

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEW YORK CIVIL LIBERTIES UNION,

Plaintiff,

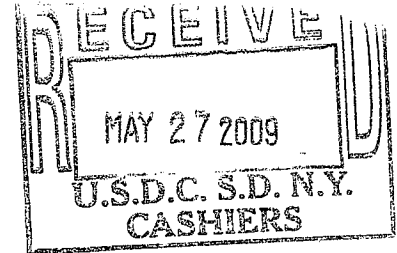
-versus-

NEW YORK CITY TRANSIT AUTHORITY
(NYCTA); H. DALE HEMMERDINGER,
Chairman Ex Officio of the NYCTA; and ELLIOT
G. SANDER, Executive Director Ex Officio of the
NYCTA,

Defendants.
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09 Civ. 3595 (RJS)

FIRST AMENDED COMPLAINT



PRELIMINARY STATEMENT

1. This civil rights action challenges the secrecy that surrounds the court that handles the hundreds of thousands of summonses issued by New York City Police Department officers to people using the New York City transit system. The court – the Transit Adjudication Bureau (“TAB”), which is operated by the New York City Transit Authority – holds approximately 20,000 hearings a year in which subway and bus riders face charges leveled by NYPD officers. Those hearings, however, are effectively closed to the public, as the TAB has a policy of barring access to any hearing unless the person charged with the offense consents to an outsider observing the hearing. As a result of this policy and the fact that TAB case records are exempt from the state Freedom of Information Law, the TAB essentially operates as a secret court, thereby shielding from public scrutiny the TAB’s handling of NYPD summonses and the NYPD practices behind those summonses.

2. As an organization that long has advocated for open governmental and judicial proceedings, that is deeply involved in advocacy about NYPD policies and practices, and whose lawyers represent clients issued summons returnable to TAB, the plaintiff New York Civil Liberties Union (“NYCLU”) has a significant interest in being able to observe TAB hearings. The NYCLU repeatedly has attempted to observe recent TAB hearings, only to be turned away by security officers, hearing officers, and other TAB personnel.
3. The TAB has failed to publicize information about how it conducts its hearings, leaving those issued summonses in the dark about those hearings. This failure, combined with figures indicating that the TAB enters judgments against those who challenge their summonses about 70 percent of the time, raises serious concerns about the fairness of these proceedings. And, these concerns are exacerbated by figures indicating that black and Latino New Yorkers receive a disproportionate share of NYPD transit summonses.
4. The TAB’s policy of closing its hearings violates the First and Fourteenth Amendments of the United States Constitution, federal common law, Article I Section 8 of the New York State Constitution, and the common law and public policy of the State of New York. Because the TAB has rejected the NYCLU’s request that it open its hearings to the public, the NYCLU now seeks declaratory and injunctive relief against the TAB policy.

PARTIES

5. Plaintiff NEW YORK CIVIL LIBERTIES UNION (“NYCLU”) is a not-for-profit corporation that defends civil rights and civil liberties in New York.
6. Defendant NEW YORK CITY TRANSIT AUTHORITY (“NYCTA”), a municipal board, is a public benefit corporation established by the laws of the State of New York. The NYCTA, which has an office in Manhattan, is responsible for the operation of the Transit Adjudication Bureau (“TAB”).
7. Defendant H. DALE HEMMERDINGER is Chairman Ex Officio of the NYCTA. Mr. Hemmerdinger, whose office is in Manhattan, is named in his official capacity.
8. Defendant ELLIOT G. SANDER is Executive Director Ex Officio of the NYCTA. Mr. Sander, whose office is in Manhattan, is named in his official capacity.

FACTS

Enforcement of Rules of Conduct in New York City’s Mass Transit System

9. New York City’s mass transit system is by far the largest in the United States. It includes 468 subway stations, 660 miles of subway track, 243 bus routes, and 12,499 bus stops. Over seven million people use the transit system every weekday. In 2008, over 2.3 billion passengers – a record ridership – used the transit system.
10. Conduct in the New York City transit system is governed both by criminal law and by Rules of Conduct – many of which mirror criminal law provisions – promulgated by the New York City Transit Authority. The NYCTA Rules of Conduct prohibit, for instance, fare evasion, public intoxication, gambling, unreasonable noise, and obstructing pedestrian traffic.

