

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

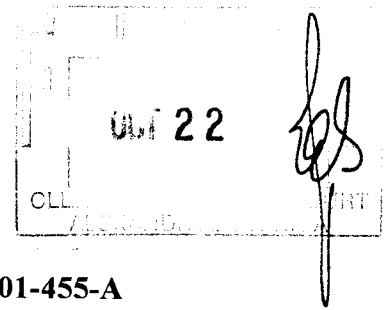
UNITED STATES OF AMERICA,

Plaintiff,

v.

ZACARIAS MOUSSAOUI,

Defendant.



Criminal Action No. 01-455-A

**BRIEF OF INTERVENER ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO
IN OPPOSITION TO MOTION OF GANNETT SATELLITE INFORMATION
NETWORK, INC. FOR ACCESS TO COCKPIT VOICE RECORDER TAPES**

Intervener Association of Flight Attendants, AFL-CIO ("AFA"), the union representing 50,000 flight attendants, submits this brief in opposition to the motion of intervener Gannett Satellite Information Network, Inc. ("Gannett") opposing the Government's Motion for Protective Order Regarding Cockpit Voice Recorders (CVR).

The Government has informed the Court that it intends to introduce into evidence and play the CVRs for Flight 93 and ExecuJet 956. As required by Federal statute, the Government requested the Court to enter a protective order regarding the CVRs played at trial. Gannett entered a motion to intervene to oppose the Government's request for a protective order. The Air Line Pilots Association ("ALPA") entered a motion to intervene to oppose Gannett's motion to uphold the law and protect the privacy interests of its members who were the pilots on those flights. The AFA also seeks to intervene to oppose Gannett's motion because flight attendants' voices are sometimes heard on these tapes and it is possible that a flight attendant's voice is heard on the UAL 93 CVR tape.

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Federal law 49 U.S.C. §1154 specifically prohibits release of the CVR tapes and transcripts to Gannett in order to protect the privacy interests of airline crewmembers. Congress recognized that, although CVRs may play a valuable role in promoting airline security, constant monitoring of the workplace also creates an extreme intrusion and violation of privacy to which few workers would consent but for the higher values served. Congress sought to balance these interests in by limiting the use of CVR tapes and transcripts. The AFA is particularly interested in the maintenance of Congress' intended nondisclosure requirements applicable to CVR tapes because recently Congress has authorized the use of video monitors provided they are subject to the same nondisclosure requirements as CVRs. It is crucial that these recordings be afforded the protection Congress intended if they are to be accepted in the workplace. The AFA membership will be irreparably harmed as they will suffer an erosion of confidence, a sense of unwarranted and unwanted intrusion, and a loss of privacy. The requested protective order is Constitutionally acceptable because it satisfies the Supreme Court's rules for sealing of court documents. It is a limited measure narrowly tailored to protect the crewmembers' privacy, and to protect their families and colleagues from the trauma of repeated airings in the media of the CVR tapes at issue.

I. FEDERAL LAW PROHIBITS PUBLIC DISCLOSURE OF COCKPIT VOICE RECORDER TAPES.

Gannett does not have a right of access to the CVR tapes the Government expects to use at trial. Public disclosure of CVR tapes and transcripts violates the privacy interests of airline crewmembers involved in airline disaster and their families because CVR tapes' and transcripts' dissemination through the media subjects the deceased and their families to unwanted intrusion and exploitation. Repetitive playing of accident recordings offends and traumatizes victims' families and

colleagues and serves no useful public purpose. For these reasons, Congress has specifically and repeatedly prohibited public disclosure of CVRs.

As described more fully in the Brief of Intervener Air Line Pilots Association, International in Opposition to Motion of Gannett Satellite Information Network, Inc. for Access to Cockpit Voice Recorder Tapes the history of legislation regarding CVR tapes clearly illustrates that Congress intended for CVRs to be used in very limited circumstances, and not be available to the news media. Brief of Intervener Air Line Pilots Association 4-11. Although CVRs present an invasion of privacy for airline crewmembers, they also provide a unique opportunity to advance aviation safety by facilitating analysis of aviation accidents. Thus the FAA requires CVRs, but with limitations that they only be used for accident investigation and prevention. Federal Regulations state that the FAA only use the CVR record,

to assist in determining the cause of accidents or occurrences in connection with investigations under Part 830 [of the NTSB's regulations]. The [FAA] Administrator does not use the record in any civil penalty or certificate action.

