

**Transcript of Proceedings of Pre-Trial Conference—Filed
October 30, 1951**

APPEARANCES:

Hon. Walter A. Huxman, Judge, United States Court of Appeals, Tenth Circuit.

Hon. Arthur J. Mellott, Judge, United States District Court, District of Kansas.

Charles S. Scott, Topeka, Kansas; John Scott, Topeka, Kansas; Charles Bledsoc, Topeka, Kansas; Robert L. Carter, New York, New York, and Jack Greenberg, New York, New York. Appeared on behalf of Plaintiffs.

Lester M. Goodell, Topeka, Kansas, and George M. Brewster, Topeka, Kansas. Appeared on behalf of De-

endants, Board of Education, Topeka, Shawnee County, Kansas, et al.

Harold R. Fatzer, Attorney General, State of Kansas, by Willis H. McQueary and Charles H. Hobart, Assistant Attorneys General, State of Kansas, Topeka, Kansas. Appeared on behalf of State of Kansas.

Harold Pittell, Official Reporter.

[fol. 20] Be it remembered, on this 22nd day of June, A.D. 1951, the above matter coming on for hearing before Honorable Walter A. Huxman, Judge, United States Court of Appeals, Tenth Circuit and Honorable Arthur J. Mellott, Judge, United States District Court, District of Kansas, and the parties appearing in person and/or by counsel, as hereinabove set forth, the following proceedings were had:

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[fol. 21] COLLOQUY BETWEEN COURT AND COUNSEL.

Judge Mellott: Do you have the appearances, Mr. Reporter?

The Reporter: Yes, Your Honor.

Judge Huxman: Gentlemen, the purpose of this session this morning is to hold a pre-trial conference to see whether we can simplify the matters and what can be agreed to before we go to trial next Monday.

Judge Mellott has called my attention to Rule 16. It provides for conference to simplify the issues, whether there is any necessity for amendments to the pleadings and to inquire into the possibility of obtaining admissions of fact concerning which there can be no dispute, limitation of the number of expert witnesses, the advisability of a preliminary reference of the issues to a master for findings and any such other matters as may simplify the issues at the time of the trial.

All the parties have entered—are in court and have filed pleadings; that is true of the State of Kansas, is it not?

Mr. McQueary: It is, Your Honor.

Judge Huxman: Is there a desire on the part of anybody to amend the pleadings in any manner; any necessity for amendment of pleadings?

Mr. Charles Scott: Yes, if the Court please. We have one amendment we desire to make.

[fol. 22] Judge Mellott: To what paragraph?

Mr. Charles Scott: Paragraph 5, sub-paragraph (a) of the plaintiffs' amended complaint.

Mr. Goodell: What was that again?

Mr. Charles Scott: Paragraph 5, sub-paragraph (a).

Judge Huxman: Paragraph 5 what?

Mr. Charles Scott: Paragraph 5(a).

Judge Mellott: Let me orient myself and Judge Huxman. Did you file a complete amended complaint?

Mr. Charles Scott: No, sir.

Judge Mellott: You filed an original complaint.

Mr. Charles Scott: And an amended complaint and—

Judge Mellott: And then in the amended complaint—there was an amendment to the amended complaint.

Mr. Goodell: I interpret that they did file—

Judge Mellott: You did file an amended complaint on March 22nd, didn't you?

Mr. Charles Scott: Yes.

Judge Mellott: The motion to make more definite was addressed to that amended complaint.

[fol. 23] Mr. Charles Scott: That is correct.

Judge Mellott: And then you filed an amendment to the amended complaint, under date of May 29th, did you not?

Mr. Charles Scott: That is correct, sir.

Judge Huxman: What do you desire presently?

Mr. Charles Scott: We desire to correct the statute of 72-1809 of the General Statutes of 1935 and the supplements thereto.

Judge Mellott: Let me get this in the pleading here. You are now talking about your original amended complaint, aren't you?

Mr. Charles Scott: The original amended complaint.

Judge Mellott: And you say you want to refer to paragraph 5 of that.

Mr. Charles Scott: 5(a).

Judge Mellott: 5(a). Your amendment is what; you want to make reference to the General Statutes of '49 instead of 1935, is that what you are saying?

Mr. Charles Scott: We also want to make reference to the General Statutes of 1949 and also strike therefrom Section 72-1809 and insert therein 72-1724.

Judge Mellott: 72-1724.

Mr. Charles Scott: That is correct.

[fol. 24] Judge Mellott: And does that read, then, that that is the General Statutes of Kansas for 1949?

Mr. Charles Scott: That is correct.

Judge Mellott: You wish to leave out the words, "and supplements thereto."

Mr. Charles Scott: Yes, we can take that out, that's true.

Judge Mellott: Let me see if I understand what you are doing. Paragraph 5(a), as amended, now reads: "Defendant, Board of Education, is under a duty to enforce the school laws of the State of Kansas (General Statutes of Kansas, 1949, Section 72-1724)", is that the amendment you are making?

Mr. Charles Scott: That is correct, sir.

Judge Mellott: Any other amendments?

Mr. Charles Scott: That is all we have.

Judge Huxman: Any objections to that? No objections; the amendment will be—

Mr. Goodell: If I understand his point, he cited in his amended complaint, which he now desires to correct, a statute which applies to cities of second class, erroneously when he intended to use—so we have no objection.

Judge Huxman: All right; the amendment will be ordered.

Judge Mellott: The Court will make the amendment by [fol. 25] interlineation.