11. Police officers in the New York City Police Department's Transit Bureau patrol the transit system and are responsible for enforcing laws including the NYCTA Rules of Conduct. There are over 3,000 police officers in the Transit Bureau, which, if it were a separate police department, would be one of the eleven largest in the United States.
12. Prior to 1979, the criminal courts -- namely the New York City Criminal Court or, in some very narrow instances, the New York Supreme Court -- had exclusive jurisdiction over charges of violations of the NYCTA Rules of Conduct. The criminal courts retained exclusive jurisdiction over all but a few such charges until 1984, when the TAB was created to enhance the enforcement of the NYCTA Rules of Conduct and was given concurrent jurisdiction over alleged violations of the Rules of Conduct. The criminal courts still retain concurrent jurisdiction over charges of violations of the NYCTA Rules of Conduct. All criminal court proceedings are and historically have been open to the public.
13. When the TAB was created, the maximum fine for a violation of NYCTA rules quadrupled, from \$25 to \$100.
14. Since 2002, the TAB has had jurisdiction each year over between 125,155 and 195,214 summonses issued by the NYPD.
15. NYPD officers have the authority to choose whether, for any given alleged violation of NYCTA Rules of Conduct, to issue a summons returnable to the TAB or to the criminal courts. The TAB summons form closely resembles the criminal court summons form used by the NYPD. Adjudication of summonses alleging violations of the NYCTA Rules of Conduct and returnable to the criminal courts take place in public while adjudications

of summons for the exact same offenses but returnable to the TAB are subject to the TAB's restrictive public-access policy.

16. When a person issued a TAB summons by an NYPD officer wants to contest the charge, he or she must either appear in person before the TAB or submit via mail a signed form, printed on the back of the TAB summons, stating, "I plead not guilty."
17. In 2008 the TAB held approximately 20,000 live hearings to adjudicate NYPD charges against transit riders.
18. As in criminal court, an individual contesting an NYPD summons in person appears before an adjudicator who makes a determination of the person's guilt or innocence. A person charged with violating the NYCTA Rules of Conduct has the right to be represented by counsel, the right to request the presence of witnesses, the right to cross-examine, and the right to present exculpatory evidence.
19. TAB proceedings are governed by detailed rules that closely resemble traditional rules of court. Among other things, those rules address the filing of documents, the computation of time to comply with time periods specified in the rules, the appearance of counsel or other representatives, the filing of motions, the issuance of subpoenas, the scheduling of hearings, the rights of parties to notice, cross-examination, and presentation of evidence, the specific conduct of hearings, the requirement that all testimony be under oath, the handling of evidence, the contents of the record, the issuance of decisions, the right to appeal, and the "enforcement of judgments."
20. The NYCTA has not formally promulgated the rules governing TAB proceedings, has not posted the rules on any website, does not have them out in the public area of the

TAB, and has no signs posted at the TAB informing members of the public of the existence of the rules.

21. The failure to publicize the TAB rules regarding its hearing procedures means people appearing at TAB hearings are ignorant about the process they will face. This lack of information severely hampers a person appearing at a hearing from preparing and presenting a coherent and complete defense.
22. Upon information and belief, most people who appear at hearings before the TAB are unrepresented by counsel.
- 22A. For those people who appear in person, the initial hearing includes only the person and a TAB hearing officer. The police officer issuing the summons is required to appear at a subsequent hearing only if the person issued the summons is able to establish at the initial hearing a basis for requiring the officer's presence. Upon information and belief, a small number of hearings involve participation by the police officer who issued the summons.
23. Nothing in the conduct of TAB hearings poses any threat to the disclosure of sensitive law-enforcement information. Indeed, upon information and belief, the overwhelming majority of TAB hearings involve only the hearing officer and the respondent, and the only law-enforcement information available to the hearing officer about the incident is the information provided on the summons. Moreover, TAB proceedings are no more likely to entail disclosure of sensitive law-enforcement information than are criminal court proceedings that adjudicate identical violations of the NYCTA Rules of Conduct and that are fully open to the public.
24. Upon information and belief, the TAB rules against those challenging summonses in the vast majority of cases. In 2008, for instance, of the 15,557 summonses disposed of by

the TAB on the merits, it ruled against the respondent approximately 70 percent of the time.

