ORIGINAL

In the

Supreme Court of the United States

Teamsters Local Union 657, Petitioner. v. Jesse Rodriguez, et al., Respondents.	
Southern Conference Of Teamsters, Petitioner, v. Jesse Rodriguez, et al., Respondents.	No. 75-651
and East Texas Motor Freight System, Inc., Petitioner, v. Jesse Rodriguez, et al., Respondents.	No. 75-715
	No. 75-718

Washington, D. C.
January 10, 1977
January 11, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

TEAMSTERS LOCAL UNION 657, Petitioner, v. JESSE RODRIGUEZ, et al., Respondents.	No. 75-651
SOUTHERN CONFERENCE OF TEAMSTERS, Petitioner, v. JESSE RODRIGUEZ, et al., Respondents.	No. 75-715
and EAST TEXAS MOTOR FREIGHT SYSTEM, INC., Petitioner, v. JESSE RODRIGUEZ, et al., Respondents.	No. 75-718

Washington, D. C.,

Monday, January 10, 1977.

The above-entitled matters came on for argument at 1:53 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

RICHARD C. HOTVEDT, ESQ., Morgan, Lewis & Bockius, 1800 M Street, N. W., Washington, D. C. 20036; on behalf of Petitioner in No. 75-718.

EDWARD W. PENSHORN, ESQ., 519 Majestic Building, San Antonio, Texas 78205; on behalf of Petitioner in No. 75-651.

G. WILLIAM BAAB, ESQ., Suite 200, 8204 Elmbrook Drive, Dallas, Texas 75247; on behalf of Petitioner in No. 75-715.

MRS. VILMA S. MARTINEZ, Mexican-American Legal Defense and Educational Fund, 145 Ninth Street, San Francisco, California 94103; on behalf of Respondents Rodriguez, et al.

RUBEN MONTEMAYOR, ESQ., 301 W. Market, San Antonio, Texas 78205; on behalf of Respondents Herrera, et al.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-651, Teamsters Union against Rodriguez, and the related cases.

Mr. Hotvedt.

ORAL ARGUMENT OF RICHARD C. HOTVEDT, ESQ.,

ON BEHALF OF PETITIONER IN 75-718

MR. HOTVEDT: Mr. Chief Justice, and may it please the Court:

We speak for East Texas Motor Freight, which was charged with violating the Civil Rights Acts for refusing to transfer three Mexican-Americans from city driving jobs they held in San Antonio to road jobs in some other city.

Plaintiffs originally sought class relief as well. But, as we shall discuss later, the trial and record really developed as a suit by three individuals. The defendants were acquitted, securing a dismissal after trial, of all charges.

The Fifth Circuit reversed, deciding that it could determine from its level that the matter warranted class treatment. It set the classes and remanded for remedies. I should say it found liability to them as well, and remanded for remedies.

We seek reversal of that Fifth Circuit decision, restoration of the district court judgment or at least a remand for a proper class determination by the district court.

In the event the district court should certify a class for some trial on liability, we seek guidance on the use of racial statistics as an evidentiary device.

A brief statement of our special facts is in order because of the regrettable tendency of the appellate court to treat all Title VII and trucking industry cases alike. We think we have unique facts in this case, which we should like to tell, not only to secure justice for ourselves but also to put some rational bounds on the generalizations that have come to dominate Title VII litigation.

The company is a common carrier, with many terminals stretching across the country. At some of those terminals it has both city drivers and road drivers. At other terminals it only has city jobs available.

Mr. Rodriguez, Mr. Herrera and Mr. Perez were city drivers in San Antonio, who applied for transfer to a road job in 1970. When their applications were not considered, they attacked the transfer denial as a violation, arguing that the company's localized hiring practice and rule against city-to-road transfer, as well as the contract seniority system, were facially neutral policies that locked them in to lesser jobs.

QUESTION: Now, did San Antonio have road drivers?

MR. HOTVEDT: It did not, Your Honor. There is evidence that, upon the acquisition of a predecessor company, that company had one driver domiciled at that point because of

the way its system fit. But that ceased to be the practice and that was unexceptional in this record, as far as all parties were concerned.

QUESTION: What was the nearest terminal that had over-the-road drivers?

MR. HOTVEDT: I think it was about 240 miles away, elsewhere in Texas; but I'm at a loss to know in which direction. I think it was to the north, up towards Dallas.

The key fact here is that when plaintiffs originally applied for jobs, they did so in a place where there were no road jobs. They asked for and got the only job that the company had to offer in San Antonio. And we think that these facts distinguish this case from Franks v. Bowman and the similar seniority cases with which this Court is familiar.

Plaintiffs complained of Civil Rights violations as to themselves and a class of Mexican-Americans and blacks. All defendants opposed the claim for class relief, in their answers.

QUESTION: There was no claim of any discrimination in their original hiring. Well, if you're right, that these were -- that they were hired on their first application, there couldn't have been.

MR. HOTVEDT: Not only that, Your Honor, but at the trial plaintiffs stipulated that they had not been discriminated against when they were hired at San Antonio.

Plaintiffs did not move for a class certification. No court-managed pretrial conference occurred.

On the morning of the trial, the parties reached case-narrowing stipulations, the most important of which was, and I quote, "the only issue presently before the court pertaining to the company is whether its failure to consider plaintiffs' applications violated Title VII and Section 1981."

So the trial went on. The ruling rejecting any class status came in the post-trial findings. During trial, a colloquy among court and counsel showed opposition to and doubt about whether this was being tried as a class action.

In the Fifth Circuit, the district court's findings of nondiscrimination as to the named plaintiffs and lack of personal qualifications were reversed. We ask for restoration of Judge Wood's judgment, to be sure.

QUESTION: Let me ask you a question, if I may, Mr. Hotvedt, about the class action aspect of the case in the district court.

The plaintiffs did, in their complaint, ask for class certification, did they not?

MR. HOTVEDT: Yes, sir.

QUESTION: Is it your position here, not only that there should have been no class certification on the merits but that they were under some sort of obligation to file a separate motion during the trial?

MR. HOTVEDT: We emphasize the second point, Your Honor. That is, that -- and it is precisely the first point of argument we have here. The fundamental error of the Fifth Circuit, in our opinion, was its disbelief that the plaintiffs had abandoned or waived the class action aspects of it.

QUESTION: Well now, those are two separate points, I would think. One is, after you requested a class certification in your complaint, to simply omit filing a motion prior to trial. I think that would stand on quite a different footing than if in a stipulation in open court you say, We no longer seek class certification.

MR. HOTVEDT: Well, Your Honor, it's our view that the burden for moving under Rule 23 to clear up the confusion in cases of this kind should very well be placed upon the plaintiffs, whose responsibility it is to fulfill the internal elements of the rule as well.

