

**Matter of Owner Operator Ind. Drivers Assn., Inc. v  
New York State Dept. of Transp.**

2020 NY Slip Op 34831(U)

May 1, 2020

Supreme Court, Albany County

Docket Number: Index No. 904994-19

Judge: Catherine Cholakis

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**DECISION & ORDER**

SUPREME COURT STATE OF NEW YORK  
 COUNTY OF ALBANY  
 .....

In the Matter of the Application of :

OWNER OPERATOR INDEPENDENT DRIVERS  
 ASSOCIATION, INC.; DOUGLAS J. HASNER; DAVID D.  
 WINN, d/b/a DAVE-LIN ENTERPRISES; and GARY L.  
 O'BRIEN, d/b/a BLUE EAGLE EXPRESS,  
*Petitioners-Plaintiffs,*

**DECISION & ORDER**  
 (Motion #2)  
 Index No.: 904994-19

**-against-**

NEW YORK STATE DEPARTMENT OF  
 TRANSPORTATION; MARIE THERESE DOMINGUEZ,  
 ACTING COMMISSIONER, NEW YORK STATE  
 DEPARTMENT OF TRANSPORTATION; GEORGE P.  
 BEACH, II, SUPERINTENDENT OF THE NEW YORK  
 STATE DIVISION OF STATE POLICE, AND MARK J.F.  
 SCHROEDER, COMMISSIONER FOR THE NEW YORK  
 STATE DEPARTMENT OF MOTOR VEHICLES,  
*Respondents-Defendants.*

APPEARANCES:

TABNER, RYAN and KENIRY, LLP  
 (by Thomas R. Fallati, Esq.)  
 The Cullen Law Firm, PLLC  
 (by Daniel E. Cohen and Gregory Reed, Esqs.)  
 Attorneys for Petitioners/Plaintiffs

LETITIA JAMES  
 Attorney General of the State of New York  
 (by Assistant Attorney General Helena Lynch)  
 Attorneys for Respondents/Defendants

Cholakis, AJSC

Respondents/defendants (respondents) in this hybrid CPLR Article 78 and declaratory judgment action move to dismiss the petition/complaint under CPLR 3211(a)(7) for failure to state a cause of action. They also move pursuant to CPLR 3211(a)(8) to dismiss as to the

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individual respondents/defendants for want of personal jurisdiction over them.

Petitioners/plaintiffs (petitioners) have not opposed dismissal as to the individual respondents. They do, however, vigorously oppose dismissal as to respondent New York State Department of Transportation. Accordingly, the motion to dismiss the petition/complaint as to the individual respondents is granted as unopposed, the Court finding no evidence in the record of personal jurisdiction over them having been acquired. The balance of this Decision and Order, therefore, deals with the question of whether petitioners have a cause of action in the present litigation against the remaining respondent, the New York State Department of Transportation (NYSDOT).

Petitioner Owner Operator Independent Drivers Association, Inc. (OOIDA) is a not-for-profit corporation with headquarters in Missouri. It describes itself as “a national trade association of owner operator truck drivers, small business truckers, and employee drivers” (Petition/Complaint at para 22). It states as a component of its mission “to protect the rights of truck drivers” (*Id.* at para 23). The individual petitioners are current or former truck drivers who allege that they have been or will be impacted by the set of regulations at the center of this lawsuit (*Id.* at paras 31-44).

The present litigation arises out of the adoption, on April 24, 2019, by NYSDOT of 17 NYCRR § 820.6, an amendment to a set of regulations designed to require commercial truckers to maintain accurate records of their hours of service in order to avoid accidents caused by driver fatigue. The administrative exhibits provided by petitioners indicates that New York State has had some form of “hours of service” (HOS) recording regulations for over thirty years. The recent amendment adopts, in its entirety, a set of federal regulations (49 CFR Part 395) which are intended to increase the accuracy of HOS records through the mandatory use of “electronic logging devices” (ELD’s) in certain late-model over-the-road trucks.