The TAB Denies the Public Access to Its Hearings

25. The TAB enforces an informal policy of closing all of its hearings to the public, unless the person who has received a summons consents to the hearing being opened. This policy effectively closes the TAB's proceedings to public scrutiny.
26. The TAB's enabling statute does not authorize the closure of TAB hearings. The TAB has not promulgated any regulations officially adopting or codifying its policy.
27. For the first 25 years of the TAB's existence, the policy was not set forth anywhere in writing. Only after the NYCLU notified the NYCTA of its intention to sue did the NYCTA formulate written guidelines. Those guidelines, provided to the NYCLU on the eve of the filing of this case, confirm that, "[i]f the respondent objects, the observer will not be allowed into that particular hearing."
- 27A. Under the TAB's recently issued guidelines, public access to TAB hearings is determined as follows: (1) Any person wishing to observe a TAB hearing must identify himself or herself to a TAB official as being a person wishing to observe a hearing, at which point the person is then given a number; (2) When the next hearing is called, the observer is called to the locked door leading to the hearing area, where he or she is met by the hearing officer, who then asks the respondent if he or she consents to the person observing the hearing; (3) If the respondent objects, the TAB hearing officer denies the observer access to the hearing; the respondent is not asked for a reason for objecting and need not provide any reason; (4) If the respondent does not object, the hearing officer allows the observer to proceed to the hearing room, at which point the observer must

identify himself or herself and the respondent is given a second opportunity to object; if the visitor declines to identify himself or herself or the respondent objects to the visitor's presence, the TAB bars the visitor from observing the hearing; and (5) If the respondent consents to the member of the public observing the hearing, the TAB will allow the person to observe without further inquiry. The TAB has no interest in restricting public access to its hearings independent of the respondent's.

- 27B. The sole justification for the TAB policy is a concern that respondents will be chilled in their willingness to participate in TAB hearings if a member of the public is present without the respondent's consent. The TAB has no empirical basis for this concern. It has no information suggesting that persons charged with rules of conduct violations and issued summonses to criminal courts where proceedings are open to the public have been adversely affected by that public access. Similarly, TAB officials have not studied any other forum to determine whether allowing members of the public to observed hearings without the consent of the respondent affected the respondent's participation in the hearing. Finally, the TAB has not conducted any surveys of TAB respondents to determine whether allowing members of the public to observe hearings without the consent of the respondent would affect the respondent's participation in a TAB hearing.
- 27C. Nothing in the TAB's public-access policy bears any relationship to a concern for protecting against the disclosure of sensitive law-enforcement information.
- 27D. The TAB public-access policy was developed by TAB staff and was never presented to or approved by the NYCTA board. It has never been formally promulgated.
28. The TAB policy may be unique, as TAB officials know of no other forum that has the TAB's respondent-consent policy. By contrast, administrative agencies in New York

City, including the Office of Administrative Trials and Hearings, the Parking Violations Bureau, the Environmental Control Board, and the Taxi and Limousine Commission, all open their adjudicatory proceedings to the public.

The NYCLU's Interest in Open TAB Proceedings

29. The NYCLU's mission is to defend civil rights and civil liberties in New York and to preserve and extend the constitutionally guaranteed rights of those whose rights have historically been denied. For over fifty years, the NYCLU has been involved in litigation and other advocacy in support of civil rights and government accountability.
30. The NYCLU has actively pursued its interest in opening government proceedings to the public. In 2005, for instance, the NYCLU encountered substantial barriers – including locked doors to hearing rooms – in attempting to observe hearings, conducted by the New York City Taxi and Limousine Commission (“TLC”), adjudicating customer complaints about cab drivers. The NYCLU objected to this regime, and, without the NYCLU having to sue, the TLC agreed to take a number of specific steps to open its hearings to the public, including removing physical barriers to hearing rooms, issuing directives to TLC staff, and posting public notices about hearings being open.
31. As was true with the TLC proceedings, the NYCLU has considerable concerns about the fairness of TAB hearings and thus wishes to observe them. In the late spring of 2008 the NYCLU started to make plans to send observers to watch TAB proceedings. Shortly thereafter the NYCLU learned that the TAB did not allow the public to freely observe TAB proceedings, and the NYCLU thus initiated discussions with the NYCTA's general counsel about the TAB's policy. promulgate

