

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

UNITED STATES OF AMERICA,)
)
)
 Plaintiff,)
)
 - vs -)
)
 ZACARIAS MOUSSAOUI,) Criminal No. 01-455-A
)
 Defendant,)
)
 GANNETT SATELLITE INFORMATION)
 NETWORK INC.)
)
 Movant-Intervenor.)

**GANNETT SATELLITE INFORMATION NETWORK, INC.’S REPLY TO
ASSOCIATION OF FLIGHT ATTENDANTS’ BRIEF CONCERNING
COCKPIT VOICE RECORDER TAPES**

Gannett Satellite Information Network Inc. d/b/a USA Today respectfully submits this reply to the Brief of Intervener Association of Flight Attendants, AFL-CIO (Docket No. 627).

PRELIMINARY STATEMENT

The Government wishes to offer cockpit voice recordings from United flight 93 and ExecuJet 956 into evidence at trial, and seeks a protective order to restrict further dissemination of that evidence (Docket No. 399). USA Today opposes the protective order motion (Docket No. 432). The Association of Flight Attendants, AFL-CIO (“AFA”) has filed a brief (1) supporting the protective order, (2) contesting USA Today’s application (Docket 627), and (3) seeking to close the courtroom while any CVR tapes are played. This brief responds to the AFA’s submission. The motion for a broad protective order should be denied, as should AFA’s motion for secret judicial proceedings.

ARGUMENT

There is a strong constitutional right to open and public judicial proceedings. Docket 432; Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-14 (1986); In re State-Record Co., Inc., 917 F.2d 124, 127 (4th Cir. 1990); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572-73 (1980). The public and press's right of access to criminal trials is integral to the judicial system. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982). AFA has no standing to seek closure of the trial in this case. Nor is there a constitutionally adequate basis for its reflexive and unsupported motion (Docket 625 at 3; 627 at 8) to close the courtroom to the press and public if and when CVR tapes are played to the jury. AFA's motion to close the courtroom should be denied.

AFA also joins the Government's application for a protective order, precluding dissemination of CVR tapes beyond the confines of the courtroom. AFA, too, invokes the statute purporting to regulate the manner in which federal trial evidence must be handled to prevent the use of cockpit voice recordings for purposes "other than for the [trial]." 49 U.S.C. 1154(a)(4)(B). USA Today opposes that broad protective order request.

The First Amendment grants the public and press an independent right to review "documents submitted in the course of a trial." In re Time, Inc., 182 F.3d 270 (4th Cir. 1999). A common law right to "right to inspect and copy ... judicial records and documents" complements that First Amendment right, and carries with it "a strong presumption that material introduced into evidence at trial should be made reasonably accessible in a manner suitable for copying and broader dissemination." United States v. Criden, 648 F.2d 814, 819, 823 (3rd Cir. 1981); In re National Broadcasting Co. (Meyers), 635 F.2d 945, 952 (2nd Cir. 1980).

AFA urges that the statute balances the interests in airline security and the crewmembers' right to privacy. Docket 627 at 2-3. According to the Government, however, the statute is intended to "protect the National Traffic Safety Board against premature public speculation regarding the cause of any airline crash so it may 'conduct a full and fair investigation.'" Docket 552 at 2 (quoting McCoy v. Southwest Airlines Co., Inc., 208 F.R.D. 617 (C.D. Cal. 2002)). Yet the government candidly acknowledges that "[o]f course, these concerns are not present here because the crash of Flight 93 resulted from a criminal act." Docket 552 at 3.

Nothing in USA Today's opposition, however, need jeopardize the airline crews' privacy interests so important to AFA. USA Today has acknowledged that to "the extent that crew members' voices are heard ... a protective order as to the portion of the tapes upon which the voices appear might be appropriate." Docket 432 at 6.