We point out that in this record we had the cumulative development of no movement for class certification by the plaintiffs, the stipulation I have referred to, and then the form of a trial which concentrated upon the individual issues. And we think that for these reasons the reasoning of the district court judge was correct. And more important, from our standpoint, we had reason to rely upon it being tried as an individual action. And we think it was error for the Court of Appeals to disbelieve that it was tried as an individual

action.

QUESTION: But you still -- I understood from your original statement, the Court of Appeals could have said that "We will remand it for consideration"?

MR. HOTVEDT: Indeed. Even if --

QUESTION: And they would have -- they didn't argue it in the Court of Appeals?

MR. HOTVEDT: We did not, and it's interesting to note that even the plaintiffs, when they approached the briefing to the Court of Appeals, said, and I quote, "The class action question has never been considered by the lower court."

When the Court of Appeals came to the determination that the plaintiffs had not abandoned the class issue, looking at the state of confusion in the colloquy in the record, and the different views on this point, the wise thing to do, the correct thing to do would have been to remand for a fresh determination on that point. In fact, for the first determination on that point.

QUESTION: But you don't -- I mean, you're not limited to that. The Court of Appeals could have said that it is over.

MR. HOTVEDT: Well, as I -- for the reasons I answered to Justice Rehnquist.

QUESTION: Yes.

QUESTION: In what respect would you have tried the

case differently had you not relied on the stipulation?

MR. HOTVEDT: If we had been assaulted frontally with a pattern and practice type of case, or with a broad class type of case, one brings to bear the kind of statistical and expert evidence, it goes to the depth and breadth of one's trial preparation, and the extent to which one goes in handling the argument, Your Honor.

But my point is not that this record is ready to demonstrate we could have satisfied such a case, my point is we deserved a fresh chance to counter such an approach.

One of the points that the Fifth Circuit made in saying that it's of little mind that Rule 23 is being decided at this level rather than at the district court level, was that one should take a liberal approach to the interpretation of Title VII, or Rule 23 in Title VII cases.

That expression about liberality in the interpretation of Rule 23 is all right as far as it goes, but I think it arose, at first, in the context of Title VII when defendant employers in the early Sixties or mid-Sixties were saying "no classes should arise in Title VII cases." And so the dictum arose that these are inherent class cases, or this relief is inherently class relief.

But that's what it is, by generalization or a dictum.

What we are faced with today, arising from at least this Court of Appeals, is the notion that Rule 23 in Title VII

cases contains within it some mandate for automatic results in favor of the plaintiffs on the class issue. And that's the extreme we call into question.

We think it was also especially erroneous for the Court of Appeals to have set the classes at its level rather than remanding to the district court. In the light of what it then knew to be the fact, the development of a major consent decree reached following a 707 action brought by the Justice Department against our client, East Texas Motor Freight; and before the case was argued to the Fifth Circuit, before it decided it, it knew that massive relief had been granted: monetary, seniority, alteration of qualification rules, et cetera.

It arrived on the scene at the time the Court of Appeals was in a position to look at the issues extant in the Rodriguez case, and offer yet another reason against the background of the confusion I referred to earlier. For the Court of Appeals to have sent it back to where it belonged for the proper determination of a class issue, for the informed judgment of a district court, in developing a record on that point.

QUESTION: Then what would you do after the Court made the determination of the class, would you then move to re-open and offer some additional proof?

MR. HOTVEDT: We certainly would, but it would much

depend on the shape of the class, Your Honor.

For example, the consent decree has overlapping reaches down into the group that arises in San Antonio. We may very well have arguments that the class should be so narrowed to one terminal or just a few terminals or to just a limited number of persons in the light of what justice was secured under the auspices of Judge Sarah Hughes in Dallas, when we reached the consent decree.

We would further find that in its application internally of Rule 23, the Fifth Circuit erred by its somewhat cavalier approach to how you go about satisfying the internal elements.

I won't dwell on that. We have briefed it extensively. We would simply state that we think it unfair for the Court of Appeals to say that there is no serious challenge, that the internal elements of Rule 23(a) have been satisfied.

That hasn't even been focused yet. We think that plaintiffs, even in a Title VII case, should be put to the test of thos rules. And if we get a class action determination, we're prepared to challenge commonality, typicality; indeed, adequacy of representation has not been aired.

And it's interesting that we have here, for example, the implications of severe questions about commonality and typicality and adequacy of representation arising from within facts where you have people of different kinds of ethnic

discrimination being claimed, with Mexican-Americans borrowing statistics from blacks, with people from San Antonio,with no road jobs, being represented by counsel with aspirations to speak for people at domicile terminals.

The implications of need for such an airing of those issues are pretty clear, we think, on the remand.

We turn now to the proof of liability issue.

We think that the Court of Appeals erred in establishing the components of a prima facie case in class actions under Title VII by the sweeping assumption that statistical differences between work force and population, standing alone, are sufficient to make a prima facie case.

Preliminarily here, we would note the government position, which arrives in recent weeks, and we note that it urges a remand for a new trial on the issue of liability, saying that the Fifth Circuit erred by determining liability to a class; and they concede that this could have been premature and prejudicial to the defendant employer, with no fair chance to contest liability on a class scale.

That's a welcome concession. We think it carries within it the logical implication that we were similarly disadvantaged on the class issue, but we are prepared to receive it on any terms.

As to proof of discrimination based on statistics alone, or at least sufficient to shift the burden of proof, we

recognize that proof of discrimination seldom comes in quotable form. One has to search for circumstantial evidence: expressions, remarks, conduct, inconsistent behavior and, indeed, statistics.

So what we are seeing now is the statement that a raw numerical disparity over a broad geographical area between population statistics and the employer's work force constitutes that element of proof which will shift the burden from the plaintiff to the defendant and, in a court such as the Fifth Circuit, put the employer in a hole from which it is very difficult to extricate himself.

We think it especially ironic that this reliance on such undifferentiated statistics should arise under a statute which contains the congressional caution of Section 703(j). We;re not suggesting that that section prohibits the use of statistics at all, but when the Congress goes to the trouble of suggesting that one should not create special favor for a particular ethnic or racial type because of the statistical imbalance, one thinks then that the development of evidentiary rules under the statute should very well take place in a careful manner.

And we ask, what is the logical reach of -- or what is the inference to be drawn from a statistical imbalance on a broad scale?

QUESTION: Is 703(j) reprinted here somewhere?

MR. HOTVEDT: In the Joint Appendix, Your Honor, on the penultimate and final page.

QUESTION: Yes.

MR. HOTVEDT: We have this case arising from within San Antonio, Texas, where we have three individual plaintiffs, Mexican-Americans, who would borrow, for purpose of burden shifting proof, black and Mexican-American statistics from the system at places where those jobs existed.