14 C.F.R. § 121.359(h)(2002).

In response to the appearance of CVR transcripts in the media and subsequent trauma to the victims' families, Congress also limited the extent to which the National Transportation Safety Board ("NTSB") could make CVR tapes and transcripts available to the public, providing,

The Board may not disclose publicly any part of a cockpit voice or video recorder recording or transcript of oral communications by and between flight crew members and ground stations related to an accident or incident investigated by the Board. However, the Board shall make public any part of a transcript or any written depiction of visual information the Board decides is relevant to the accident or incident--
(A) if the Board holds a public hearing on the accident or incident, at the time of the hearing; or
(B) if the board does not hold a public hearing, at the time a majority of the other factual reports on the accident or incident are placed in the public docket.

49 U.S.C. 1114(c)(1).

Congress also recognized that CVR tapes and transcripts may provide valuable evidence in litigation, and made them available for such purpose. However, Congress imposed limitations on CVR information in judicial proceedings in 49 U.S.C. § 1154 to prevent the news media from acquiring for public broadcast copies of CVR tapes put at issue during trial. § 1154 allows use of a part of a CVR tapes or transcript at trial, “only if the court places the part of the transcript or the recording under seal to prevent the use of the part of the transcript or the recording for purposes other than for the proceeding.” 49 U.S.C. 1154(a)(4)(B). By the plain language of § 1154, the CVR tapes at issues may not be used for trial unless they are placed under seal. As Intervener ALPA illustrates more fully in its brief, these pieces of legislation, and others, were enacted in response to the broadcasting of CVR material in the media. The purpose of the statute, according to the House Committee Report, was to “prohibit CVR tapes from being released to the public.” H.R. Rep. No. 661, 101st Cong., 2d. Sess. 4 (1990). Congress enacted §1154 to forbid exactly what Gannett is seeking here- the acquisition by the news media of the CVR tape or transcript from an airline disaster. Gannett’s request for access to the CVR tapes should be denied.

II. THE CONFIDENTIALITY OF CVR TAPES AND TRANSCRIPTS MUST BE PROTECTED TO FACILITATE THE ADOPTION OF FURTHER AIRCRAFT MONITORING DEVICES THAT WILL BENEFIT PUBLIC SAFETY.

To promote airline safety Congress has recently authorized airlines to place monitors in aircraft cabins. Section 104 of the Aviation and Transportation Security Act of 2001 authorizes the Administrator of the Federal Aviation Administration to

develop and implement methods to use video monitors or other devices to alert pilots in the flight deck to activity in the cabin, except that the use of such monitors or devices shall be subject to nondisclosure requirements applicable to cockpit video

recordings under section 1114(c).

Upon information and belief, a number of airlines are contemplating such monitors.

Cabin monitors and other devices present a similar tension between privacy and safety as the CVRs. If this Court fails to accord protection to the UAL 93 CVR, the intrusive nature of these devices will become greater. In the event of an airline disaster, the potential for media exploitation of any recordings from such monitors would be significant. The airlines will more easily and effectively implement cabin monitors if flight attendants do not view them as workplace and privacy intrusions. The benefit will be to the public. The protections Congress intended for such recordings must remain in place.

AFA is concerned that if this Court fails to accord protection to the UAL 93 CVR here, its membership will conclude that the Courts are unable to enforce Congress' intent that the privacy interest of deceased and injured crewmembers and their families be protected. Furthermore, there will be no effective protection for CVRs and cabin recordings in the future. The AFA membership will be irreparably harmed as they will suffer an erosion of confidence, a sense of unwarranted and unwanted intrusion, and a loss of privacy.

III. GANNETT HAS FAILED TO ARTICULATE A PERSUASIVE REASON FOR THE COURT TO VIOLATE THE PRIVACY RIGHTS OF VICTIMS, AND THEIR FAMILIES AND COLLEAGUES.