Judge Huxman: Any other amendment to the pleadings?

Mr. Goodell: We have none, Your Honor.

Judge Huxman: No further amendments to any of the pleadings.

Mr. Bledsoe: If the Court please, at this time I would like to inform the Court we have two attorneys who are interested in this case with the plaintiffs, and they are here now, and I would like to present them to the Court at this time.

Judge Huxman: I will ask Judge Mellott to handle that because he knows how that matter is handled.

Judge Mellott: Very well. You may introduce them, if you will, and tell me who they are.

Mr. Bledsoe: They would like to be admitted for the purpose of this case only.

Judge Mellott: Present them.

Mr. Bledsoe: If the Court please, this gentleman here is Robert Carter, from New York. This, gentlemen, is Judge Huxman of the Tenth Circuit Court of Appeals; the gentleman over here is Jack Greenberg, of New York, and this is Judge Mellott of the District of Kansas Federal Court.

Judge Mellott: Are these gentlemen members of the bar? [fol. 26] Mr. Bledsoe: They are.

Judge Mellott: In what state?

Mr. Bledsoe: New York.

Judge Mellott: In good standing?

Mr. Bledsoe: They are.

Judge Mellott: And are they admitted to practice in federal courts and courts such as this in their home jurisdiction?

Mr. Bledsoe: They are.

Judge Mellott: Never been disbarred. You vouch for them.

Mr. Bledsoe: I do.

Judge Mellott: Without further formality, then, they will be permitted to appear as counsel, along with the other gentlemen who presently appear as counsel in this case. Thank you, gentlemen; you may be seated.

Judge Huxman: Unless there is something else preliminary, we might—

Mr. Carter: Your Honor, if I may, I would like to raise one point. I don't think an amendment would be necessary to our pleadings, but we erroneously refer to school districts in Topeka, where it should be "territories", and we were going to make a stipulation with the defendants that they are territories rather than districts—and there is one school district.

[fol. 27] Judge Huxman: I think that is covered.

Mr. Carter: I just want to be sure.

Judge Mellott: I suppose, if necessary, for all proper purposes in this case, the Court can consider that where you use the word "district" in your pleading, that really what you are referring to is "territories." I believe I suggested that at an earlier proceeding here. It was my under-

standing Topeka was one school district, so you were referring to territories.

Judge Huxman: There is one other matter that might come up during the trial—at least I think the Court might want to make inquiry—will either or any of the parties to this litigation want to use expert witnesses?

Mr. Carter: Well, Your Honor—

Judge Huxman: For what purpose?

Mr. Carter: We want to use expert witnesses for the general purpose of showing that the segregation, which is the issue in the case, the segregation of the plaintiffs and of the class they represent in the negro schools is in fact a denial to them of their right to equal educational opportunities, that they are not getting equal educational opportunities by virtue of that. That is the purpose of our expert testimony.

Judge Huxman: Will there be any opposition to expert witnesses?

[fol. 28] Mr. Goodell: The—

Judge Huxman: —the use of expert witnesses by the plaintiffs?

Mr. Goodell: The way the question was stated, we will certainly object to that. We think that is a question of law. I, of course, don't know what turn it will take.

Judge Huxman: Well, the question of whether such testimony is competent, does not need to be decided at this time. The purpose of this inquiry is to ascertain how many such witnesses you will request and whether there shall be a limit. How many witnesses do you gentlemen desire on that question, assuming that the Court rules it is competent.

Mr. Carter: Well, Your Honor, I think that we were not certain of the exact number but approximately nine. We have approximately nine or ten people who we want to call who have made studies of this.

Judge Huxman: Well, the Court feels that nine witnesses on that one issue is too many witnesses. In other words, the issue is whether segregation itself, I presume, is not a denial of due process, irrespective of whether everything else is equal, to that furnished in the white schools, is that not your general contention?

Mr. Carter: Yes, sir.

Judge Huxman: Because of the effect it has upon the

[fol. 29] mind, upon the student, upon his outlook; I presume that would be your position.

Mr. Carter: That is absolutely correct, Your Honor.

Judge Huxman: Could nine witnesses give different testimony, or would their testimony be largely the same?

Mr. Carter: I doubt that, Your Honor. Our testimony will not be cumulative. Our purpose of getting these people was in order to give a rounded picture with respect to the subject that we have just raised. Now, we will have some witnesses who will testify as to tangible and physical inequalities also among those people, so that I think that it would be a great hardship to us if we were limited. We have no intention of merely bringing on witnesses to be cumulative.

Judge Mellott: That is the thing the Court thinks it should avoid. We shouldn't hear nine witnesses testify cumulatively even as experts, it seems to me, on the same thing.

Mr. Carter: I agree, but, Your Honor, we have no—we are not going to have duplication. Each of the people that we are asking to come here to testify will handle a different phase of this.

Judge Mellott: Then we should not limit you if that is what you expect to do.

[fol. 30] Judge Huxman: The Court feels this way, that it's difficult for it at this time to see where nine witnesses could testify on this one subject, to nine different sets of facts, unrelated facts, but you may be right; we do not intend to deny you the right to fully present your case. The Court, however, feels that after it has heard five witnesses, expert witnesses, if the Court then feels that the witnesses that you are offering thereafter are merely duplicating what has been said, an objection to their testimony on that ground will be sustained. If, on the other hand, the testimony is clearly different from what has been given, why you then should have the right to present your nine witnesses. But at the end of five, the Court will certainly scrutinize the testimony of the other four quite carefully to see whether it is duplication or additional testimony.