But what logical inference is there, particularly in the context of their earlier stipulation, that they had not been discriminated against at the time of hire, that these people suffered hiring discrimination?

We say none.

We think it's time for the development within the plaintiffs' case of a requirement for congruity between the statistics they use and the available labor market and skills and ages of the workers, and whether these people, as plaintiffs and as members of plaintiff class, were reasonably within the zone of those who could have been impacted by the adverse hiring decision.

Messrs. Rodriguez, Herrera and Perez, and similar city drivers like themselves at San Antonio, or at other terminals that were not places where one domiciled drivers, certainly not on this record is there any basis for concluding that they were reasonably within that zone.

QUESTION: Where was the closest terminal that domiciled drivers, over-the-road drivers?

MR. HOTVEDT: About 240 miles away, Your Honor.

And I would point out that the Fifth Circuit, somehow sensing in the latter stages of its opinion that the element of discrimination in hire is somehow an element of the guidance it secured from this Court earlier, tried to supply that on a bare record by presuming labor mobility in South or West Texas for Mexican-Americans with a reference to its own out-of-context, or different context development in the Johnson v. Goodyear case.

And that's all there is for the Fifth Circuit making up, at the appellate level, arguments, proofs, evidence, et cetera, on labor mobility which might supply the element of discrimination in hire for these people.

My time has expired. I have reserved four minutes for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Penshorn.

ORAL ARGUMENT OF EDWARD W. PENSHORN, ESQ.,

ON BEHALF OF THE PETITIONER IN 75-651

MR. PENSHORN: Mr. Chief Justice, and may it please the Court:

In the Rodriguez case, the individual plaintiffs named not only their employer, East Texas, as a defendant, but

joined the Southern Conference of Teamsters and it's their own Local Union 657, which is located in San Antonio.

The trial court held that Local 657 had not violated either Title VII of the Civil Rights Act or Section 1981 with respect to these three individual members of that Local.

The Fifth Circuit reversed as to the unions, and specifically 657, with this language: For their role in establishing separate seniority rosters, it failed to make allowance for minority city drivers, who have been discriminatorily relegated to city driver jobs.

I understand that language to mean that Local 657 has been held by the Fifth Circuit to have violated both Section 1981 of Title 42, and Title VII, for failing to establish some type of contractual right to transfer with what is commonly called company seniority.

With that in mind, I would like to call the Court's attention to some of the pertinent facts that I believe are relevant to the position of Local 657 with regard to remedying or doing what the honorable Fifth Circuit said it should have done.

QUESTION: Mr. Penshorn, will you first give me the jurisdiction of the Local?

MR. PENSHORN: Yes, sir. The jurisdiction, the geographical jurisdiction, Your Honor, of Local 657 is bounded on the south by the Mexican border, it runs north approximately

250 miles to Austin, Texas, and west some distance, oh, I would say approximately 200 miles.

Does that answer Your Honor's question?

QUESTION: No, sir. Does that include the city drivers and the road drivers?

MR. PENSHORN: As Mr. Hotvedt pointed out, Local 657 has no representation jurisdiction of any road drivers employed by East Texas, because none are domiciled within the jurisdiction of this particular Local Union.

Does that answer your question?

QUESTION: That means that whole area?

MR. PENSHORN: That whole area. There were none within that area.

QUESTION: So the employees you represented were all city drivers or other city employees?

MR. PENSHORN: Yes, sir, that is correct.

QUESTION: Unh-hunh.

MR. PENSHORN: That is exactly correct.

And another very important fact about this particular Local Union is that it is and always has been an integrated Local Union.

QUESTION: One other thing: who represents the line drivers in that same geographic area?

MR. PENSHORN: It depends, Your Honor, upon where they are domiciled. If they were domiciled in San Angelo,

which is within another Local's jurisdiction, that Local would. The Dallas Local, which had some, I believe, at the relevant time, would be represented by that Local Union, in Dallas.

QUESTION: I see.

MR. PENSHORN: But there were --

QUESTION: None is domiciled within your geographical jurisdiction, --

MR. PENSHORN: No, sir.

QUESTION: -- some drive through it, and the Local to which they belong would depend upon where they are domiciled?

MR. PENSHORN: Exactly, Your Honor.

Local 657 put into evidence in this record a statistical summary of the racial breakdown of all the employees of East Texas Motor Freight for the period from 1952 to, I believe, 1971. And if my memory serves me correct, that statistical summary showed that Mexican-Americans and Negro employees were in the majority in the employment of East Texas within this jurisdiction from the period 1952 until 1972.

In further anticipation of what we thought would be the plaintiffs' attempts to show some specific conduct by Local 657, amounting to violation of these two statutes, we also compiled, and there is in this record, a statistical

breakdown of the general membership of Local 657, which reflects that since 1965 the majority of the general membership have been Mexican-Americans and Negroes.

A third statistical summary that was introduced by Local 657 pertained to the racial composition of this particular bargaining unit, and by that I mean the bargaining unit consisting and covered by the National Master Freight Agreement and the Southern Conference Supplement.

That statistical summary also showed that since 1965 the majority of the employees within the jurisdiction, representation jurisdiction of Local 657, working for this employer, were also Mexican-Americans and Negroes. Certainly negating any contention that within the jurisdiction of Local 657 there was any hiring discrimination by this employer with which this Local defendant could have participated.

Now then, in the briefs before the Court, we call the Court's attention to the bargaining procedures which are followed in the negotiation of the National Master Freight Agreement and also the Southern Conference Supplement, to which Local 657 is a party by reason of having given powers of attorney to national and regional negotiating committees.

There is also evidence in this record that at no time, from the period of 1952 to the date of the trial, had any member of this Local Union ever complained in a meeting called for the purpose of presenting contractual demands to the

employer that there was racial discrimination in these contracts.

There is also evidence in this record that at no time, since 1952, had any minority member of this Union, in the proper meetings called for the purpose of obtaining contractual demands, ever made a complaint that these contracts locked them in, and that that so-called lock-in was racially discriminatory.

QUESTION: You're not suggesting that the absence of such statements in a union meeting would be dispositive of this claim, are you?

MR. PENSHORN: No, sir. I'm saying, Your Honor, that -- basically what I am saying is that my position is that the plaintiffs in this case must prove more, they must prove some conduct by Local 657, other than the mere existence of separate contracts for road and city drivers, to hold this Local Union liable.

That is my position. Does that answer your question, Your Honor?

I think that there is also a stipulation in this record that in so far as Local 657 is concerned, that no white city driver has ever transferred from a city driver's job within the jurisdiction of Local 657 to a road driver's job and carried with him his company seniority, for any purpose.