The adoption of this so-called “ELD Rule” is the result of an agreement reached between the federal government and the States. At the time of adoption, 47 other States had already entered into similar agreements (*see* Notice of Adoption, New York State Register [Apr 24, 2019]). In exchange for the adoption of the rule, New York has received and will continue to receive a significant amount of federal funding for law enforcement. In fiscal 2017, for example, that amount was in excess of 14 billion dollars (*see* Notices appended as Exhibits A and B to the

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Petition/Complaint).

Petitioners initially challenged the federal regulations on Fourth Amendment grounds, contending that the ELD Rule constituted an unreasonable search and seizure. They were unsuccessful in the federal litigation (*see Owner Operator Individual Drivers Assoc., Inc. v United States DOT*, 840 F3d 879 [7<sup>th</sup> Cir 2016]). When it appeared to petitioners that New York law enforcement officers were attempting to enforce the federal ELD Rule prior to its enactment as a New York regulation, petitioners brought an action in New York State Supreme Court in which they sought an injunction against respondents. That action was dismissed on summary judgment, with the Court determining that the federal regulations were not being enforced by State officers (*Owner Operator Independent Drivers Assoc. v Calhoun*, 62 Misc3d 909 [Sup Ct, Albany Cty 2018] [Platkin, J]).

Now that the federal regulations have been formally adopted by respondents as State regulations, petitioners have renewed their challenge. They contend that the adoption of the regulations by respondent DOT was arbitrary and capricious. They also contend that the regulations are facially violative of both Article I § 6 and Article I § 12 of the State Constitution. As noted, the matter is now before the Court on a motion to dismiss.

### **Arbitrary and Capricious**

That portion of the present litigation grounded on CPLR Article 78 is predicated on a claim that the adoption of the New York ELD Rule was arbitrary and capricious. Specifically, petitioners allege that respondents failed to comply with SAPA § 202 because respondent NYSDOT “denied OOIDA’s request for a hearing, failed to meaningfully consider or address OOIDA’s comments, failed to address any of the legal deficiencies of the NY ELD Rule and failed to take into account the real-world experience of ELD requirements” (Petition/Complaint at para 187). A review of the record generated in the rule-making process, however, demonstrates that petitioners do not have a cause of action under CPLR Article 78.

During the public notice and comment period prior to the enactment of the New York ELD Rule, petitioners were the only ones to file public comments. Their submission was 28 pages long. It raised – and eloquently argued – petitioners’ concerns that the proposed

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regulations ran afoul of federal and State Constitutional protections against unreasonable searches and seizures, as well as their protections of due process. Petitioners also argued that NYSDOT had improperly delegated State rulemaking authority to the federal government. In the notice of adoption, however, respondent NYSDOT addressed each of petitioners' concerns. NYSDOT succinctly reviewed the long history of New York's regulation of HOS for commercial drivers; detailed the agreement, shared with 47 other states, entered into with the federal government; noted that New York did not "automatically" adopt the federal regulations as they were enacted and amended, but rather enacted individual regulations selectively; and, most significantly, NYSDOT addressed both the federal Constitutional challenge by citing the Seventh Circuit *OOIDA* decision as well as the State Constitutional challenge by citing to the analysis performed by Judge Platkin in the *Calhoun* decision. While respondents did not engage in a painstaking rehash of these two decisions, it cannot be argued that the Seventh Circuit decision was not binding on petitioners, as they were parties to that action; nor can it reasonably be argued that Judge Platkin's reasoning regarding the State Constitutional challenges, though perhaps dicta in the *Calhoun* matter, constituted persuasive and rational authority for the position taken by respondents regarding petitioners' public comments. As a result, petitioners have no cause of action against respondents for arbitrary and capricious conduct in NYSDOT's adoption of the regulations over petitioners' objection, as due consideration was clearly given to their comments as required under SAPA.