Mr. Carter: All right, sir.

Judge Huxman: Do you gentlemen then stipulate that, in any event, the expert witnesses which you request will be limited in number to nine.

Mr. Carter: Your Honor, frankly, our difficulty in making any stipulation like that is that Mr. Greenberg and I have just gotten here from New York this morning about—

Judge Huxman: This isn't the first case of this kind you were in. You were in the South Carolina case, weren't [fol. 31] you?

Mr. Carter: Yes, sir; but the thing is we haven't really had an opportunity to go over this. I would not want to make that stipulation. What I will say and what Your Honor has ruled is that after five, you will scrutinize whatever testimony we present for duplication, and we will certainly attempt to avoid that, but I wouldn't want to say that we would only have nine.

Judge Huxman: That was your statement in response.

Mr. Carter: I said approximately; I didn't want to be tied down to that number at all.

Judge Mellott: How much leeway do you want?

Mr. Carter: Well, I frankly think that we won't have more than nine, but I just would prefer not to be tied down. I am not going to, believe me, Your Honor, we are not going to parade a lot of witnesses here merely to keep you tied down.

Mr. Goodell: It would be under ninety, wouldn't it?

Mr. Carter: It will be under fifteen.

Mr. Goodell: Nine to ninety.

Judge Huxman: It would be the order of the Court that expert witnesses on behalf of the plaintiff, in the first [fol. 32] instance, will be limited to five, but if at that point the plaintiffs have additional witnesses which they feel have testimony to offer which has not been covered by these five, they will not be denied the right to present that testimony, is that correct, judge?

Judge Mellott: Yes, at this time, I think.

Judge Huxman: But that after five have been heard, the Court will reserve the right to reject any further evidence if it should feel that the evidence that is being offered is cumulative and not additional to what the first five have testified, is that fair to you boys?

In view of the fact that there has been a statement that plaintiffs will offer expert witnesses on this subject, assuming that the testimony will be received, will the de-

fendants, or any of them, want to on their part offer expert testimony along this same line?

Mr. Goodell: Well, I am a little at a handicap of knowing exactly what their line is. They mention there is to be testimony from experts, as I understood it, on some physical facts which, of course, I don't know what they are referring to except I take it to mean that inferiority to—as to some—something relating to the school system and, of course, if that comes up, we will probably want to rebut that, not with experts, I don't think.

[fol. 33] Judge Huxman: Judge Mellott—

Mr. Goodell: As to the other phase which I understand is the psychological aspect and sociological, until I have heard their testimony, I am at a loss to know whether we will want to rebut it or attempt to rebut it.

Judge Mellott: Well, would it not be proper if the Court thought in terms of the same basic premise that in the event you do decide to offer experts rebutting the testimony of the plaintiffs' experts, that a limitation somewhat along the line suggested by Judge Huxman to the plaintiff should, likewise, apply to you.

Mr. Goodell: I certainly think so.

Judge Huxman: All right; that will be the order of the Court at this time.

Now, is there anything else, gentlemen, as to preliminary matters that we want to discuss before we go into these requests for admissions. Anything else that might be helpful in shaping the issues, shortening this trial.

I may state for myself, as a member of this court, that it would certainly be my purpose to afford the parties a full and complete hearing and an opportunity to present the issues fully and completely but, on the other hand, I would be very loathe to just permit the introduction of a great mass of testimony for any purpose whatever that has no bearing upon the issues; it merely prolongs and drags out [fol. 34] this trial.

Anything else preliminary? Do you care to say anything more?

Judge Mellott: I am quite sure Judge Hill and I concur entirely as to what you have just said, though my authority, of course, to speak is only to speak for myself.

Judge Huxman: In a preliminary conference, Judge

Mellott, to bring you up to date, purely informal, with attorneys for the plaintiffs and the defendants, I suggested that, as a preliminary to this pre-trial conference, each side prepare requested admissions of fact and serve them on the other side.

Judge Mellott: I am sure that was quite helpful.

Judge Huxman: We have that here this morning and, if there is nothing further, suppose, gentlemen, we proceed to see how many of these requests we can agree upon.

We will take up the defendants' requests for stipulations first.

No. 1 is a request for an agreement that the City of Topeka, Kansas, constitutes one school district.

Mr. Carter: We agree.

Judge Huxman: That is agreed to.

Judge Mellott: Thank you, gentlemen.

[fol. 35] Judge Huxman: Request No. 2:

"That defendants have designated within the City of Topeka, Kansas, eighteen territories and in each of these territories have established and maintain a public elementary school for white children only; in addition thereto defendants have established and maintain in the City of Topeka, Kansas, four separate elementary schools for colored children and attendance at these four schools is restricted to colored children. Exhibit A, which is made a part hereof by reference, is a map of the City of Topeka and adjacent territories attached to Topeka School District for school purposes only. Said Exhibit A correctly designates the school territory for white schools for the City of Topeka, Kansas. Said map also designates the four colored schools, which are Buchanan, McKinley, Monroe and Washington. Colored school children in the City of Topeka, Kansas, may attend any one of these four colored schools, and the choice of schools is made by the colored school children or their parents. The territory colored blue on Exhibit A represents areas not within the City of Topeka except for school purposes, and children residing in said areas attend schools in the City of Topeka, Kansas."

Now, before you make any request, Judge Mellott has not seen Exhibit "A". As a preliminary question, may I ask, Mr. Goodell, who prepared that exhibit?