In fact, if my memory serves me right, I don't recall

there being any evidence of a city driver transferring to a road job.

The Court has long ago recognized that national bargaining units are recommended and promoted by Congress, by reason of the National Labor Relations Act. And, as I have already stated, Local 657 entered into this contract and was -- into this negotiating unit, and was bound by its decision as a bargaining unit.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Penshorn.

Mr. Baab.

ORAL ARGUMENT OF G. WILLIAM BAAB, ESQ.,

ON BEHALF OF THE PETITTIONER IN 75-715

MR. BAAB: Mr. Chief Justice, may it please the Court:

First of all, I would like to point out, as the Court may be aware, there is an important factual distinction between this case and the one that preceded it. That is, the employer's absolute no transfer rule at the San Antonio Terminal, which absolutely prohibited the possibility of city drivers transferring to road jobs under any circumstances.

As we pointed out in our brief herein, accordingly, where there can be no transfer, seniority rules which operate only on transfer in fact never operate. So, indeed, at the San Antonio Terminal they had no causal effect and are not an

active consideration in regard to alleged violation of Title VII.

QUESTION: Well, the company had a no transfer rule at every terminal, didn't it?

MR. BAAB: It lifted its no transfer rule, as I understand it, at road domicile terminals for a short period of time in 1972.

QUESTION: Yes.

MR. BAAB: I would like, although it has been discussed in the preceding case, again briefly to address the issue of union liability concerning these seniority rules, which are the same, of course, as those in T.I.M.E.-DC.

Initially I would like to say that Mr. Justice White, I think, is correct in his questions about the position of the union as a Rule 19 defendant. We think that would be our proper position in these cases.

That is so because we regard our seniority systems as bona fide, not having their genesis in racial discrimination, and because we would then be present for the accordance of relief.

But I do want to state that we regard this Court's opinion in Franks as being very clear that, inasmuch as our systems are bona fide, they do not and cannot be read to bar rightful place relief.

And in clarification of what was said to and by Mr.

Wells, I am authorized to state that this union supported it at the time of this trial in this case, in Rodriguez, and T.I.M.E.-DC, and before that and since, the proposition of rightful place relief in these kinds of cases.

QUESTION: What do you understand to be the predicate for the Court of Appeals holding that the union violated the Act here?

MR. BAAB: Well, without quoting it precisely, it states that because the seniority rules do not automatically grant to those who are alleged to be discriminatees full carryover seniority, we, quote, "lock them in", close quote, and that, under the Quarles line of cases, violates Title VII.

QUESTION: But nobody is ever going to transfer, except for -- if the company discriminates.

MR. BAAB: But that is the point, that's the company's discrimination, if that happens. And that's what ought to be addressed.

The question of the seniority rules and their applicability is one of relief.

QUESTION: But there's no special -- that's all there was in this case, also, that there's no finding that the seniority system itself was discriminatory.

MR. BAAB: And there could be none. Everybody admits it's neutral both in its origin and on its face.

Really, the whole lock-in theory, at least as it

applies to these cases, is one of relief.

QUESTION: Then, I want to be sure that I understand you to have made by way of a concession when you began, you concede that you could have been in here as a so-called Rule 19 defendant.

MR. BAAB: Yes. Yes, we do.

QUESTION: For the purpose of according adequate relief to the plaintiffs.

MR. BAAB: Adequate relief based on, if found, employer discrimination at hiring, that's right.

QUESTION: And assuming employer discrimination were validly found, --

MR. BAAB: Yes, sir.

QUESTION: -- what could you have, as a Rule 19 defendant, been ordered to do or not to do?

MR. BAAB: To honor the court's award of rightful place relief to those discriminated against.

QUESTION: What do you envision as rightful place relief in this context?

MR. BAAB: On a very general basis, as applied to this case, job bidding and layoff and recall, seniority in road jobs that the discriminatee would have had but for discrimination against him.

Now, that involves consideration of various elements, which would include either an application or a proven reason

why no application would be made.

QUESTION: On a certain -- at a certain date or at a certain time.

MR. BAAB: Yes.

QUESTION: And then his seniority in the over-the-road local would date from that time.

MR. BAAB: From that time.

What I would like to point out is --

QUESTION: According to that statement, on qualification.

MR. BAAB: Qualification and vacancy.

QUESTION: Yes.

QUESTION: If he was qualified, there was a vacancy, and he did or showed that he abolutely would have made an application, had it not been for racial discrimination.

MR. BAAB: Yes.

QUESTION: But, of course, if the Court happened to disagree with you and say, well, there isn't such a tight proof requirement, you would still say that you still would be -- you still would be an object for the remedy; I mean, you would still have to comply with the --

MR. BAAB: Yes, we would.

QUESTION: Without a finding that you violated the Act.

MR. BAAB: Yes. And we are bound by the rightful

place theory as the courts may define it.

QUESTION: But you wouldn't say that without any violation of the Act having been properly found that you could be liable for back pay?

MR. BAAB: Exactly not.

Well, even if one were found, concerning hiring or transfer, we still think we're not liable.

QUESTION: Well, I know, but the Court of Appeals -- didn't the Court of Appeals say that the district court was going to have to work out some allocation of liability for back pay --

MR. BAAB: Yes.

QUESTION: -- between the union and the company?

MR. BAAB: They did say that. But, of course, that was based on -- the Court of Appeals did say --

QUESTION: But none of your concession would go to back pay?

MR. BAAB: Only rightful place seniority relief, which is our real purpose.

And, incidentally, there has been some discussion about what unions could have done concerning relief, which is -- Mr. Justice Marshall had addressed that. This contract, of course, awards road or city seniority upon entry into that particular bargaining unit.

Of course, the contract in Franks awarded seniority

only upon date of employment for the individuals involved. That contract was not considered to bar the rightful place relief that this Court gave. In fact, quite the contrary. So with ours. If, but for discrimination, this individual would have been in the road unit, there's nothing in our contract that would bar or undercut the award of rightful place seniority.

Really, again, it's just a problem of relief.

But I want to point out, in ending, if I may, the impossibility of the union's position in doing what respondents here, and the government in other case, have suggested that we must: that is, without proof, without determination of discrimination, unilaterally award to minority city drivers, full carryover seniority in road jobs.

That is what respondents say they want here as relief. This case, as Mr. Hotvedt pointed out, was tried primarily on an individual basis.

In proof, concerning the three named individuals, the trial court found they had not properly applied for, had not been qualified for, and had not been discriminatorily denied road jobs. There was no other evidence offered at trial as to any other individual, No. 1, applying for or even wanting a road job, as to any other individual in a class of some 200 people, the class they want, the Texas-wide class, even being qualified for a road job, and scant evidence as to

vacancy.

