

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

**FILED**  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.  
★ NOV 14 2011 ★

----- X  
ERNEST STEVE BARRY and MICHAEL  
BURKHART,

Plaintiffs,

-versus-

THE CITY OF NEW YORK, THE NEW YORK  
CITY TRANSIT AUTHORITY, and STEVEN  
DUTES, a member of the New York City Police  
Department,

Defendants.  
----- X

11 Civ. BROOKLYN OFFICE

**CV 11 - 5533**

COMPLAINT  
JURY DEMANDED

COGAN, J.

PRELIMINARY STATEMENT

1. This is a civil rights action to vindicate the rights of the plaintiffs and of the public to take photographs in the New York City subway system without fear of arrest and to be in public without identification documents. Plaintiffs Steve Barry and Michael Burkhardt are long-time railroad enthusiasts and photographers who in August 2010 traveled to New York City to photograph a vintage train sponsored by the New York City Transit Authority. While standing on an outdoor subway platform photographing other subway trains before the arrival of the vintage train, the two were detained by a New York City police officer and charged with unlawful photography. In addition, Mr. Barry, who had identified himself to the officer, was handcuffed and charged with failing to produce identification documents in violation of a Transit Authority rule.

2. All charges against Mr. Barry and Mr. Burkhart were dismissed. Though they used to come to New York City regularly to photograph subway trains before the August 2010 incident, neither has returned to photograph since then because they fear further arrest.
3. The defendants' actions violated the United States Constitution and New York law, and the Transit Authority's regulation is unconstitutional to the extent it requires persons using the New York City transit system to carry identification. The plaintiffs seek declaratory relief, compensatory damages, and other appropriate relief.

#### FACTS

4. Plaintiff Ernest Steve Barry, age fifty-four, is the editor of *Railfan & Railroad Magazine*, a print magazine published monthly for train enthusiasts. He also manages the website <http://www.railroadphotographer.com/>. Mr. Barry is a United States citizen.
5. Plaintiff Michael Burkhart, age thirty-six, works in marketing in the Philadelphia area. He is a United States citizen.
6. Both Mr. Barry and Mr. Burkhart have been fascinated by trains, including subways, for as long as they can remember. One of Mr. Burkhart's train photographs was first published when he was only thirteen years old.
7. The New York Transit Museum scheduled a run of one of its vintage subway trains (the "Nostalgia Train") for August 21, 2010. Nostalgia Train excursions are popular among photographers.
8. Mr. Barry and Mr. Burkhart, who are friends and members of the National Railway Historical Society (with Mr. Burkhart serving as the president of the Wilmington, Delaware chapter), met in New York City on August 21, 2010 to photograph the Nostalgia Train.
9. Neither Mr. Barry nor Mr. Burkhart carried or used any lighting equipment or tripods.

10. At approximately 3:30 p.m., Mr. Barry and Mr. Burkhart were on the aboveground platform of the Broad Channel subway stop in Brooklyn, waiting for the Nostalgia Train to arrive. They were taking pictures of commonplace subway trains and looking forward to photographing the Nostalgia Train.
11. Defendant Steven Dutes, a uniformed New York City police officer, approached Mr. Barry and Mr. Burkhart and told them that they were not allowed to take photographs in the subway system.
12. Mr. Barry asked Officer Dutes to cite the statute or ordinance they were violating and asked to speak to Dutes's supervisor.
13. Officer Dutes ignored Mr. Barry's request and demanded identification from both men.
14. Mr. Burkhart gave Officer Dutes his driver's license.
15. Mr. Barry stated his full name and address, but did not produce any identification documents.
16. Officer Dutes handcuffed Mr. Barry and searched his pockets.
17. Officer Dutes did not handcuff Mr. Burkhart.
18. Officer Dutes, with at least three other uniformed New York City police officers, detained Mr. Barry and Mr. Burkhart in a waiting area in the subway station for approximately half an hour. Mr. Barry remained handcuffed during this time.
19. Mr. Barry was handcuffed solely for not producing identification documents to the police.
20. Officer Dutes issued a summons to Mr. Barry for violating Transit Rule 1050.6(d)(3), stating: "At T/P/O P.O did ask Deft for ID. Deft did refused [sic] to provide at the time of request." This notice is numbered T 103416730.