[fol. 36] Mr. Goodell: The clerk of the Topeka Board of Education.

Judge Huxman: Do you vouch for its territorial correctness and integrity?

Mr. Goodell: Absolutely.

Judge Huxman: All right. With that preliminary statement, is there any objection to the admission requested in request No. 2?

Mr. Carter: Well, Your Honor, this is the first—I think we have no objection on Exhibit "A", but going over on to page 2—about the fifth line from the top—

Judge Huxman: Fifth line from the top on page 2.

Mr. Carter: "and the choice of schools is made by the colored school children or their parents." I should think we have to get more information on that before we could agree. With that exception, we will agree.

Mr. Goodell: For clarity, what is meant there, of course, is choice of which of the four colored schools. It doesn't mean to say—

Mr. Carter: It is a question in our minds as to whether that is true.

Judge Huxman: Do you have testimony to the effect that that is not true?

Mr. Carter: We may.

[fol. 37] Judge Huxman: You may.

Mr. Carter: Yes, sir.

Judge Huxman: Well, do you have reasons to believe that it is not true?

Mr. Carter: Well, the only thing I can say at this time, Your Honor, is that up to—as far as this is concerned, we have to know—we would have to make a little further investigation on this ourselves. We might stipulate, agree, that this is true by Monday, but I don't think we can do it today.

Judge Huxman: All right. I just feel this way, that there ought to be a perfect willingness on the part of both parties to freely and frankly agree to facts concerning which there just can't be any dispute. Now, if there is a question about a fact, that should not be agreed to, of course, but you have local colored counsel here who no doubt went to schools here, these segregated schools.

Mr. Carter: That is——

Judge Huxman: Do you agree to the request with the exception of that portion starting—with this exception: "Colored school children in the City of Topeka, Kansas, may attend any one of these four colored schools, and the choice of schools is made by the colored school children or their parents."

Mr. Carter: All we reject is of the choice.

[fol. 38] Judge Huxman: Do you agree to everything but that?

Mr. Carter: We agree with the first part of the statement. All we don't know about is the choice.

Judge Huxman: I am just taking the one sentence. I don't like to divide a sentence. You want to reserve the agreement to that until Monday.

Mr. Carter: Yes, sir.

Judge Huxman: And, in the meantime, you will make an investigation and if you find that that is a fact——

Mr. Carter: We will agree to it.

Judge Huxman: Mr. Scott, you have been a resident of Topeka all your life.

Mr. Charles Scott: Yes, sir.

Judge Huxman: Are you able to say whether that is or is not a fact as the schools are administered.

Mr. Charles Scott: Qualified, Your Honor. We are allowed to go to the schools that are closest to our home. Now, whether or not the school board has any control over that or not, I don't know, but, as a practical matter, naturally, the colored students go to the school closest to their home.

Judge Huxman: I tell you what I wish you would do with your New York counsel. I wish you would have a conference [fol. 39] with the members of the school board between now and Monday and ask them if a colored student wants to attend any one of these four schools whether there is any restriction upon his right to do so.

Mr. Charles Scott: I will do that, Your Honor.

Judge Huxman: And then come in Monday morning——

Mr. Goodell: Of course, my information came from the board and the administrative officers on all these matters.

Judge Huxman: They should have the right to get that information themselves.

It is agreed, then, that request for admission No. 2 is argeed to with the exception of that portion which has just been read by the Court and, as to that portion, inquiry will be made by Monday and a statement by counsel for plaintiffs will be made then as to whether they agree to that portion which is presently eliminated.

We will take up No. 3:

“That the same curriculum is used in the elementary colored schools in the City of Topeka, Kansas, as is used in the elementary white schools in said city.”

Mr. Carter: After conference, Your Honor, we cannot stipulate to that.

[fol. 40] Judge Huxman: Do you claim that that is not so?

Mr. Carter: We would change in the first sentence where it reads, “That the same curricula is used”, we would change that to “prescribed” as long as curricula is understood to mean courses of study.

Judge Huxman: That is what the curricula means, isn't it, courses of study.

Mr. Goodell: That is what I intended by it.

Mr. Carter: I am not sure.

Judge Huxman: Do you have a different meaning of curricula?

Mr. Carter: Yes, sir.

Judge Huxman: Is there any objection to the elimination of the word “curricula” and the substitution of the “studies are used”?

Mr. Carter: “Prescribed” is what we want to use.

Judge Huxman: That wouldn't be any admission. The question is, is it actually used, that is the test.

Mr. Carter: We are advised that that is not true, Your Honor.

Judge Huxman: How?

[fol. 41] Mr. Carter: We at this table don't feel that we can stipulate to that at this time.

Judge Huxman: Well, do you intend to offer evidence to show that that is not so?

Mr. Carter: Yes, sir.

Judge Huxman: In what respect do you contend that there is a difference?

Mr. Carter: Well, there are several things that I have

right now at my fingertips that I can indicate. One is that there is a difference in terms of the special teachers and the special—there are special teachers that are used at the White schools. No special teachers or special courses for certain classes of the student body are at the Negro School.

Judge Huxman: The teachers have nothing to do with the courses of study?

Mr. Carter: Yes, sir. They have set up, as we understand it, Your Honor, set up at the White school a special course of study for children who are somewhat retarded who are not able to come up to the part of their class. Now, no such course is available at the Negro school. We also have a question right now as to whether even though the same courses of study are prescribed, and we think that we have evidence to show that it is not used, that this is not followed out at the Negro school generally.

