

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
)
 v.) CRIMINAL NO. 02-10013-WGY
)
RICHARD C. REID)

DEFENDANT'S REPLY TO GOVERNMENT'S
OPPOSITION TO MOTION TO DISMISS COUNT NINE

The government opposes defendant's motion to dismiss Count Nine, alleging a purported attempt by defendant to violate 18 U.S.C. § 1993(a)(1), which punishes anyone who willfully "wrecks, derails, sets fire to, or disables a mass transportation vehicle or ferry." The government claims that the Boeing 767-300 International airliner at issue in Count Nine is a "mass transportation vehicle."

Among the many points the government makes in its opposition to defendant's motion to dismiss Count Nine, the most important is that there is a federal appellate case, namely, Certain British Underwriters at Lloyds of London v. Jet Charter Service, Inc., 789 F.2d 1534 (11th Cir. 1986), directly on point, holding, in confirmation of defendant's argument, that "an airplane is not a vehicle as the latter term is commonly and ordinarily used." Id. at 1537. (A copy is attached.) We address below Certain British Underwriters and several other points the government raises.

1. Certain British Underwriters

At issue in Certain British Underwriters is whether the term "vehicle" in a particular insurance policy included aircraft. The appellee in that case, like the government here, tried to make the argument that certain dictionary definitions of "vehicle" -- including the Webster's Third New International Dictionary definition upon which the government relies ("a means of carrying or transporting something") (id. at 1536-37, Government Opposition, p. 9) -- include aircraft. The court flatly rejected that approach, quoting from the dissent in a 1973 Iowa Supreme Court case, McReynolds v. Municipal Court of City of Ottuma, 207 N.W.2d 792 (1973):

The difference between the etymological meaning and the man-on-the-street concept of "vehicle" has been recognized by almost all modern-day court decisions interpreting that word. (citations omitted)

The general holding is thus distilled in the annotation found at 165 A.L.R. 916:

"Although the result is always contingent on the particular wording involved, it has been almost invariably held, in the construction of statutes and regulations, that airplanes are not within the terms 'vehicles,' 'motor vehicles,' etc."

Certain British Underwriters at 1537. The court went on to quote

more of the McReynolds dissent, including:

Other supportive statements are found in the following authorities: 8 Am. Jur. 2d, Aviation § 20, at p. 638 ("An Airplane is in a class by itself. It has usually been held, in the absence of any express provision on the subject calling for a different conclusion, not to be within the terms 'vehicle,' 'motor vehicle,' 'vessel,' or the like."); Ballentine's Law Dictionary 1334 (3rd ed. 1969), ("The word [vehicle] is commonly understood as something which moves or runs on the land, not something that

flies in the air, although etymologically the term might be considered as broad enough to cover a conveyance propelled in the air."); 91 C.J.S., Vehicle, at p. 806 ("In everyday speech 'vehicle' calls up the picture of a thing moving on land, and, accordingly, the term ordinarily is not applied to an aircraft * * *."); 2 Funk & Wagnalls New Standard Dictionary of the English Language 2637 (1940) ("vehicle * * *, That in or on which anything is or may be carried; especially, a contrivance with wheels or runners for carrying something * * *; specif., in law, any artificial contrivance used or capable of being used as a means of transportation on land.").

Certain British Underwriters at 1537.

In attempting to distinguish the case, the government says that "the principal dictionary source upon which the panel majority relied, Black's Law Dictionary (5th ed 1979), was revised, prior to the enactment of [18 U.S.C.] Section 1993, to include 'aircraft' within the definition of vehicle."

Opposition, p. 10, n. 4. But the case is crystal clear that it relies not on "etymological," dictionary constructions, but on the "man-in-the-street" concept of vehicle; and the change in definition in Black's is scant evidence of any change in that concept.

(Though not relying upon dictionary constructions, the case brings out a fact about the Webster's Third definition that the government fails to mention: that appropriate adjectives are used to modify "vehicle" when the word is used to refer to airborne conveyances, e.g., the examples Webster's Third gives that include the phrases "aerial vehicles such as airplanes" and

"space vehicles."¹ Certain British Underwriters at 1537. All of this totally undercuts the claim that "the term 'vehicle,' as now commonly understood, embraces an aircraft." Opposition at p. 9.)

2. The Aircraft Analogue to 18 U.S.C. § 1993: 18 U.S.C. § 32

The government repeatedly asserts that Congress, in enacting § 1993 in the wake of September 11, would not have wanted to exclude aircraft from § 1993's reach. The more relevant question is why Congress would have wanted to include aircraft in § 1993, given that crimes against aircraft are already covered, and extensively covered, by another section of Title 18, namely, section 32, which appears in Chapter 2 of Title 18, "Aircraft and Motor Vehicles." (Indeed, Count Seven of the present indictment is brought under § 32.) Thus, subsection (a)(1) of § 32, punishes whoever willfully:
sets fire to, damages, destroys, disables, or wrecks any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce;

¹ There is a substantial error in the government's quotation from Webster's Third definition 5 of "vehicle" as "a means of carrying or transporting something: conveyance . . . a carrier of goods or passengers . . . *such as airplanes.*" (Opposition, p. 9, italics added by government). The phrase "such as airplanes" is not part of the definition: it is taken from one of seven examples of the definition, specifically the example: "<aerial [vehicle]s such as airplanes, and submerged [vehicle]s such as . . . submarines>."

while subsection (a)(1) of § 1993 adapts similar phraseology, with the addition of "derails," to mass transportation vehicles, punishing whoever willfully:

"wrecks, derails, sets fire to, or disables a mass transportation vehicle or ferry[.]

Other subsections of § 32 target more specific wrongdoing directed at aircraft, just as other subsections of § 1993 target more specific wrongdoing directed at mass transport.

(Copies of the two statutes are attached.)

3. Section 1993's Inclusion of Ferries as Mass Transportation Vehicles

The government insists that Congress's inclusion of a "ferry" as a mode of mass transportation "in no way suggests that it also did not view an aircraft to be a mass transportation vehicle within the terms of the statute." Opposition, p. 12. This bald statement is plainly false. Why else place ferries within § 1993's coverage unless Congress meant "mass transportation vehicles" to be ground-based conveyances and wanted to cover waterborne "mass transportation" conveyances as well. It is "a cardinal principle of statutory construction" to "give effect, if possible, to every clause and word of a statute." Duncan v. Walker, 533 U.S. 167, 174, 121 S.Ct. 2120, 2125 (2001), quoting United States v. Menasche, 348 U.S. 528, 538-539 (1955), and Williams v. Taylor, 529 U.S. 362, 404 (2000). "[I]f it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Id.,

quoting from Market Co. v. Hoffman, 101 U.S. 112, 115 (internal quotes omitted).

4. Rule of Lenity

Were it possible to interpret § 1993 as covering aircraft, which we dispute, then defendant prevails under the rule of lenity. The rule requires that "ambiguous criminal statute[s] . . . be construed in favor of the accused." Castillo v. United States, 530 U.S. 120, 131, 120 S.Ct. 2090, 2096 (2000), quoting Staples v. United States, 511 U.S. 600, 619, n. 17 (1994), and citing United States v. Granderson, 511 U.S. 39, 54 (1994); United States v. Bass, 404 U.S. 336, 347 (1971).

RICHARD C. REID
By his attorneys,

Tamar R. Birckhead
B.B.O. #561657
Owen Walker
B.B.O. #513040
Federal Defender Office
408 Atlantic Avenue, 3rd Floor
Boston, MA 02210
Tel: 617-223-8061