21. The NYCTA's Transit Rule 1050.6(d)(3) states: "All persons on or in any facility or conveyance of the authority shall . . . provide accurate, complete and true information or documents requested by New York City police officers or authority personnel acting within the scope of their employment and otherwise in accordance with law."
22. Officer Dutes did not issue any identification-related summons to Mr. Burkhart.
23. Officer Dutes also issued summonses to Mr. Barry and Mr. Burkhart for taking "unauthorized photos" in violation of Transit Rule 1050.9(c). These notices are numbered T 103416720 and T 103416711 for Mr. Barry and Mr. Burkhart, respectively.
24. Transit Rule 1050.9(c) provides that "[p]hotography... in any [NYCTA] facility or conveyance is permitted."
25. After issuing the three summonses, Officer Dutes released Mr. Barry from the handcuffs and allowed him and Mr. Burkhart to leave the waiting area.
26. Mr. Barry and Mr. Burkhart both were humiliated and distressed by their arrests.
27. After his arrest, Mr. Barry had visible marks on his wrists from the handcuffs and had strained a muscle in his arm. The pain from this muscle strain persisted for approximately two weeks.
28. On October 1, 2010, Mr. Barry and Mr. Burkhart traveled to New York City to appear before the New York City's Transit Adjudication Bureau (TAB) to contest the notices of violation issued by Officer Dutes.
29. At the TAB hearings, all charges against Mr. Barry and Mr. Burkhart were dismissed.
30. Both Mr. Barry and Mr. Burkhart fear future arrest, detention, and harassment for taking pictures of New York subway trains. Prior to being arrested, Mr. Barry would visit to take pictures of the New York City subway trains approximately twice a year, and Mr. Burkhart



would do so approximately once every two years. As a result of being arrested on August 21, 2010, neither has returned to New York to take photographs. Mr. Barry is also apprehensive about encountering the police when taking pictures of trains in other urban areas, an activity he enjoyed more, and more often, before his arrest.

31. Mr. Barry fears being arrested again for not carrying identification documents. Although prior to his arrest he preferred to leave his driver's license in his car before entering a city, his fear of the police is now greater than his fear of being robbed, and he carries his driver's license with him everywhere.
32. Other than on August 21, 2010, neither plaintiff has ever been arrested.
33. Each plaintiff filed a timely notice of claim.
34. At all times relevant to this complaint, Officer Dutes was acting under color of law.

#### CAUSES OF ACTION

35. Defendant Dutes violated the plaintiffs' rights under the First Amendment of the United States Constitution and under Article I, § 8 of the New York State Constitution.
36. Defendant Dutes violated the plaintiffs' rights under the Fourth Amendment of the United States Constitution and under Article I, § 12 of the New York State Constitution.
37. Defendant Dutes violated Steve Barry's rights under the Fourteenth Amendment of the United States Constitution and under Article I, § 6 of the New York State Constitution.
38. Defendants Dutes and the City of New York violated the plaintiffs' rights under the common law of the State of New York to be free from false arrest, assault, and battery.
39. Defendant NYCTA's regulation 21 NYCRR § 1050.6(d)(3) violates the Fourteenth Amendment of the United States Constitution and Article I, § 6 of the New York State

Constitution because it is vague and to the extent it requires individuals using the New York City transit system to carry identification documents.

40. The plaintiffs bring their federal claims under 42 U.S.C. § 1983.

#### JURY DEMAND

41. The plaintiffs demand a jury.

#### JURISDICTION, VENUE, AND DEFENDANTS

42. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3)-(4) over the plaintiffs' federal claims.
43. This Court has supplemental jurisdiction under 28 U.S.C. § 1367(a) over the plaintiffs' state law claims.
44. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) in that all of the events giving rise to the claims occurred in the Eastern District of New York.
45. Defendant Steven Dutes is a New York City police officer.
46. Defendant City of New York is Officer Dutes's employer and is responsible for his tortious conduct while acting within the scope of his employment.
47. Defendant New York City Transit Authority is a public benefit corporation established by the laws of the State of New York. The NYCTA is responsible for writing and promulgating 21 NYCRR § 1050.

WHEREFORE, the plaintiffs respectfully request that the Court:

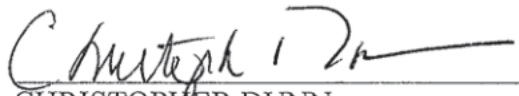
- (1) Assume jurisdiction over this matter;
- (2) Declare that the defendants violated the plaintiffs' rights under federal and state law and award compensatory damages for those violations;

(3) Issue a declaratory judgment that 21 NYCRR § 1050.6(d)(3) is unconstitutional to extent it requires persons using the New York City transit system to carry identification documents;

(4) Award appropriate attorneys' fees and costs; and

(5) Grant any other relief the Court deems appropriate.

Respectfully submitted,



CHRISTOPHER DUNN

ARTHUR EISENBERG

New York Civil Liberties Union Foundation

125 Broad Street, 19<sup>th</sup> Floor

New York, NY 10004

(212) 607-3300

Counsel for Plaintiffs

Dated: November 14, 2011

On the Complaint:

ANDREW AVORN\*

Law Student

New York University School of Law

Civil Rights Clinic

TIMOTHY-TAYLOR HURLEY\*

Law Student

New York University School of Law

Civil Rights Clinic

ELEANOR SPOTTSWOOD\*

Law Student

New York University School of Law

Civil Rights Clinic

\* The plaintiffs and the New York Civil Liberties Union Foundation will be seeking leave of court to permit these students to serve as attorneys in this matter pursuant to the Eastern District's Plan for Student Practice in Civil Actions