[fol. 42] Judge Huxman: Mr. Goodell, what do you say with regard to the statement that special courses prescribed in white schools for sub-normal children are not in colored schools?

Mr. Goodell: I don't think that is curricula that is special—that comes under a heading later in our brief about special services which they cover in paragraph 8, which I don't think is embraced in the question of curricula.

Judge Mellott: I am wondering if you gentlemen perhaps are in dispute primarily about the definition of the word "curricula." I wonder if that is your difficulty.

Mr. Goodell: I think—my interpretation of it and the use I intended is the—as meaning the subjects taught, programs used in the school and the subjects taught, courses of study.

Judge Mellott: Well, do you wish to rephrase it so that it does limit it to those particular terms? Maybe your adversary will agree if you rephrase it.

Mr. Goodell: I am willing to change it, Your Honor, by striking out the word "curricula" and substituting therefor "that the same course of study"—"courses of study".

Judge Mellott: I suggest that counsel for the plaintiff give attention to what is being said.

[fol. 43] Mr. Carter: Yes, sir.

Judge Huxman: He is suggesting that perhaps a change in the word "curricula" might make this understandable

so you do agree upon its meaning and perhaps get closer to a stipulation.

Mr. Goodell: "That the same course of study is used in the elementary colored schools in the City of Topeka as is used in the elementary white schools." It will read, Your Honor, my suggested amendment.

Judge Huxman: Also keep in mind, gentlemen, that under Mr. Goodell's explanation this special matter which you mentioned for abnormal children is not meant to be included in here, and the agreement to this stipulation would not bar you from showing that some special services are rendered to white children that are not rendered to colored children. With that statement, are you willing to agree with this?

Mr. Charles Scott: At this time, Your Honor, I don't think we are inclined to accept it.

Judge Mellott: Your associates think they are. They say if you limit it to simply saying that the same course of study is used, that they don't have any objection.

Mr. Charles Scott: Well, this is the reason, Your Honor: We have examined a greater portion of the curricula, as prescribed by the school board, and we have found that [fol. 44] there are some differences, certain course of studies are offered in some schools and are not offered in some of the colored schools, and so I don't think we are inclined to accept it on those basis.

Judge Huxman: Can you name a specific instance?

Mr. Charles Scott: Yes, sir.

Judge Huxman: All right, let's have it.

Mr. Charles Scott: They have a course entitled "Literature Appreciation" that is offered in the fifth and sixth grades in several of the white schools, and it is not offered in one or two of the colored schools. Then you have—

Judge Huxman: Is that shown by the exhibits?

Mr. Charles Scott: Yes, sir.

Judge Huxman: All right. What would you say to this: Would you agree that the courses of study as outlined in these exhibits—what are the exhibits?

Mr. Charles Scott: If the Court please, now they label—

Judge Huxman: Are the courses of studies that are used.

Mr. Charles Scott: They call it the school program, but it appears to be the course of study.

[fol. 45] Judge Huxman: That is quibbling about words, isn't it?

Mr. Charles Scott: Well—

Mr. Goodell: I am willing to limit that again. I am not familiar with that matter he points out—to have it read, “That the same course of study required by the Kansas” — by law—“by the Kansas statute is given.” I think what he is talking about is some extra-curricular subject that some teachers of their own volition give, like outside reading, reference texts, and so forth, rather than a prescribed course of study.

Mr. Charles Scott: No, I beg to differ with counsel. This is prescribed by the school board and sent down.

Mr. Goodell: I am talking about what the state law requires to be taught in our Kansas elementary public school system.

(Colloquy was here had between counsel off the record.)

Mr. Goodell: If we are going to have a lawsuit here and pursue factual inquiry as to—us to school by school, of which there are twenty-two, we will be chasing down each textbook for outside reading that Miss Jones may prescribe at Randolph which Miss Baker at another school doesn't like, and she prescribes another text for outside [fol. 46] reading. Suppose they are taking history; one likes this for outside reading and another teacher likes another. That will frequently occur.

Judge Mellott: Do you have a printed course of study?

Mr. Goodell: Absolutely.

Judge Mellott: Do you have one?

Mr. Goodell: I have it attached as an exhibit here. And what I meant to convey and what I mean by this stipulation and will reframe it—

Judge Mellott: Where is it attached?

Mr. Brewster: Exhibit “F”.

Mr. Goodell: That the course of study required by our Kansas statute is followed in all of the schools without any distinction between the white and colored elementary schools.

(Colloquy was here had between counsel off the record.)

Judge Huxman: Shall we then eliminate request No. 3?

Mr. Goodell: Let's pass that, Your Honor.

Judge Huxman: We will pass request No. 3 and take up No. 4:

"That the same school books are used in the elementary colored schools in the City of Topeka, Kansas, as are used in [fol. 47] the elementary white schools in said city."

Is that not related to 3 and also covered by your exhibits?

Mr. Goodell: Yes.

Judge Huxman: Shall we pass it?

Mr. Goodell: Yes, that is satisfactory.

Mr. Carter: Your Honor, we are having one of our expert witnesses, that is going to be a librarian, who is at the present time checking the holdings of all the schools.

Judge Huxman: Is what?

Mr. Carter: The holdings, the library holdings of all of the schools, and we therefore are not—we can't—

Judge Huxman: We passed 4.

Mr. Goodell: I would like to amend, in view of his remarks, I would like to amend that to read, "The same textbooks"—"school textbooks"—so that it doesn't—

Judge Huxman: All right, that will be permitted.