**New York State Constitution Article I § 12**

Petitioners' main argument is that the ELD Rule, on its face, violates the protections against unreasonable searches and seizures embodied in the New York State Constitution. Their argument is premised on the fact that, "[f]or many drivers, their truck is not simply a vehicle – it is also an office and their home. For more than a few drivers, the truck is their *only* home" (Petition/Complaint at para 93). Petitioners contend that "[e]ven when the truck is being used for personal reasons, the ELD continues to record where and when the driver travels – to family, friends, doctors, counselors, drugstores, places of worship, and any place of a personal nature an individual goes in their daily life" (*Id.* at para 95). Petitioners further allege that "[t]he NY ELD

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Rule enables intrusive tracking in the form of mandatory monitoring *of drivers' every movement* via a sophisticated electronic device” (*Id.* at para 98 [emphasis added]). In short, petitioners describe the ELD Rule as enabling a system of government-mandated personal intrusions beyond Orwellian in its proportions. Surely a set of regulations that would require commercial drivers not only to surrender every shred of personal privacy to the government, but that would also allow government agents to review the record of those drivers' every movement whenever they chose would be unconstitutional on its face. Indeed, to hold otherwise would offend two and a half centuries of Constitutional jurisprudence.

A close look at the ELD Rule, however, discloses a very different landscape than that depicted in petitioner's papers. The ELD Rule requires certain commercial vehicles to be equipped with an electronic device to monitor and record the date; the time; the vehicle's geographic location *accurate to within one half mile* (49 CFR Part 395, Appendix A, § 4.3.1.6[c]); the number of running hours on the engine; the number of miles on the vehicle; and the identity of the vehicle (49 CFR § 395.26[b]). The driver is required manually to input certain information including the driver's identity, when the driver changes from on-duty to off-duty, and when the driver is occupying a sleeper cab. The ELD Rule provides specific protections for a driver's privacy: when the vehicle is being operated for the driver's personal use, the ELD Rule mandates that the device be programmed to leave blank the engine hours and vehicle miles, and also to degrade the geographic location to *within a ten-mile radius* (49 CFR § 395.26[d] and [i]). Contrary to petitioners' claims, then, there is nothing in the ELD Rule empowering the government to indiscriminately spy on a driver's visits “to family, friends, doctors, counselors, drugstores, places of worship, and any place of a personal nature an individual goes in their daily life.” Rather, the ELD Rule limits recording of information when a driver is on a personal errand merely to the physical location of the vehicle within a ten-mile radius.

With the nightmare scenario described by petitioners' thus dispelled, it is clear that the information required to be captured by the ELD Rule is limited in scope to data relevant to effectively monitoring a commercial driver's compliance with HOS guidelines that have been in place for years. What remains, then, of the facial Constitutional challenge on Article I § 12 grounds is the question of whether the New York State Constitution forbids the warrantless

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retrieval of the information required to be recorded by the ELD Rule by law enforcement.

The language of Article I § 12, adopted at the State Constitutional Convention of 1938, is identical to that of the Fourth Amendment to the United States Constitution. That identity of language, however, does not require New York Courts to interpret our Constitutional provision in lockstep with the way in which the federal Courts interpret the Fourth Amendment (*see e.g. People v Scott*, 79 NY2d 474 [1994]; *People v P.J. Video*, 68 NY2d 296 [1986]). Indeed, our Court of Appeals has never hesitated to act to protect the rights of New Yorkers when protecting those rights required a broader interpretation of guaranteed liberties than that afforded by the United States Supreme Court (*see id.*). Yet the mode of analysis and many of the terms employed in that analysis often, of necessity, mirror those that appear in federal Constitutional cases. It is therefore often difficult to tease out the distinctions between State and federal interpretations of identical Constitutional provisions, and even more difficult to attempt to predict the ultimate outcome of a State Constitutional dispute based on authorities following federal Constitutional jurisprudence.