This Court recognized in McDonald vs. Santa Fe Trail, that, indeed, a union's Title VII obligation extends to members and representative employees of all races. Were we unilaterally to award road seniority to minority city people under those circumstances, whites would absolutely have a claim of reverse discrimination against us.

We have to wait until either the individuals allege discrimination and seek to use the grievance procedure to prove it, to get their rightful place that way, or go to court, or if we can have a factual situation where, as we do from time to time, work out an agreement and effect the award that way.

But the Solicitor General himself has agreed in his brief in the Jersey Central case that to prefer any minority individual simply because of his membership in a class, rather than based on a showing of individual discrimination, would be to effect reverse discrimination. That's what is prohibited.

We don't want to effect reverse discrimination. Nevertheless, we strongly adhere to the proposition of rightful place relief.

Thank you.

QUESTION: Mr. Baab, do you read the Court of Appeals opinion to find clearly erroneous the district court's disposition of those three individual cases that you mentioned?

MR. BAAB: They used the words "clearly erroneous". A careful reading of his reasons for doing so, I think, indicate that can't be supported. But they do use the words, saying the finding is clearly erroneous. But they really find that there was, as the employer said, discrimination in the air, that there appeared to be a pattern and practice of discrimination, although not against any single identifiable person.

Then, against that background, well, the findings against the individuals must have been erroneous, so go back and see if they were.

QUESTION: And what if we agreed with you on the class action matter, that the Court of Appeals should not have, itself, designated the class. I take it from your brief that you think that before a class could be designated, that there has to be some hearings.

MR. BAAB: Well, I guess that's Mr. Hotvedt's brief. I actually --

QUESTION: Oh, I'm sorry.

MR. BAAB: -- didn't brief the question. But I think there should be --

QUESTION: What do you think? If we agreed that the Court of Appeals shouldn't have done that, do we stop there and send it all back?

MR. BAAB: I would think not, upon this record. I

personally think the case was tried as an individual action, no proof was offered concerning the class except that there was a group of 200 minority city drivers. There was shown no adverse impact on any of them, by virtue of the alleged actions.

QUESTION: Well, you would say that the Court of Appeals erred in the class designation, that we should then reverse and reinstate the judgment of the district court?

MR. BAAB: That would be my opinion, because there is no basis for finding, then, that the -- the finding as to no discrimination was clearly erroneous, as to the factual findings on which that was based.

QUESTION: Because -- with respect to these three people?

MR. BAAB: The claim of discrimination of these three people was fully tried.

QUESTION: Yes.

MR. BAAB: There in the trial court.

Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Martinez.

ORAL ARGUMENT OF MRS. VILMA S. MARTINEZ,

ON BEHALF OF THE RESPONDENTS RODRIGUEZ, ET AL.

MRS. MARTINEZ: Mr. Chief Justice, and may it please the Court:

This case involves a number of legal and factual

questions, some are technical complaints.

Petitioners strenuously argue these complicated points and try to obscure the basic nature of this case.

In approaching the difficult question --

MR. CHIEF JUSTICE BURGER: Mrs. Martinez, may I suggest that you lower the lectern, so that you will get the microphone -- if you will lower it with the --

MRS. MARTINEZ: Oh.

MR. CHIEF JUSTICE BURGER: Then you will be closer to the microphone.

MRS. MARTINEZ: I didn't know this was possible, Your Honor.

MR. CHIEF JUSTICE BURGER: Well, it's very flexible here.

MRS. MARTINEZ: Is that better?

MR. CHIEF JUSTICE BURGER: Yes, that's better.

MRS. MARTINEZ: Thank you.

In approaching these difficult questions, however, I would urge the Court not to lose sight of two simple facts.

The first one is that the record shows that East Texas Motor Freight is a blatantly discriminatory employer, and that East Texas Motor Freight is joined by the Union Petitioners in seeking to perpetuate the effect of their traditional and nationwide commitment to employment discrimination.

Petitioners' arguments boil down to a salvo of complicated legal reasons for denying to their Mexican-American and black employees and members what this Court said in Albemarle Paper Company and Franks v. Bowman was due them: Complete relief from Petitioners' employment discrimination.

In my argument I wish to focus on three of the reasons advanced by Petitioners: one, that this was not a proper class action; second, that we did not prove a prima facie class -- case; and, third, that the no transfer rule on seniority system of petitioners did not violate the law.

Because the Petitioners have understated the extent of employment discrimination shown on the record, I would briefly highlight that evidence.

East Texas Motor Freight had never employed a Mexican-American or a black road driver in the Southern Conference in Texas until Mr. Rodriguez filed his EEOC charge in 1970.

East Texas stipulated in the government suit that as late as to 1972 the company had no black road drivers anywhere, and only eight Mexican-American road drivers among its approximately 180 road driver work force.

QUESTION: Now, when you're speaking of this, are you speaking of Local 657 here?

MRS. MARTINEZ: I am speaking of the Southern Conference.

QUESTION: Of the whole Conference?

MRS. MARTINEZ: Yes.

QUESTION: Well, Local --

MRS. MARTINEZ: Only as it relates to the State of Texas, we sought a class that would cover the employees in -- in fact, we sought a class covering applicants and employees in the State of Texas. The class was narrowed by the Fifth Circuit to city driver, black and Mexican-American city drivers.

QUESTION: Well, that makes quite a lot of difference in light of the argument you were just embarking on, does it not?

MRS. MARTINEZ: Well, I think the statistics --

QUESTION: How is it relevant what some other local or some other area did or did not do, by way of employing minorities? You've lost me on that point.

MRS. MARTINEZ: I'm sorry. I think the statistic is very relevant, because we're talking about the same company, East Texas Motor Freight, and its employment pattern in the State of Texas.

We are also talking about the union defendants, and we have here two union defendants, the Southern Conference and all of its members within the State of Texas, and also the Local Union which our three named plaintiffs were a member of.

I wanted to point out that of the eight Mexican-

American road drivers that East Tex as Motor Freight had in 1972, it had, itself, hired only three of them. The rest it had acquired through a merger. The terminal-by-terminal, Statewide and Southern Conference employment figures make it crystal clear that race was a constant and pervasive factor in staffing ETMF truck driver jobs.

In El Paso, for example, all city drivers were minorities, but road driver jobs were reserved for whites.

In Fort Worth, with no road drivers domiciled, all 35 city drivers were Anglo.

In Pecos, with no city drivers, all 16 road drivers were Anglo.

And superimposed on these statistics were two policies which operated to lock in all of the minority city drivers into the city position. These were, of course, ETMF's no transfer rule, which prohibited transfer from city to road positions, and further which prohibited transfer between terminals.

QUESTION: But that's a company rule?