32. The NYCLU also has been actively involved in advocacy about NYPD actions in the transit system. In just the last few years, the NYCLU has advocated for reforms in NYPD treatment of photographers in the subway system; in the NYPD's stopping and frisking of people in the subways system; and in the NYPD's "Lucky Bag" program, under which officers were arresting individuals who did nothing more than pick up property that appeared to be abandoned but in fact was planted by the NYPD.
33. The NYCLU long has been concerned about racially discriminatory police practices and thus has an additional interest in NYPD conduct in issuing TAB summonses. Upon information and belief, blacks and Latinos receive a disproportionately large percentage of NYPD summonses issued in the transit system and, therefore, a disproportionately large percentage of summonses returnable to the TAB. According to an analysis of the NYPD's stop-and-frisk database obtained by the NYCLU, blacks and Latinos received 85 percent of all summonses issued by Transit Bureau officers during stops and frisks between 2003 and 2007. During that period, the number of such summonses issued to black and Latino individuals grew by more than 900 percent, a rate that far outpaced that of summonses issued to white individuals.
- 33A. As a result of its specific interest in the actions of NYPD officers issuing summonses in the transit system, the NYPD has a particular interest in observing TAB hearings in which NYPD officers testify.
34. In addition, the NYCLU has a specific interest in the TAB because NYCLU attorneys represent people who receive summonses returnable to the TAB and because they regularly receive requests for legal assistance from individuals to whom NYPD officers have issued TAB summonses. Because it has been unable to observe TAB proceedings,

the NYCLU is seriously hampered in its ability to advise clients and potential clients, and those persons are far less able to effectively challenge their TAB summonses.

The Transit Adjudication Bureau's Facilities and the Enforcement of Its Policy

35. An individual charged with violating the NYCTA's rules of conduct who wishes to challenge his or her summons before a hearing officer must appear at the TAB.
36. The TAB is located on the third floor of 29 Gallatin Place, a one-way street running one single block between Fulton and Livingston Streets in Brooklyn. Several small placards identifying the TAB, on the front doors and on a small sign protruding slightly from the building's façade, are not visible from Fulton or Livingston Streets.
37. The TAB's front doors open to a hallway that, apart from two unmarked doors and two doors marked "NO EXIT," leads only to a single elevator. For those appearing at TAB hearings, the elevator services only the first and third floors.
38. Immediately outside the elevator on the third floor is a small area, penned in by retractable crowd control barriers, leading to a security checkpoint staffed by at least two guards. Even to gain access to the waiting room beyond the checkpoint, a visitor must present identification, furnish a summons or otherwise explain his or her reason for being there, and pass through a metal detector.
39. As far as NYCLU representatives have seen, the TAB's third floor space consists of the security area and waiting room, several service windows adjacent to the waiting room, and about a dozen hearing rooms accessible from the waiting room only through a locked door. It is not possible to see the hearing rooms from the public waiting area, and thus it is not possible to determine from the public area which hearings involve testimony from NYPD officers.