Nonetheless, there are general principles common to both areas of Constitutional analysis. One of the foremost among these is the presumption of the constitutionality of statutes and regulations (*See e.g. Regina Metropolitan Co., LLC v NY State Div of Housing and Community Renewal*, \_\_\_ NY3d \_\_\_, 2020 WL 1557900 slip opn 4/20/20 at 16; *State v Della Villa*, 186 Misc2d 490, 499 [Sup Ct, Schenectady Cty 2000] [citation omitted]). Simply put, this presumption places the burden squarely on the shoulders of the party seeking to challenge the constitutionality of the legislation or regulation in question (*Id.*). This burden is particularly ponderous when it is the facial constitutionality of a particular enactment that is challenged, for there it must be shown that the enactment is unconstitutional in all its applications (*see People v Stuart*, 100 NY2d 412, 423-424, citing *People v Wood*, 85 NY2d 238 [1995] and *McGowan v Burstein*, 71 NY2d 729 [1988]).

Petitioners are correct in their focus on how the ELD Rule authorizes warrantless searches of commercial vehicles by law enforcement. 49 CFR § 395.24(d), enacted as part of 17 NYCRR § 820.6, provides, “On request by an authorized safety official, a driver must produce and transfer from an ELD the driver’s hours-of-service records in accordance with the instruction

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sheet provided by the motor carrier.” Thus, the ELD Rule permits the search of a driver’s HOS records without the need for law enforcement officers to obtain a warrant beforehand. Such warrantless searches are generally looked upon with disfavor by our Courts (*see People v Keta*, 79 NY2d 474, 495-499 [1992]). There are, however, exceptions to the warrant requirement that are recognized as a matter of New York State constitutional jurisprudence.

One such recognized exception to the warrant requirement is the so-called “administrative search.” Our Courts have recognized the propriety of the warrantless searches of a limited class of places in order to ensure compliance with administrative regulations (*see People v Quackenbush*, 88 NY2d 534, 541 [1996]). Our Court of Appeals has been particularly conscientious in this area, recognizing that an overly broad allowance of administrative searches would allow them to equate to the notorious “writs of assistance” that were among the proximate causes of the American Revolution (*People v Keta*, *supra*, at 498).

This is not to say that warrantless administrative searches, in and of themselves, run afoul of our State Constitution. Indeed, the Court of Appeals has recognized their propriety when they are used in a “pervasively regulated industry” and are not used as a method of investigating criminal conduct (*see e.g. People v Quackenbush*, *supra*). It is precisely here that the crux of the present litigation is to be found: petitioners contend that interstate trucking is not a “pervasively regulated industry<sup>1</sup>,” and petitioners claim that, since certain violations of the ELD Rule and the related regulatory requirements relating to drivers HOS restrictions can be prosecuted as criminal offenses, the warrantless searches authorized under the ELD Rule do allow for the functional

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<sup>1</sup> Petitioners tread a careful path here: without explicitly making the claim that interstate trucking is not a pervasively regulated industry, their use of the subjunctive mood for the verb in the phrase “even assuming that the ‘closely regulated industry’ exception *applied*” [emphasis added] implies their unwillingness to concede, at least for purposes of the State constitutional argument, that interstate trucking is such an industry. The Seventh Circuit has, of course, found to the contrary in its analysis of the federal constitutional question. Since it is obvious that petitioners bristle at respondents’ purported fluidity in arguing State constitutional issues with federal constitutional principles, however, this Court will try its best to confine its analysis to State constitutional authority. Accordingly, though the question of whether interstate trucking is a closely regulated industry is a settled one in federal Court, it will be treated as a question of first impression under Article I § 12 of the State Constitution.

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equivalent of criminal prosecutions without appropriate safeguards.