MRS. MARTINEZ: Yes, it's a company rule, Your Honor.

QUESTION: The union had no part in that rule.

MRS. MARTINEZ: They did not.

However, their role came in through the collective --

QUESTION: I understand you are going to do the other

two points now, is that right?

MRS. MARTINEZ: Yes.

QUESTION: Go ahead.

MRS. MARTINEZ: But the point is that the other one is the Petitioner's seniority system. Under the union contract --

QUESTION: Wait a minute. On this, is it true that these three named parties are in San Antonio, and in San Antonio it's impossible to transfer from city to road?

MRS. MARTINEZ: That is precisely the thrust of our complaint.

QUESTION: For anybody.

QUESTION: And now, why is that discriminatory? On the basis of race, color, or national origin.

MRS. MARTINEZ: Because, Your Honor, in --

QUESTION: It says nobody.

MRS. MARTINEZ: Pardon me?

QUESTION: It says nobody.

MRS. MARTINEZ: Yes, I understand that.

However, the impact of that facially neutral rule is on minorities.

QUESTION: Why?

MRS. MARTINEZ: Because whites could always get the road driver jobs at other terminals, In fact, all 180 road driver jobs were held by white males. But minority --

QUESTION: But not a one in San Antonio.

MRS. MARTINEZ: Not a one --

QUESTION: Because there were no jobs.

MRS. MARTINEZ: There were no jobs in San Antonio. However, our three named plaintiffs were willing to move. They further were willing, at an early point, to give up their seniority to move. But the system operated to lock them into the city driver position in the San Antonio Terminal.

QUESTION: Now,how was that? How did it lock them in?

MRS. MARTINEZ: It locked them in because the company said: You may not transfer between terminals.

QUESTION: Wall, I know, but that's the company, not the union.

MRS. MARTINEZ: And then the union said --

QUESTION: That's not the collective bargaining contract.

MRS. MARTINEZ: Andthen the union said: But if you do transfer, you may not carry over your unit seniority which you have earned only in the city driver unit.

Needless to say, that would be a substantial impediment.

QUESTION: But the "if" never came into operation. If there were no transfers for anybody from city to over-the-road drivers, then the seniority provisions never had any

effect. Do they?

MRS.MARTINEZ: But in striking down, hopefully, that --

QUESTION: That would have had effect only if there had been transfers, and there were no transfers in this company. Isn't that correct?

MRS. MARTINEZ: Yes. And that rule was challenged, and not only the no transfer rule but the subsequent and followup impact of the now operative collective bargaining agreement, if there is a successful challenge to the company's no transfer rule.

There is, furthermore, additional proof of discrimination in this record. Contrary to the assertions that East Texas Motor Freight, that it applies equally its facially neutral driving standards, ETMF has often treated its minority and Anglo employees differently by not requiring all Anglo drivers to meet those standards.

In analyzing the --

QUESTION: How do you define "Anglo"? As anybody who is not a Spanish surname and not a Negro?

MRS. MARTINEZ: Is an Anglo, yes, that's how we define it.

QUESTION: Would an American Indian be an Anglo?

MRS. MARTINEZ: Probably not. That would be another minority.

QUESTION: Unh-hunh. So it's a --

MRS. MARTINEZ: A non-minority.

QUESTION: You do it by a process of exclusion of others, and then what's left are Anglos?

MRS. MARTINEZ: Yes.

QUESTION: Even though they might be Polish?

MRS. MARTINEZ: Well, commonly in the Southwest one does use the term "Anglo", which is --

QUESTION: Or Irish or something.

[Laughter.]

MRS. MARTINEZ: Even -- yes.

There are some inaccuracies built up over the years. But we all recognize each other.

QUESTION: Unh-hunh.

[Laughter.]

QUESTION: They know them when they see them.

MRS. MARTINEZ: In analyzing the application, the 52 road drivers who were either employed as new road drivers or transferred from the city to the road by East Texas Motor Freight between '70 and '72, 12 did not meet a stated requirement for the road position which was a high school diploma or its equivalency. The names of these individuals are found at page 181 of the Appendix.

Further, a high company official testified that East Texas relies very heavily on referrals by incumbent employees

as a source of applicants. The incumbents, of course, are Anglo.

QUESTION: While you are on that, how many Anglo or Negro applications were denied?

MRS. MARTINEZ: We did not get into, in this record, the class of applicants, and that's why the Fifth Circuit --

QUESTION: Well, I thought that's what the case was all about, that people had applied and been denied.

MRS. MARTINEZ: No, it's about the inability of minority city drivers, existing employees, to transfer and carry over their seniority.

QUESTION: Well, what city employee applied and was not given a job?

MRS. MARTINEZ: Our three named plaintiffs.

QUESTION: Is that -- did they apply?

MRS. MARTINEZ: They applied. They applied -- they requested -- they applied orally, since 1965, and then they applied in writing in 1970.

QUESTION: And how many others?

MRS. MARTINEZ: That is all that we have in the record in terms of applications.

QUESTION: Well, what would your idea of the class be? Those who applied?

MRS. MARTINEZ: No. We contend that in facts such as these --

QUESTION: You mean that your class applies to everybody who happens to be a Negro or a Mexican --

MRS. MARTINEZ: City driver.

QUESTION: -- regardless of whether they wanted to, or were qualified to, or had any idea of doing it?

MRS. MARTINEZ: Mr. Justice Marshall, we contend that in the initial stage of establishing a prima facie case -- establishing a class action, all we need to do is identify -- certainly in this pattern, on these statistics, and with these policies --

QUESTION: I am now asking you: What is your idea of who the class consists of?

MRS. MARTINEZ: Yes. My idea of the class consists of employees, Mexican-American and black employees, who are city drivers. We leave it to the later stage to -- to the remedy stage to --

QUESTION: And that's it. All of them are in the class?

MRS. MARTINEZ: Are in the class.

QUESTION: Are in the class.

MRS. MARTINEZ: Whether they qualify for relief, of course, is a different matter.

QUESTION: No -- and whether they want it or not.

MRS. MARTINEZ: That's right. But certainly all of them who wanted to transfer were affected by the policies

which we intend to --

QUESTION: And what is the size of that class?

MRS. MARTINEZ: Approximately 200 city drivers in the State of Texas.

QUESTION: Who wanted to transfer?

MRS. MARTINEZ: No. That has not yet been established.

QUESTION: Generally a class is -- if I can think out loud a minute -- it consists of people who have a grievance of some kind, and people who never wanted to transfer, as Mr. Justice Marshall said, weren't qualified, never thought of it, never wanted to, would have no grievance whatsoever; would they?

MRS. MARTINEZ: Well, we haven't yet --

QUESTION: So how could the class include all the city employees, even those described by my brother Marshall?