40. Upon passing through the security checkpoint, someone seeking to contest a summons is referred to the “information” window, where he or she is assigned a number and told to wait for the number to appear on one of the public announcement monitors.
41. The NYCLU recently represented a client in a TAB proceeding.
42. On November 21, 2008, that client received a summons from an NYPD officer for “refus[ing] lawful orders to stop videotaping in the NYC transit system, impeding with the arrest of another.” He was filming the arrest of a third party from a safe distance on a subway platform using only a cellular telephone.
43. The NYCLU chose to defend this client as it has a strong interest in ensuring that police officers do not unlawfully infringe on people’s right to engage in photography, particularly when documenting a third party’s arrest in the subway system or elsewhere. The NYCTA Rules of Conduct expressly allow filming in the subway system except with ancillary equipment such as tripods and lighting devices. Furthermore, pursuant to a consent decree obtained by the NYCLU in 1977, onlookers are expressly entitled to remain in the vicinity of and photograph an arrest of a third person unless threatening the safety of the people and officers involved.
44. The NYCLU believed that the client’s summons was invalid. The client challenged the summons.
45. On January 6, 2009, on the advice of the NYCLU, the client – in preparation for his January 14 return date – went to the TAB to request all documentary evidence the NYCTA planned to present against him in a hearing. A TAB official informed him that the only such evidence was the summons he received from the police officer on November 21.

46. On January 14, the client, challenging the charge against him, attended a TAB hearing to request the appearance of the officer who issued the summons. Three law students working with the NYCLU (“law students”) accompanied the client to the TAB.
47. Earlier that day, one of the law students attempted to observe a third party’s hearing to familiarize herself and the client with the hearing process in preparation for his hearing. The head hearing officer denied the law student’s request to observe a hearing unless she could identify a consenting respondent. This requirement prevented her from observing a hearing.
48. When called for his hearing, the client requested that three law students be allowed to observe the proceeding. At first, the hearing officer denied this request. One law student then explained that the head hearing officer had stated that, if someone consented, an observer could attend that person’s hearing. The hearing officer acknowledged that this is the TAB’s policy but still allowed only one student into the hearing room – as she put it, to provide the client with “moral support.” The hearing officer waved goodbye as she locked the other two students out of the hearing area.
49. After accompanying the client and the remaining law student to the hearing room, the hearing officer left and returned multiple times for unstated reasons before beginning the hearing. Several times upon returning, the hearing officer posed questions to the law student regarding his presence at the hearing.
50. Before beginning the hearing, the hearing officer required the law student to furnish identification. She provided no explanation for this demand. Then, she left the room, made a photocopy of the law student’s identification, and added it to the client’s case file.

51. The hearing officer then commenced the audio recording – which, under the TAB’s enabling statute, serves as the official record of the hearing – and instructed the law student to state his name and purpose in attending for the record. Following the law student’s statement, the hearing officer stopped the audio recording and left the room. She also stopped the recording at several other points to hold discussions with the law student and the client without explaining why she was conducting these discussions off the record.
52. Even though the client, from the beginning of the hearing, repeatedly requested that the issuing officer be summoned to appear as a witness, the hearing officer refused to grant an adjournment until the client testified about the incident. After hearing the client’s testimony, the hearing officer finally agreed to adjourn the proceeding to call the officer who issued the summons to testify at a later hearing.
53. In preparation for the client’s next hearing, the three law students returned to the TAB in an effort to observe third parties’ hearings. The law students met repeated resistance from various TAB officials in gaining access to hearings and even in obtaining information about the TAB’s adjudicatory procedures.
54. On January 23, 2009, a law student told an information desk attendant, to whom he had been referred by an officer at the security checkpoint, that he wished to observe a hearing. After consulting her supervisor, the attendant denied the law student’s request, stating that TAB hearings are not open to the public. The law student then requested to speak to the supervisor. According to the attendant, the supervisor refused to speak to the law student. The law student left the TAB without observing a hearing.

55. On January 26, another law student visited the TAB to observe a hearing. A security guard, who identified himself as the head of security, denied the law student access to the waiting room, stating that it was “against the law” for an observer to attend a hearing. Because the law student could not access the waiting room, he could not even attempt to obtain consent to observe a hearing as required by the TAB’s policy.
56. The law student also overheard the head of security tell another security guard that he knew observing hearings was “against the law,” as the *New York Times* and *New York Post* had previously tried to access TAB hearings.
57. On January 29, another law student made her second attempt to observe a TAB hearing. The security guard initially turned down the student’s request and denied her entry into the waiting area, stating that she was not permitted to observe a hearing. After asking to speak to a supervisor, the student was granted access to the waiting room and allowed to speak to the head hearing officer. Recognizing the law student from her previous visit, the head hearing officer offered to request a random individual’s permission to let the student sit in on a hearing.
58. Once someone consented, the law student was allowed to view a hearing, but she was required to state her name and purpose for the audio record. Her name was also noted in the case file, although she had no connection to the person or the case. At the conclusion of the hearing, the law student asked the hearing officer who conducted the hearing if he would answer some questions about the hearing procedures. Without answering, the hearing officer left the room and quickly returned, stating that he felt it was inappropriate for him to answer any of her questions. He told the law student that she could direct her