Nor, of course, will the broad, inflexible protective order urged by AFA necessarily advance the privacy interests with which AFA is concerned. Contrary to AFA's implication, the CVR tapes do not contain solely the private, intimate conversations of pilots and crew during an aircraft disaster. Rather, the tapes portray the scene of a violent crime. Thus, the Government has described its proposed evidence as follows (Docket 552) :

- § "there are no national security concerns or other policy reasons why the tapes and transcripts should be sealed" (id. at 1);
- § the CVR tapes are the "best available evidence of the violent charges contained in the Indictment" (id. at 11);
- § the CVR for Flight 93 explicitly "shows the attack and its impact on the flight of the plane" (id. at 6);

§ the CVRs “constitute probative evidence that directly substantiates the overt acts charged in the Indictment” (id. at 6);

§ “the CVRs are probative of the identity of the hijackers” (id. at 5);

§ the CVRs contain the hijackers voices; “[s]imply put, there is be no better evidence of the hijacking than the actual words of the hijackers during the course of the hijacking” (id. at 5).

The CVRs in question have, moreover, already been disclosed by the government outside of the avenues contemplated by the statute. Evidently, the National Transportation Safety Board disclosed some or all of the tapes to the FBI, and perhaps other governmental agencies – disclosures not provided for by the statute. The government has also disclosed some or all of the tapes to the families of the victims of Flight 93. These disclosures by the government have in turn led to additional public disclosures and discussions by some who heard the recordings.

The situation at bar is therefore similar to the situation in Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608-09 (1982), where sensitive information was already in the public record. Globe established the importance of a “case-by-case” determination of the appropriateness of closure. Globe, 457 U.S. at 609-610. That is what USA Today suggests in this case. To the extent that the statute may continue to serve the interests of protecting crewmember privacy, a particularized inquiry by the Court – such as that contemplated by Globe -- can achieve that statutory objective. Globe 457 U.S. at 609. Broad and reflexive application of a statute, the purpose of which has been undercut by earlier disclosures, serves no purpose other than to deprive the public of information in which it has a compelling interest.

Dated: October 30, 2002

Respectfully submitted,

NIXON PEABODY LLP

By: _____/s/

Robert C. Bernius

(Not Admitted in Virginia)

Leslie P. Arrington, Va. Bar No. 36072

401 9th Street, N.W.

Suite 900

Washington, D.C. 20004

(202) 585-8000

(866) 947-3762

ATTORNEYS FOR GANNETT SATELLITE
INFORMATION NETWORK, INC. d/db/a USA

Today

CERTIFICATE OF SERVICE

I, Leslie P. Arrington, hereby certify that on this 30th day of October, 2002, I caused to be served true and correct copies of the foregoing Brief by hand delivery or by fax and/or first class U.S. Mail, postage pre-paid, as indicated below, on the following:

By Hand Delivery

Zacarias Moussaoui
Alexandria Detention Center
2001 Mill Road
Alexandria, Virginia 22314
(via the United States Marshal's Service)

Robert A. Spencer
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, VA 22314-5794

By Fax and/or First Class U.S. Mail

Carla Markim Siegel, Esq.
Zwerdling, Paul, Liebig, Kahn, & Wolly, P.C.
1421 Prince Street, Suite 400-A
Alexandria, VA 22314
703-299-4371
703-299-4375 (fax)

Gerald Zerkin, Esq.
Assistant Public Defender
One Capital Square, 11th Floor
830 East Main Street
Richmond, VA 23219
804-565-0880
Fax: 804-648-5033

Edward J. Gilmartin
Deidre Hamilton
Association of Flight Attendants, AFL-CIO
1275 K Street, N.W., Suite 500
Washington, DC 20005-4090
202-712-9799

Alan H. Yamamoto, Esq.
108 N. Alfred St., 1 st Floor
Alexandria, Va. 22314-3032
703-684-4700
Fax: 703-684-9700

Frank Dunham, Jr., Esq.
Office of the Federal Public Defender
1650 King Street
Suite 500
Alexandria, Virginia 22314
703-600-0808
Fax: 703-600-0880

Edward B. MacMahon, Jr., Esq.
107 East Washington Street
Middleburg, VA 20118
540-687-3902
Fax: 540-687-6336

/s/
Leslie P. Arrington