MRS. MARTINEZ: Because certainly they were all affected by the policies --

QUESTION: How? How? If they never had any idea of wanting to transfer, how possibly were they affected by that policy?

MRS. MARTINEZ: It's hard, at this first-stage proceeding, Your Honor, to identify those class members who in fact wanted to transfer.

QUESTION: But generally the definition of a class

is a group of people who have one thing in common, at least, and that is that they have a common grievance of some kind.

MRS. MARTINEZ: Well, the common grievance here certainly was the system involved here, the collective bargaining agreement, the no transfer rule, and the statistics which showed that road driving jobs were for Anglo males.

QUESTION: No, but what if, as has been suggested -- and I think you have not yet answered --

MRS. MARTINEZ: And the no transfer -- pardon me.

QUESTION: -- have not yet answered; what if these people didn't want to leave San Antonio, they like San Antonio, they like city driving, because they could return to their homes every night. Are they properly members of any class of people with a grievance?

MRS. MARTINEZ: Well, as I have said to Mr. Justice Marshall, certainly our three named plaintiffs indicated they were willing to move, at an early stage in their application, they were willing to give up their seniority; but it would be very difficult, in this factual context, with the company having a no transfer rule, to look for applications because of the no transfer rule.

QUESTION: Well, then, are you talking about these three people being the class?

MRS. MARTINEZ: They are members of the class. There are, conceivably, other members in the class who were similarly

situated, and, in fact, there were other people who testified at trial, Mr. Trinidad Gomez, for example, also said that he had wanted to apply.

QUESTION: How about those that just didn't want to leave the Canal in San Antonio, or didn't want to leave the Alamo?

[Laughter.]

MRS. MARTINEZ: In that case, they will probably not be coming forward at the remedy stage, where we will be attempting to identify those people who did in fact want to transfer to these jobs.

QUESTION: But by the time you get to remedy, you have passed liability, and you have found that the company -- you hope to have proved at that stage that the company has violated the Act with respect to every single member of the class.

Now, that won't quite be true, will it, if some of the city drivers never wanted to transfer, and would get very angry if somebody suggested that they would transfer.

MRS. MARTINEZ: Well, the answer could well be that what we would do then is to say the class will consist of people who, in fact, wanted to transfer.

QUESTION: Well, now we're getting down to --

MRS. MARTINEZ: Who wanted to transfer, even though they might not have actually applied, because of these --

QUESTION: But -- so let's ask again: What is the class? Mr. Justice Marshall asked what your class was. Now, have you changed? Just the city drivers who want to transfer?

MRS. MARTINEZ: Who wanted or now want to transfer.

QUESTION: So that's the class?

MRS. MARTINEZ: That's our class.

QUESTION: May I ask a question, Mrs. Martinez?

MRS. MARTINEZ: Yes.

QUESTION: With respect to the three named defendants, in view of the findings of -- named plaintiffs, I should have said. With respect to the findings of the district court as to their absence of qualifications,each of them had been engaged in, or involved in a number of accidents involving injuries to people, is it still your position that they had demonstrated their qualification for over-the-road jobs?

MRS. MARTINEZ: Yes, it is, Your Honor. For two reasons.

No. 1, as the Fifth Circuit pointed out, the same standards that have been used to evaluate the qualifications of Anglos were not used in evaluating the qualifications of the named plaintiffs.

QUESTION: Does the record show that people, Anglos, had been employed after having been engaged in as many

as three accidents involving seven injuries?

MRS. MARTINEZ: I think the record is not complete -- is not complete in that respect. But certainly it does show that the same standards were not being used by the company. And further, the record shows, that the company had stipulated that it, itself, had never even considered the applications of the individual plaintiffs.

And that, of course, is the meaning of that stipulation that Mr. Hotvedt relies on, to say that we gave up the class action on the eve of trial.

That stipulation went to what was the standard to be used by the court to determine if there had been discrimination against the individual plaintiffs.

We contended that the discrimination consisted of not considering their applications.

Further, by a separate stipulation, the company stipulated: It's true, we have not considered their applications.

The record which the company then came in with was a record which they compiled after the charges, EEOC charges, had been filed, and they used that record to say: Now, looking it over, we contend they are not qualified.

QUESTION: Was the reason the company didn't consider the applications because of its no transfer rule?

MRS. MARTINEZ: We contend that the reason was

certainly the no transfer rule, but also the fact that road driver jobs were limited to Anglo males.

Again, in remembering what was --

QUESTION: But they were also limited to original hire in over-the-road jobs, weren't they?

MRS. MARTINEZ: In over-the-road jobs.

QUESTION: Given a no transfer rule.

MRS. MARTINEZ: Precisely. And of course we were hired here, our plaintiffs were, to city jobs.

QUESTION: You were hired in San Antonio for city jobs, and that's the only jobs that the company had in San Antonio.

MRS. MARTINEZ: But we were complaining about the inability to go into the road jobs.

Again, understanding what was in this record, I think it's important to see what sort of responses the plaintiffs were getting when they indicated, very early, a desire for the more lucrative and desirable road jobs. To oral requests for transfer, the plaintiffs received non-commital responses from company and union officials that they would look into it. That the no transfer rule precluded such a transfer.

One of them even said that road jobs were not for Mexican-Americans, that the equipment was too expensive for Mexican-Americans to be driving it.

When plaintiff Perez learned from East Texas Motor Freight's new terminal manager that there were road openings in San Angelo, he sought the assistance of the union president in getting that job.

The response of the union president was to go to the manager's superior and ask that superior to tell the new manager to quit giving out this type of information.

And then the response to the filing of the EEOC charges was to invite the plaintiffs to file written applications, which they themselves have stipulated they then ignored, and were not even forwarded to the Dallas office, who does the main hiring.

QUESTION: Mrs. Martinez, does the record tell us whether the three named plaintiffs would have taken over-the-road jobs and given up their seniority?

MRS. MARTINEZ: Yes, it does. And at least one of them testified that he would have given up his seniority. Another one, Mr. Herrera, testified that earlier, yes, he would have given up his seniority, but now that he was older he saw that as far more of an impediment.

QUESTION: I should refine the question a little bit. Does the record show whether the named plaintiffs so advised the company? Or did they just ask for a transfer with full seniority?

MRS. MARTINEZ: No, I think the record is clear that

they did so advise the company officials and the union officials as well.

QUESTION: That they are willing to surrender seniority if they could get the road jobs?

MRS. MARTINEZ: And the union officials as well.

Since the filing of the EEOC charges in the complaint in this suit, all three named plaintiffs have been discharged. At the time the complaint was filed, Mr. Rodriguez had worked for East Texas Motor Freight six years, Mr. Perez for twelve, Mr. Herrera for six.

