 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.

Id. at § 552b(e)(3).

22. Any person may bring an action against any agency for failure to comply with the public notice requirements of Section 552b and the court shall grant such declaratory judgement, injunctive relief, or other relief as may be appropriate. *Id.* at § 552b(h).

23. The Administrative Procedures Act (“APA”) provides

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(D) without observance of procedure required by law;

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706.

24. Under the APA, “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

Facts

25. On March 14, 2017, the UCR Plan Board, at its monthly meeting, voted to recommend to the Secretary of Transportation a revised 2018 and 2019 fee structure and sent that recommendation to the Secretary. (*See* 2017-03 UCR Board Meeting Minutes, attached as Ex. 5, at 3.) In 2010, the UCR fee had been established, 49 C.F.R. § 367.30, which would be applicable to 2018 and 2019, unless changed by the Secretary.

26. The Secretary of Transportation had until June 12, 2017, to revise the annual fees for 2018 and 2019 based on the UCR Plan Board's recommendation. *See* 49 U.S.C. §14504a(d)(7)(B).

27. On September 14, 2017, the UCR Plan Board met and voted to change the Opening Date of the Renewal Period, which is October 1 in the UCR Agreement, from October 1 to November 1. (*See* article *UCR filings? Don't do it yet*, attached as Ex. 6.)

28. There was no public notice of the September 14, 2017, meeting of the UCR Plan Board and no notice of the meeting was published in the Federal Register.

29. The effect of changing the Opening Date of the Renewal Period from October 1 to November 1 is to delay the opening of the Renewal Period by 30 days and to also shorten the Renewal Period from 90 to 60 days.

30. At the September 14, 2017, meeting, the UCR Plan Board justified the change in the Opening Date for the Renewal Period, because "FMCSA has not yet decided on the fee structure or taken steps required to finalize the new fee chart." (*See* article *UCR filings? Don't do it yet*, attached as Ex. 6.) Because of this delay, the UCR Plan Board voted to extend the October 1st Opening Date another 30 days. (*Id.*)

31. However, the UCR fees applicable to 2018 had already been set in 2010, 49 C.F.R. §

367.30, and, since the FMCSA, acting for the Secretary, had not acted to change the 2018 UCR fees within 90 days of the UCR Plan Board's recommendation, the UCR fees for 2018 could not now be changed.

32. On September 15, the INDOR UCR website publicly announced that the UCR registration and fee payment period for 2018 opened on October 1, 2017. (INDOR UCR website page from September 15, 2017, attached as Ex. 7.)

33. However, on September 17, the INDOR UCR website was changed to announce that the UCR registration and fee payment period for 2018 had been delayed to begin on November 1. (INDOR UCR website page from September 17, 2017, attached as Ex. 8.)

34. The delay in the Opening Date for the Renewal Period for 2018 is to the detriment of motor carriers, brokers and freight forwarders because they have fewer days to comply with UCR.

35. 12PL, Inc. has registered and paid its UCR fees since 2008 and intends to register and pay its UCR fees with the INDOR on October 2nd this year.

36. Plaintiffs will suffer irreparable harm by the actions of Defendants, are suffering a legal wrong because of the actions of the Defendants, are adversely affected or aggrieved by the actions of the Defendants and have no adequate remedy at law.

Count I

UCR Plan Board Failed to Notice Meeting Under Sunshine Act and Federal Law.

37. Plaintiffs allege and incorporate by reference the assertions contained in paragraphs 1 through 36.

38. The UCR authorizing statute and the UCR Agreement require the UCR Plan Board's meetings to follow "the provisions of section 552b of title 5." 49 U.S.C. § U.S.C. §

14504a(d)(4)(D). (*UCR Agreement*, attached as Ex. 2, at 13.).

39. Under the Sunshine Act, 5 U.S.C. § 552b, at least one week before an agency meeting, the agency shall publicly notice or announce the meeting by stating 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. *Id.* at § 552b(e)(1). Immediately following the public announcement, the agency meeting shall also be submitted for publication in the Federal Register. 5 U.S.C. § 552b(e)(3).

40. The UCR Plan Board held a meeting on September 14, 2017, with no public notice and no publication of the notice in the Federal Register. (*See UCR filings? Don't do it yet*, attached as Ex. 6.)

41. On September 14, 2017, meeting of the UCR Plan Board, the Board voted to change the Opening Date for Renewal Period from October 1, as required by the UCR Agreement, to November 1.