Judge Mellott: Do you agree that the same textbooks are used?

Mr. Carter: I think we will agree.

Judge Mellott: Very well.

Judge Huxman: Did you, Mr. Reporter, get request No. [fol. 48] 4, as amended?

The Reporter: Yes, Your Honor.

Judge Huxman: We will take No. 5:

"That each of the four colored elementary schools in the City of Topeka, Kansas, is situated in neighborhoods where the population is predominantly colored."

Mr. John Scott: That is agreeable, Your Honor.

Judge Huxman: That is agreed to.

Judge Huxman: No. 6:

"That transportation to and from school is furnished colored children in the elementary schools of the City of

Topeka, Kansas, without cost to said children or their parents. No such transportation is furnished white children in the elementary schools of the City of Topeka."

It would seem to me that is either a fact or isn't a fact.
Mr. Charles Scott: We will agree to that.

Judge Huxman: All right. No. 6 is agreed to.

No. 7:

"That the same services are offered to colored and white elementary schools by the school authorities of the City of Topeka, Kansas, except in the case of transportation, as [fol. 49] set out in the preceding paragraph hereof."

Now, before you speak on that, I would like to ask a preliminary question: I am not sure that I understand, Mr. Goodell, what you mean by the "same services."

Mr. Goodell: I mean services like supervised play of the children at recess and noon period; I mean services of public health, nursing, which is furnished the elementary schools, both white and colored alike; I mean services that are entailed in departmental heads calling on the elementary school system, such as music department, and giving supervision and advice to the teachers. That is what I mean.

Judge Huxman: Is there anything else that you include in services?

Mr. Goodell: No, that is what I mean.

Judge Huxman: All right. And your request, requested admission, that these services which you have mentioned are furnished both in the colored schools and in the white schools.

Mr. Goodell: That is correct.

Mr. John Scott: We don't accept that, if Your Honor please. I think that is a little too indefinite; we need a little more definite and certain—

Judge Huxman: That is the reason I asked you to state [fol. 50] specifically the kind of services he had in mind.

Mr. John Scott: Yes, Your Honor, I understand that, but, as it stands in the stipulation at the present time, we wouldn't have a way of knowing.

Judge Huxman: The stipulation as it reads in the printed record isn't going to be the record. The record

that is made is as modified by the statements of Mr. Goodell. They are the ones that go into the record.

All right; is that agreed to, then?

Mr. Carter: That is agreeable, Your Honor.

Judge Huxman: That is agreeable.

Judge Mellott: Well, are there any other services that either side thinks should be incorporated. Now, I have in my mind some three or four services. Now, in order to make that complete, do you wish to give us a more detailed or do you wish to add anything to the services which Mr. Goodell has referred to?

Mr. Carter: No, sir. We have one item that I think I spoke of before. I think that Mr. Goodell indicated that it was a service, but he doesn't include that in his special statements. The statement is satisfactory to us.

Judge Mellott: The word "services" is rather big and broad and all-inclusive.

Judge Huxman: Of course, it—all right, that is agreed [fol. 51] to, then, as modified by the explanation; the furnishing of services as stated is agreed to.

We will take up No. 8:

"That the distance traveled by colored children in reaching the schools they attend is not on the average greater than the distance white children are required to travel to reach the schools they attend."

Mr. Carter: Well, Your Honor, I don't think we want to stipulate on this. I don't think it has anything to do with the case. I think it's irrelevant.

Mr. Goodell: If the Court please, on that point, it is merely a mathematical proposition. That map, Exhibit "A", shows the whole City of Topeka and territory outside of the city is in blue, which is in Topeka for school purposes. We have marked on the map, Exhibit "A", each school territory. It shows, of course, the physical facts of distances which appear on this city map and can be computed. Children, in other words, living, for example—taking Exhibit "A"—in the blue territory over here in the corner (indicating) their school that they would have to go to, white children, would be Randolph, and all of that. Of course the matter of various school distances are written in

on the map—are identified. Of course to get at it any more accurately, which would be almost an intolerable job, would be to get each child that went to the city schools and get the [fol. 52] actual distance travelled divided by the number of children, and then you would get the average, and then get each colored child and get the actual distance divided by number of children, and then you would have the average.

Judge Huxman: Mr. Goodell, I doubt whether the Court would want that kind of a stipulation agreed to. That might be mathematically correct when you take an outlying territory. Now, to reach that result, you take territory that is not in the city limits and that—

Mr. Goodell: I have done some computing with a ruler, and I have taken the school population of the various schools, and I have taken distances in various different territories, and I know that as a matter of fact, it's a conservative statement, it's on the conservative side.

Judge Huxman: Well, now you may be right, but I wouldn't want this, as far as I am concerned; I wouldn't be content to have it established by stipulation that you can have four schools in the City of Topeka for one group of people and eighteen for another in that same territorial limit and yet those in the four schools would not be required to travel greater distances than the children that have eighteen schools. Now maybe it's a fact, I don't know.

Mr. Goodell: Keep in mind, Your Honor, that the colored schools have been, and that is covered by prior stipulation which is admitted, are located in neighborhoods in each case [fol. 53] which are predominantly colored neighborhoods; consequently, you don't have a situation in the case of where four colored schools have children living blocks—thirty some blocks—away from the nearest school which we—which does obtain in the case of many of our white schools—several of them—because of the population trends in the southwest part of our city in the last few years, particularly since the war. We have had great population trends out toward the west and southwest which has caused the territory to be taken in for school purposes and, in some cases, unexed territory, and has brought about that situation.