questions to his supervisor, the head hearing officer, and then told the law student to return to the waiting room.

59. Eventually, the head hearing officer came out to the waiting room to speak with the law student. The law student asked if there were any rules or instructions to guide hearing officers in conducting hearings. The hearing officer told the law student that there was a training manual but that she was unsure if it was public information. The hearing officer said that the law student would have to ask the TAB's legal director and directed her to the information window to see if he was available. The information window attendant told the law student that she would have to write a letter to the TAB before she could speak with the legal director. It was only through discovery in this case that the NYCLU learned of and was able to obtain a copy of the rules governing TAB proceedings.
60. On February 12, 2009, after encountering these obstacles, the NYCLU sent a letter to Mr. Martin Schnabel, Vice President and General Counsel of the NYCTA, requesting that the TAB open its hearings to the public.
61. In a phone conversation on February 19, Mr. Schnabel denied the NYCLU's request. He explained that the NYCTA believes that the policy is necessary to protect the privacy interests of those charged. At the end of the conversation, the NYCLU informed Mr. Schnabel that it would proceed with litigation to vindicate the public's right to access TAB hearings.
62. On March 31, Mr. Schnabel wrote to the NYCLU explaining that the NYCTA had decided to put the TAB's "long-standing policy" in writing. Attached to the letter was a two-page document, entitled "Procedures for Accessing the TAB Facility and Admission to Hearing Rooms on the Part of Visitors," containing guidelines for administering the

policy. The guidelines, which set forth the procedure whereby a member of the public can request to observe a third party's hearing, state that, "[i]f the respondent objects, the observer will not be allowed into that particular hearing."

62A. The NYCLU proceeded to prepare for its client's hearing, which, after two adjournments, was scheduled for May 18, 2009. The police officer, however, did not appear, and the TAB hearing officer dismissed the case.

JURISDICTION AND VENUE

63. This Court has subject matter jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1331.
64. This Court has supplemental jurisdiction over all state constitutional and state law claims pursuant to 28 U.S.C. § 1367(a).
65. Venue is proper pursuant to 28 U.S.C. § 1391(b)(1) in that Defendants officially reside in the Southern District of New York.

FIRST CAUSE OF ACTION

66. The Defendants' actions violate Plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, as well as under federal common law.

SECOND CAUSE OF ACTION

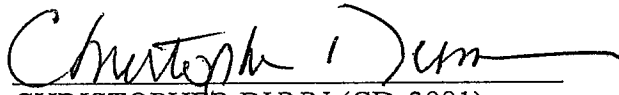
67. The Defendants' actions violate Plaintiff's rights under section 8 of Article I of the New York State Constitution and under the common law and public policy of the State of New York.

WHEREFORE, Plaintiff requests that this Court:

- (1) Assume jurisdiction over this matter;
- (2) Issue a declaratory judgment that the Defendant's policy regarding access to TAB hearings violates the First and Fourteenth Amendments to the United States Constitution, federal common law, and the Constitution, common law, and public policy of New York;
- (3) Issue preliminary and permanent injunctions enjoining the TAB from enforcing its policy regarding access to TAB hearings;
- (4) Award the Plaintiff attorneys' fees and costs; and
- (5) Grant any other relief the Court deems appropriate.

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION



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Dated: May 27, 2009
New York, N.Y.

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On the Complaint:

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* Law graduate authorized to serve as an attorney in this matter pursuant to the Southern District's Plan for Student Practice in Civil Actions.