“[T]hose engaged in business in industries subject to a complex and pervasive pattern of regular and close supervision and inspection have a substantially diminished expectation of privacy in such business affairs . . .” (*Matter of Murtaugh v NYSDEC*, 42 AD3d 986, 989 [4<sup>th</sup> Dept 2007]). “[T]hat diminished privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections” (*Id.* [citations omitted]). The trucking industry has been “subject to a complex and pervasive pattern of regular and close supervision and inspection” at the State level in New York since at least 1986, when the requirement of HOS record keeping first emerged in this State. Moreover, the trucking industry has been subjected to meticulous regulatory oversight by both State and federal government agencies. Indeed, things ranging from the materials used in brake hoses and their end fittings (*see* 49 CFR § 393.45) to the minimum thickness of foam mattresses installed in sleeper cabs (*see* 49 CFR § 393.76[e][2][iii]) are subject to regulation. It is a matter of common knowledge that the licensing of commercial drivers is subject to intense regulatory scrutiny. Likewise, registration requirements, weight limits, safety equipment and more are all closely regulated and subject to periodic inspections. In short, one would be hard-pressed to find an industry more pervasively regulated than the trucking industry.

The mere fact that an industry is pervasively regulated, however, does not deprive those working in that industry of a reasonable expectation of privacy. The degree of privacy considered reasonable in such an industry may be diminished due to the pervasive level of government oversight (*see e.g. Matter of Murtagh, supra*, at 989). Critical to the State constitutional analysis of whether warrantless administrative searches pass muster is whether the individuals working in the industry are on notice of the likelihood of such searches and whether the officials conducting the searches are adequately constrained from arbitrary action (*Id.*, *citing People v Quackenbush, supra*, at 542).

In the present case, the ELD Rule carefully delineates the quantity and quality of information to be recorded by the ELD, whether from automatic inputs from vehicle systems or information manually entered by the driver. As noted *supra*, the regulation also limits the extent of government intrusion to requiring the driver to “produce and transfer . . . the driver’s hours-of-

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service records.” Thus, a commercial driver who steps into a rig equipped with an ELD is on notice of the diminished expectation of privacy that comes with the operation of such a vehicle. Moreover, the driver is protected from arbitrary government action under the EDL Rule because the regulation strictly limits the material that may be gathered from the warrantless search.

*People v Keta*, (79 NY2d 474 [1994]), cited by petitioners in their memorandum of law more than thirteen times, does not militate in favor of a contrary result. *Keta* held that administrative searches of vehicle dismantling shops authorized by Vehicle and Traffic Law § 415-a(5)(a) violated Article I § 12 of the State Constitution because such searches are “undertaken solely to uncover evidence of criminality and the underlying regulatory scheme is in reality, designed simply to give the police an expedient means of enforcing penal sanctions” (79 NY2d at 499, citing *People v Burger*, 67 NY2d 338, 344 [1986] *reversed sub nom Burger v New York*, 482 US 691 [1987]). *People v Keta* (as well as its companion case, *People v Scott*) are certainly seminal cases in New York constitutional jurisprudence, for the Court of Appeals there carefully delineates the bases for its departure from the reasoning employed by the United States Supreme Court in its Fourth Amendment analysis of administrative searches in *Burger, supra*. Yet the present case is readily distinguishable from *People v Keta*. Here, the regulatory scheme is designed to further a goal that has been in existence for decades: to reduce accidents attributable to driver fatigue by limiting the amount of time a commercial driver can spend behind the wheel in a given period. The regulation is not designed, either expressly or by implication, to give law enforcement a pretext for warrantless searches for evidence of criminality. While failure to comply with the ELD Rule may be penalized, the regulation does not provide an “end around” the privacy protections of the State Constitution.

This is certainly not to say that there could arise circumstances under which the specific application of the ELD Rule may be unconstitutional. Such a case is not currently before the Court. Here, petitioners have opted to mount a facial constitutional challenge to the ELD Rule. Such a challenge, to be successful, would require a demonstration that the regulation is unconstitutional in all its applications, without regard to any specific conduct or discrete circumstance (*see People v Stuart*, 100 NY2d 412, 421 [2003]). Respondents here have successfully demonstrated that petitioners do not have a cause of action.