Furthermore, I—except for paragraph 8, when they make that as one of their grounds for inequality, is the matter

of distance travelled or inaccessibility of their schools. I can't see where that is too important because we do transport them in every case where they ask to be transported.

Judge Huxman: Now that is a conclusion which flows from what is done, and you might be right on that, but the fact is a different thing, and Judge Mellott and I are in agreement that the Court does not want the stipulation as an admitted fact in this case.

Mr. Goodell: Would it add anything to it for me to have some witness get on the stand and testify as to just what the map shows and testify that the children do come from [fol. 54] the territories as shown by the map, to the various schools. Now, to make anything—

Judge Huxman: Speaking for myself alone, Mr. Goodell, as I get—if I understand the effect of what you are trying to say, is that the average distances travelled by the white children are as great as the average distance travelled by the colored children.

Mr. Goodell: That's right.

Judge Huxman: I wouldn't be impressed with that in the case at all. If the fact remained that a colored child over here had to travel two miles and a number of colored children had to travel two miles by virtue of the fact that there weren't so many of them and you had an outlying district of white children which brought their average travelled distance to as great as the colored children had to travel, I still think it might be an imposition upon a colored child if it had to travel two miles whereas a white child did not have to travel two miles.

Mr. Goodell: We will have an isolated case. When I talk about travel, I say again, in the stipulations, have already been admitted on that; that they are furnished transportation so that travel doesn't seem to me as a very significant issue.

Judge Huxman: That is a different matter.

Mr. Goodell: But, be that as it may, you still have isolated cases where a colored child may go twenty-four blocks by bus.

Judge Huxman: The Court is of the view that the request for stipulation No. 8 might be eliminated, so we might as well pass it for the time being.

Mr. Goodell: As I understand the Court, I have to prove

the distance all the white children go to school and the distance the colored children go to school, is that my understanding, is that correct? We would be here for days and days on that.

Judge Mellott: You have your map here, and I think you can demonstrate—you already have indicated what you think your demonstration would consist of. What Judge Huxman, as I understand, is suggesting, and I am in accord with his views, is a mere mathematical calculation out of which flows an average allocated in one instance to the colored pupils and in another instance to the white pupils, wouldn't be particularly helpful.

Mr. Goodell: Of course there is inequality within the white structure. You have some white kids living next door and half a block away from the schoolhouse and others living thirty-six blocks away. To cure that we would have to have a schoolhouse on every corner. There always has to be that disparity.

Judge Huxman: But, as Judge Mellott has just stated, [fol. 56] an average distance travelled arrived upon the composite of a great number, has very little weight with me.

Mr. Goodell: I admit that fallacies in it, of course. I have to prove that because they have injected that as an issue.

Judge Huxman: They might be willing to concede that you having arrived at this by average, that the total distance travelled by all the white children and the total distance travelled by the colored children would produce this result; that is a different matter. But, anyhow, it wouldn't take you very long to prove that, how this computation was arrived at.

Mr. Goodell: Your Honor, I am not trying to say that I proved that on a school attendance record. I took—arbitrarily—distances and assume there would be children going to school in some of their territory. Now, that was an assumption. To get at that on a factual basis, I would have to get the school attendance from each and every one of these schools, look up the records where each kid lives, put those altogether, those children and distances, divided by the number of children to get at the average distance, and I would be all summer doing that.

Judge Mellott: I don't think we would ever ask you to do that or permit you to do it.

Judge Huxman: Request No. 8 is omitted.

[fol. 57] Mr. Brewster: One statement, judge. Plaintiffs' objection to this stipulation was the fact that distance travelled was immaterial. If that is what he meant, are you willing to stipulate, then, that the distance the students are required to travel is not an issue in the lawsuit.

Mr. Carter: No; I didn't say that. I said that the stipulation was immaterial.

Judge Huxman: No use or purpose would be served by pursuing the inquiry further because the Court itself has eliminated request No. 8.

Mr. Brewster: The point was—

Judge Huxman: We will come to No. 9:

"That Exhibits B-1 to B-22, inclusive, attached hereto and made a part hereof, are correct compilations for each of the elementary public schools in the City of Topeka, Kansas, and correctly state for the 1950-1951 school period the following as to each school designated:

- "1. Name of elementary school.
- "2. Name of principal.
- "3. Class-room units.
- "4. Enrollment.
- "5. Kindergarten units.
- "6. Kindergarten enrollment.
- "7. Names of teachers, grades taught, enrollment for each grade, and average daily attendance."

[fol. 58] Now, before we go to that, I think I would like to clear up in my mind a matter that is somewhat cloudy. I want to be sure that I understand these designations. "SP" means what?

Mr. Goodell: Special.

Judge Huxman: Special teacher. What does "K" mean?

Mr. Goodell: Kindergarten.

Judge Huxman: And the figures appearing after "K" is the number of kindergarten students, or what is that? For instance, in Buchanan, you have this: "Teacher, SP K 1 1-2 2 2-3".

Judge Mellott: I suppose those are first grades.

(Colloquy was here had between Court and Counsel off the record.)

Judge Mellott: Do you stipulate, gentlemen, that these exhibits are correct and reflect those various matters?

Mr. Charles Scott: If the Court please, we agree to everything. I think there is a typographical error in the name of Mildred Starnes, as appears on Exhibit "B-1." The name should be changed to Myrtle. It isn't material.