42. A federal court “otherwise authorized by law to review agency action” may set aside, enjoin, or invalidate agency action that intentionally or repeatedly violates the Sunshine Act, or that prejudices a party and is of a serious nature. *Pan American World Airways, Inc. v. Civil Aeronautics Bd.*, 684 F.2d 31, 36 (D.D.C. 1982) (quoting H.R. Rep. No. 1441, 94th Cong., 2d Sess. 23 (1976)); S. Rep. No. 94-354, at 34 (1975).

43. The UCR Plan Board violated the Sunshine Act and the UCR authorizing statute by failing to provide public notice of the September 14, 2017, meeting and by failing to publish notice of the meeting in the Federal Register.

44. This action of the UCR Plan Board was in a manner that was intentional, prejudices Plaintiffs, and is of a serious nature.

45. As a result, any action taken during the September 14, 2017, meeting of the UCR Plan Board, including delaying the Opening Date of the Renewal Period, is invalid and set aside.

Count II

UCR Plan Board Failure to Notice Meeting Violates the APA Because It Failed to Observe Procedures Required by Law.

46. Plaintiffs allege and incorporate by reference the assertions contained in paragraphs 1 through 36.

47. The Administrative Procedure Act, 5 U.S.C. § 706(2)(D), requires a court to set aside agency action found to be without observance of procedures required by law. *Nat'l Ass'n of Broads. v. Copyright Royalty Tribunal*, 218 U.S. App. D.C. 348, 675 F.2d 367, 370 (1982).

48. Pursuant to the UCR authorizing statute and the UCR Agreement, the UCR Plan Board must follow 5 U.S.C. §552b, the Sunshine Act procedures. 49 U.S.C. § 14504a(d)(4)(D). (*UCR Agreement*, Ex. 2, at 13.)

49. Under the Sunshine Act, at least one week before an agency meeting, the agency shall publicly notice or announce the meeting by stating 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). Immediately following the public announcement, the agency meeting shall also be submitted for publication in the Federal Register. *Id.* at § 552b(e)(3).

50. Since the UCR Plan Board failed to provide public notice of the September 14, 2017, meeting and failed to publish notice of the meeting in the Federal Register, it did not observe the procedure required by law, violating the APA.

51. Thus, any action taken by the UCR Plan Board at the September 14, 2017, meeting, including delaying the Opening Date of the Renewal Period for 2018, is invalid and set aside.

Count III

UCR Plan Board's Actions Violate the APA as Arbitrary or Capricious.

52. Plaintiffs allege and incorporate by reference the assertions contained in paragraphs 1 through 36.

53. Furthermore, the APA provides that any agency action shall be held unlawful and set aside if the action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

54. An agency action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867 (1983). The reviewing court must assure itself that the agency decision was “based on consideration of the relevant factors.” *Ethyl Corp. v. EPA*, 541 F.2d 1, 34-35 (D.C. Cir. 1976)(citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971)). Moreover, it must engage in a “substantial inquiry” into the facts, one that is “searching and careful.” *Id.*

55. Here, the UCR Plan Board voted to change the Opening Date of the Renewal Period to November 1, instead of October 1 as provided in the UCR Agreement, allowing only 60 days for all motor carriers, brokers and freight forwarders to register and pay fees instead of the customary 90 days.

56. The justification for this agency action was because “FMCSA has not yet decided on the fee structure or taken steps required to finalize the new fee chart.” (*See article UCR filings?*)

Don't do it yet, attached as Ex. 6.)

57. The UCR fee for 2018, however, had already been established in 2010 and the UCR Plan Board voted and recommended changes in the fee structure for 2018 and 2019 on March 14, 2017. (*See* 2017-03 UCR Board Meeting Minutes, attached as Ex. 5, at 3.)

58. According to UCR authorizing statute, “[t]he Secretary shall set . . . any subsequent adjustment of those fees- (i) within 90 days after receiving the board’s recommendation ,” 49 U.S.C. §14504a(d)(7)(B).

59. However, the Secretary did not change the UCR fee for 2018 and 2019 within 90 days of the UCR Plan Board’s recommendation and that 90 day time period has elapsed.

60. While the Federal Motor Carrier Safety Administration published a Notice of Proposed Rulemaking on September 21, 2017, to change the UCR fee for 2018 and 2019 under authority delegated from the Secretary of Transportation, 82 Fed. Reg. 44143 (September 21, 2017), that rulemaking cannot become final within 90 days of the UCR Plan Board’s March 14, 2017, recommendation as required by the UCR authorizing statute, 49 U.S.C. §14504a(d)(7)(B), and is thus invalid under the Administrative Procedures Act, 5 U.S.C. § 706(2)(D), for failure to follow required procedures.