**New York State Constitution Article I § 6**

The New York State Constitution provides, “No person shall be deprived of life, liberty or property without due process of law.” Petitioners allege that the ELD Rule violates this provision because the regulations contain no protection against arbitrary enforcement. They contend, for example, that nothing in the ELD Rule limits the frequency and number of times that a driver can be required to provide law enforcement access to ELD data.

As noted earlier in the analysis of the Article I § 12 claims, a successful facial constitutional challenge must demonstrate unconstitutionality without regard to specific conduct (*see People v Stuart, supra* at 421). Petitioners, however, seek to avoid this requirement by arguing the possibility that a police officer could use the ELD Rule as a means of harassment of a particular commercial driver – or commercial drivers generally – by repeatedly stopping commercial vehicles under the pretext of enforcing HOS regulations. Yet this distorts the analysis: the mere fact that a regulation can be abused does not render the regulation facially unconstitutional; rather, it is the improper conduct of the harassing officer that is the constitutional violation and not the regulation used as the pretext for misconduct. If a police officer uses a traffic stop as a pretext for an unlawful search, this does not render the Vehicle and Traffic Law unconstitutional; it is the officer’s conduct that violates the constitution, not the statute used as the purported reason for the pretextual stop (*Cf. People v Robinson*, 97 NY2d 341, 351 [2001] citing *People v Spencer*, 84 NY2d 749 [1995]).

Petitioners also claim that the ELD Rule violates State due process protections because it “is irrelevant to any legitimate public interest” (Petitioner’s Memorandum of Law at p 23). This argument needs no extended discussion. Long ago, both the federal and the State governments determined that highway safety would be improved by limiting the number of hours that commercial drivers spend behind the wheel. As the record of the enactment of the ELD Rule indicates repeatedly, efforts at limiting HOS through the use of paper logs were frustrated by the ready ability of drivers and carriers to record and maintain inaccurate information. The ELD Rule is intended as a means of increasing the reliability of the HOS data that has been subject to collection for decades. Thus, its relevance to a legitimate public interest is manifest.

Petitioners assert, however, that “an increase in accidents for small carriers since the

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implementation of the federal ELD requirement” is evidence that the ELD Rule will not achieve its intended goal (*Id.* at p 24). Aside from the obvious *post hoc, propter hoc* logical flaw in this argument, there is no authority for the proposition that the failure of a regulation to accomplish its desired objective renders that regulation facially unconstitutional. Accordingly, respondents have succeeded in demonstrating the absence of a cause of action here.

Finally, the Court would like to commend counsel for the zeal with which they have advanced their positions in this litigation. This Decision and Order is being drafted remotely while Court operations have been curtailed by the Coronavirus pandemic. The events of recent weeks have underscored both the importance of Constitutional protections and the frightening ease with which they can be imperiled. Today more than ever we are reminded that eternal vigilance is indeed the price of liberty. Kudos to those attorneys who zealously continue to press for heightened scrutiny of government action.

For the reasons stated above, it is

**ORDERED** that the motion to dismiss the petition/complaint is granted.

This shall constitute the Decision and Order of the Court. Counsel for respondents/defendants are directed to serve a copy of this order with notice of entry upon all counsel within five (5) days after this Decision, Order and Judgment is uploaded on NYSCEF. Counsel are not relieved from the applicable provisions of 22 NYCRR § 202.55-bb relating to filing, entry, and notice of entry.

SO ORDERED.

ENTER.

Dated: May 1, 2020  
Albany, New York



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Catherine Cholakis  
Acting Supreme Court Justice

**DECISION & ORDER****Papers Considered:**

Notice of Motion dated September 23, 2019; Affirmation of Assistant Attorney General Helena Lynch dated September 23, 2019; annexed Exhibit 1; Memorandum of Law dated September 23, 2019;

Verified petition/complaint dated August 7, 2019; annexed Exhibits A-D;

Memorandum of Law in Opposition dated November 8, 2019;

Reply Memorandum of Law dated November 20, 2019.