Gannett wants to publish the transcripts of the CVRs from UAL 93 and ExecuJet 956 to sell newspapers. In its brief, Gannett noted that the case was of great public interest. Gannett prophesied that the CVR tapes would reinforce “the horror of the acts of which defendant is accused” and “reveal that the passengers and crew of Flight 93 did not die in vain.” These are not reasons for ignoring Congress' clear intent to respect the privacy of deceased crewmembers.

The protective order sought by the Government is a limited measure that appropriately balances the privacy interests described herein and the Constitutional protections in favor of open trials. Although the Supreme Court has held that the Constitution favors open judicial proceedings, it has held that the right of access to criminal trials is “not absolute.” Globe Newspaper Co. v. Superior Court, 457 U.S.596, 606 (1982). The Court has held that in order to bar the press and public, the State must show that denial of such right is necessitated by a compelling government interest and is narrowly tailored to serve that interest. Id. at 606-07. The Court applied this test in Press-Enterprise Co. v. Superior Court of California, in which all but three days of a six weeks voir dire was closed to the public and press to protect the privacy of potential jurors in a rape case. 464 U.S. 501 (1984). The Court acknowledged that the potential jurors’ privacy interests may be a compelling government interest to be balanced against the presumption in favor of openness. Id. at 512. The Court suggested that appropriate measures in that case would have been to give potential jurors an opportunity to request to answer some questions in camera with counsel present. Id. The Court stated that a transcript could be available to the press later, “if the judge determines that disclosure can be accomplished while safeguarding the juror’s valid privacy interests.” Id. Under the Court’s suggested solution, keeping some of the transcript sealed was constitutionally acceptable.

The protective order requested by the Government in this case is a similarly acceptable limit on the presumption in favor of open judicial proceedings. The privacy interests of the victims and desire to protect their families and colleagues from the trauma of media exposure of the CVR tapes and transcripts is a compelling government interest under the Court’s test. As described above, Congress has repeatedly sought to protect those interests. The CVR tapes and transcripts exist as a result of a social compact between flight crewmembers and the public in which crewmembers

submit to an extreme workplace intrusion to promote public safety, in exchange for which the government protects their privacy.

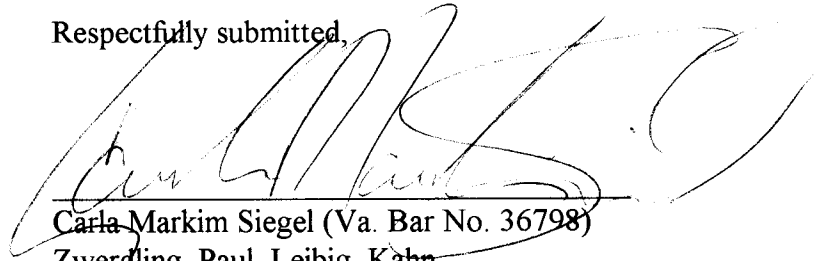
The limitation to protect crewmembers' privacy proposed by the Government- the protective order- is narrowly tailored to protect that privacy while still favoring an open trial. The Court found that openness is necessary because it assures the public that standards of fairness are being met, stating "openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Press-Enterprise at 508. In this case, the public is aware that the CVR tapes are being offered as evidence in this case. The public is aware of the general nature of those tapes. The tapes have been described in the press, as Gannett cited in its brief. The public does not need to hear the tapes themselves to determine whether standards of fairness are being met. Gannett did not express any concern that the public needed to hear the tapes to be assured of the fairness of the trial. Gannett wants them because they are newsworthy. That is not a reason to release them.

CONCLUSION

For the foregoing reasons, Intervenor Association of Flight Attendants, AFL-CIO, urges the Court to grant the motion of the United States for a protective order sealing the CVR tapes and transcripts of the cockpit voice recorders aboard United Airlines Flight 93 and ExecuJet Flight 593 on September 11, 2001 in accordance with 49 U.S.C. §1154; and grant the Motion of AFA to close the courtroom to the press and public during any actual playing of the CVR tapes.

Dated: October 22, 2002

Respectfully submitted,



Carla Markim Siegel (Va. Bar No. 36798)

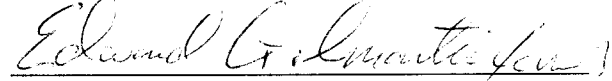
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