Again, I would like to argue that this was a proper class action, and the Fifth Circuit so held.

There were, as Justice Rehnquist pointed out, allegations in the complaint, in the pretrial order, in the colloquy with plaintiffs' counsel at the trial.

Further, the nature of the plaintiffs' claims themselves bespeak a need for a class action look at the nature of the discrimination being complained about.

QUESTION: But, of course, that goes, Mrs. Martinez, only to the fact that the plaintiffs preserved their right to have the district court make the determination. It doesn't go further and say that the district court should have determined it in their favor.

Would you not agree with that?

Those are the factors you just mentioned.

MRS. MARTINEZ: Initially, that argument; but, you know, the record doesn't end there. There is in the record substantial evidence which showed how these systems operate, what the statistics were, what the experience of the plaintiffs were in trying to get the road driver jobs, et cetera. And we contend that that was sufficient to show that there was a proper class action, which did comply with all of the requirements of Rule 23(a) and 23(b)(2).

QUESTION: Mrs. Martinez, it occurs to me that neither of the two issues that Judge Wisdom identifies at the beginning of his opinion is really raised by these plaintiffs, because the first issue was to challenge the requirement that they resign their jobs in order to get a road driver job, and you say they indicated they were willing to do that. So that that rule wasn't an obstacle.

And the second was that they would lose seniority; and you say they were willing to do that, too. So these people don't raise the issues the court discusses.

Is that -- what's wrong with my understanding?

MRS. MARTINEZ: Some were and some were not willing.

QUESTION: Of these three, I'm talking about the three named plaintiffs.

MRS. MARTINEZ: Of the individual named plaintiffs.

QUESTION: Oh, I see. Some were willing to resign and others were not; is that it?

MRS. MARTINEZ: That is right.

QUESTION: Would you identify them, so I know which they were, when I --

MRS. MARTINEZ: I can't remember. I think it was Mr. Perez who had said that he would be willing to resign; Mr. Herrera indicated that he might have earlier, but now, you know, it was too late, and he needed the seniority that he had as city driver in San Antonio.

QUESTION: I thought you told me that they all three had advised the company that they were willing to resign?

MRS. MARTINEZ: Initially. You understand, they had been making these applications orally in the 1960's, and in writing --

QUESTION: But the question: just exactly what was the application? Was it "I want to transfer with seniority" or "I'm willing to resign and take the new job if you'll give it to me"?

MRS. MARTINEZ: The application, as I recall it, was that they were willing to resign without seniority.

QUESTION: If that's their case, they don't raise this basic issue that Judge Wisdom spent so much time talking about.

Maybe I missed something here, I don't know.

MRS. MARTINEZ: They made that offer, but the company said to them that they still couldn't transfer, and

they did not accept their application. As I mentioned earlier, the company took these letters, which are set out at pages 324 through 326 of the Appendix, and basically filed them away.

QUESTION: Well, it seems to me you have a simple case of out-and-out discrimination against three people, rather than a class case involving these rules, if I understand it correctly.

MRS. MARTINEZ: I think we have both, Your Honor. And of course I don't -- I think we have both. Mr. Herrera certainly indicated that -- at the time of trial he indicated that he was not willing to give up his seniority. He was earlier, but not at the time of trial.

So that certainly he raises it. And of course we only need one person to bring a class action. And we don't have to have that person prevail necessarily, as Your Honor knows, to proceed with a proper class action.

QUESTION: But you're also subject to the rule, aren't you, that no person can represent a class of which he is not a member, which we have stated in our opinions. That is, that the named plaintiff has to have all the characteristics of the class which he purports to represent.

MRS. MARTINEZ: Well, I think we have that, with our named plaintiff, Mr. Herrera.

QUESTION: Well, then -- but should there have been

a division into classes, if one of them was willing to give up his San Antonio seniority and one wasn't?

MRS. MARTINEZ: Well, Your Honor, it would seem to me that if we find that that system is discriminatory -- and we contend that it is, and, in fact, the Fifth Circuit so held -- why should we penalize people who, many years ago, when they were first trying to transfer to those jobs, weren't able to?

QUESTION: Well, it might be discriminatory in either aspect, but, as Justice Stevens points out, there is some difference, I think, in the question that's raised by someone who says, "I want to be employed now, I'm a city driver in San Antonio, and I'm not willing to give up anything I've got", and then the second man who says, "I want to be employed now, I'm a city driver in San Antonio, and I'm willing to give up all prior benefits if you'll just put me on in San Angelo."

MRS. MARTINEZ: Of course, the bottom line problem here, Your Honor, is that none of them was permitted to transfer, because of the no transfer rule.

They just basically let them file these applications and then did not consider them.

QUESTION: Well, if none of them wished to give up anything that they had, you've got a different argument as to the merits, though, than if someone says "I'll give up everything I have if you'll just take me on anew."

MRS. MARTINEZ: I think it also is worth noting that

the letters, which I've described to you are in our Appendix, were written by the company for the plaintiff, and they were just making every effort they possibly could to get those jobs which they so badly wanted. Even with those concessions, the company refused their application.

QUESTION: Mrs. Martinez, what do you say to the suggestion of sending it back to the trial court to zero in and focus on whether or not this is a proper class action, and what is the class?

What do you say to that suggestion?

MRS. MARTINEZ: Well, I think that the Fifth Circuit certainly had before it an adequate record on which it made its findings. There is always the possibility of remand, of course, for determination of the size of the class.

QUESTION: Well, what do you say to that stipulation that the only thing before the Court is these three people?

MRS. MARTINEZ: As I said earlier, Your Honor, that stipulation was meant to define what was the standard to be used by the Court in determining whether or not there was discrimination against the named plaintiffs. In other words, was the failure to consider their applications discriminatory?

That was the clear thrust of the stipulation. It did not address the class action issue.

QUESTION: But they used the word "only", didn't they? The stipulation used the word "only", and I think that's what

they are relying on.

MRS. MARTINEZ: I think the other possibility for that would be that, at that time, they were proceeding only as to the individual plaintiff. However, I think that the record shows that, in fact, it was tried as a class action.

As you know, it's quite -- well, it's quite common to proceed in a bifurcated proceeding where you establish the class first --

QUESTION: I think it's quite common to make a motion to have a class action and have the court rule on it, up or down.

MRS. MARTINEZ: Mr. Justice Marshall, that is true. And --

MR. CHIEF JUSTICE BURGER: We will resume, and you may answer that, the first thing tomorrow morning.

MRS. MARTINEZ: Thank you, Your Honor.

[Whereupon, at 3:00 p.m., the Court was recessed, to reconvene at 10:00 a.m., Tuesday, January 11, 1977.]