61. The UCR Plan Board’s justification for its action, therefore, is based on a possible future unlawful action of the Secretary and is thus arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

62. Furthermore, the UCR Plan Board’s action to change the Opening Date of the Renewal Period is a detriment to the motor carriers since it will shorten the number of days to comply with the UCR and create industry confusion and uncertainty. In addition, some carriers will make a good faith effort to comply in October but will be unlawfully block from complying with the

UCR. As a result, these carriers will be vulnerable to penalties for failure to comply with the UCR.

63. As a result the UCR Plan Board's action to delay the Opening Date for the 2018 UCR Renewal Period is invalid and set aside.

Count IV
INDOR Unlawfully Changed the UCR Opening Date for 2018 Renewals.

64. Plaintiffs allege and incorporate by reference the assertions contained in paragraphs 1 through 36.

65. The UCR Agreement states that the Renewal Period for UCR registration and payment of the UCR fees is October 1 through December 31 for the forthcoming year. (*UCR Agreement*, Ex. 2, at 3.)

66. Under the UCR Agreement, INDOR is required to open the Renewal Period for 2018 on October 1.

67. On September 15, the INDOR UCR website publicly announced that the UCR registration and fee payment period for 2018 opened on October 1, 2017.

68. However, on September 17, the INDOR UCR website was changed to announce that the beginning of the UCR registration and UCR fee payment period for 2018 had been delayed to November 1. (INDOR UCR website page from September 17, 2017, Ex. 8.)

69. As a result, the INDOR will not accept UCR registration and payment of UCR fees until that date. (*Id.*)

70. The INDOR's refusal to open the UCR Registration Period on October 1, 2017, is a violation of the UCR Agreement, since there has been no lawful action of the UCR Plan Board to change the Opening Date of October 1 for the Renewal Period.

71. INDOR will unlawfully fail to accept UCR registrations and fees beginning on October 1.

Prayer for Relief

Wherefore, Plaintiffs respectfully pray this Court to:

1. Declare that the UCR Plan Board violated the Sunshine Act by failing to give lawful public notice of its meeting on September 14, 2017;
2. Declare that any actions of the UCR Plan Board at its meeting on September 14, 2017, are invalid and set aside, including the change in the Opening Date for the 2018 UCR Renewal Period from October 1 to November 1, for violating the Sunshine Act and the Administrative Procedure Act by failing to give lawful public notice of its meeting;
3. Declare that the change in the Opening Date for the 2018 UCR Renewal Period from October 1 to November 1 by the UCR Plan Board was invalid and set aside for violating the Administrative Procedure Act as arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;
4. Enjoin the UCR Plan Board from further violating the Sunshine Act by failing to give lawfully required public notice of its meetings;
5. Enjoin INDOR from refusing to accept UCR registrations and payment of UCR fees for 2018 beginning on October 1, 2017;
6. Award all costs and expenses of bringing this action, including attorneys' fees and costs; and
7. Grant any other relief this court deems appropriate.

Respectfully submitted,

/s/James Bopp, Jr.

James Bopp, Jr., DC #CO0041

jboppjr@aol.com

THE BOPP LAW FIRM, PC

1 South Sixth Street

Terre Haute, IN 47807-3510

812/232-2434 telephone

812/235-3685 facsimile

Verification

I, Uliana Bogash, declare as follows:

1. I am a Plaintiff in the present case, a citizen of the United States of America, and a resident of the State of Florida. I am over the age of 18. I am the sole owner and President of 12 Percent Logistics, Inc.
2. I have personal knowledge of 12 Percent Logistics, Inc., their activities, and their intentions, including those set out in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*, and if called to testify I would competently testify as to the matters stated herein.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Complaint* concerning 12 Percent Logistics, Inc., their activities, and their intentions are true and correct. 28 U.S.C. 1746.

Executed on 26 Sept, 2017



Uliana Bogash

Verified Complaint

Verification

I, James P. Lamb, declare as follows:

1. I am a Plaintiff in the present case, a citizen of the United States of America, and a resident of the State of Florida. I am over the age of 18. I am the Founder and President of Small Business in Transportation Coalition.
2. I have person knowledge of Small Business in Transportation Coalition, their activities, and their intentions, including those set out in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*, and if called to testify I would competently testify as to the matters stated herein.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Complaint* concerning Small Business in Transportation Coalition, their activities, and their intentions are true and correct. 28 U.S.C. 1746.

Executed on 26 Sept., 2017



James P. Lamb

Verified Complaint

Certificate of Service

I hereby certify that copies of the foregoing served, by email on September 27, 2017 and by certified mail on September 28, 2017, upon:

Unified Carrier Registration Plan Board

c/o Avelino Gutierrez
Chairman, UCR Plan Board
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/s/ James Bopp, Jr.
James Bopp, Jr.