Judge Mellott: Any correction such as that is not very material, but if you want them corrected—

[fol. 59] Judge Huxman: Do plaintiffs agree to request for admissions as contained in No. 9, then.

Mr. Carter: Yes, sir.

Judge Huxman: No. 9 is agreed to.

No. 10:

"That Exhibits C-1 to C-22 inclusive, attached hereto and made a part hereof, are correct compilations for each of the elementary public schools in the City of Topeka, Kansas, and correctly state for the 1950-1951 school period the following as to each school designated:

"1. Name of teacher or principal.

"2. Total service.

"3. Degree or hours credit.

"4. 1950-1951 salary.

"5. 1951-1952 salary."

Is there any objection to agreeing to that?

Mr. Charles Scott: No, sir.

Judge Huxman: All right. Request No. 10 is agreed to in toto.

No. 11:

"That in arriving at the salary to be paid teachers in the elementary public schools of Topeka, Kansas, the determining factors are the same for colored teachers as for white teachers, and the application of these factors is the [fol. 60] same."

Mr. Carter: Well, Your Honor, we can't say that this is a fact. We don't think it's important.

Judge Huxman: That's rather a conclusion, isn't it?

Mr. Goodell: Maybe it is, except what is meant by it, the

clear implication of it, what I meant to say, if it can be made plainer, I will amend it to say it. No distinction is made in the matter of payment of salaries between white and colored teachers.

Judge Huxman: Well, Mr. Goodell—

Mr. Goodell: —because of color.

Judge Huxman: The Court is of the view that No. 11 perhaps would serve no useful purpose if agreed to, and it is of such a nature that the plaintiff's perhaps shouldn't be required to agree to it. I doubt if they make an issue of that.

Mr. Goodell: If the Court please—

Judge Mellott: They have covered it in the preceding paragraph admitting what the salaries are, haven't they?

Mr. Goodell: That admits salaries, yes. That shows the physical facts of what the salaries being paid are, yes.

(Colloquy was here had off the record.)

[fol. 61] Judge Huxman: What is it you state?

Mr. Goodell: The amendment to the amended complaint which is amending paragraph 8 of the amended complaint filed in this case makes blanket allegations. They don't go into particularity, but they make blanket allegations of disparities that exist between the white and the colored elementary schools. Now one of the disparities covered by that pleading in amendment to paragraph 8 of the original —of the amended complaint, is teaching. Now I take it that under that allegation it would be fair—it would be a fair line of proof for them to admit—to introduce evidence that we are treating the teacher differently with respect to their contracts and their salary and so forth. So of course you don't get as good work and their children are suffering because they are not getting the benefit of a well-paid teacher.

Judge Huxman: Speaking for myself, Mr. Goodell, I am still of the opinion that even if that is so, if that is their position, it's a matter that you can't very well reduce to an absolute agreement. They may not—

Mr. Goodell: I see the Court's point about that.

Judge Huxman: —they may not contend that. If they do, it's their burden to establish. If they fail to establish

it, it's out of the case. If they make the contention it's a very simple matter for you to prove that it isn't so.
 [fol. 62] Mr. Goodell: Of course they know that whether it's a fact or not. I say that it's a fact, but I agree with you that they may not care to admit it and perhaps shouldn't be required to.

Judge Huxman: No. 11 is out. All right. No. 12:

"That Exhibit D, attached hereto and made a part hereof, is a correct compilation of statistics of the transportation costs for the colored elementary schools in the City of Topeka for the 1950-1951 school period."

Mr. Goodell: That is shown by our records, the treasurer's office.

Judge Mellott: Do you contend that that is not an accurate compilation, gentlemen?

Mr. Charles Scott: We agree to it.

Mr. John Scott: That is admitted.

Judge Huxman: No. 13:

"That Exhibits E-1 to E-5 inclusive, attached hereto and made a part hereof, are correct compilations of statistics relating to public school nurses in the City of Topeka, Kansas, and correctly set forth statistics relating to public health nurses in the City of Topeka for the 1950-1951 school period."

Mr. Goodell: Now all that exhibit is is to show the number of persons or children served by the various public school nurses over the city as reflecting on the question of whether there are enough nurses to give adequate service to the colored schools. In other words, it shows the load per pupil for the nurses.

Mr. Carter: Your Honor, there again is one of the things that we don't know. We are not going to controvert it.

Mr. Goodell. Our records show it.

Judge Huxman: If the records show it, could you not agree to the exhibit without agreeing to the matter which they intend to establish by it. You don't have to agree to that. You could agree that this is a fact or the facts shown by this exhibit are correct. You don't have to agree to the conclusion that flows from that.

Mr. Carter: All right.

Judge Huxman: All right. It is then agreed that Exhibits "E-1" to "E-5", as attached to the request for stipulations, are correct.

Mr. Carter: Yes, sir.

Mr. Goodell: The record is correct.

Judge Huxman: And the facts therein reflected are the facts.

Mr. Carter: All right.

Judge Huxman: All right.
[fol. 64] No, No. 14:

"That Exhibits F-1 to F-22 inclusive, attached hereto and made a part hereof, are correct compilations of the elementary public school program for each of the designated elementary schools in the City of Topeka, Kansas, for the 1950-1951 school period."

Any objections to that?

Mr. Carter: No, sir. We agree to that.

Judge Huxman: You agree.

Mr. Carter: Yes, sir.

Judge Huxman: All right. Request for admission No. 14, as read, is agreed.

Judge Mellott: Let me be on the record for just a moment.

I believe that if I have understood correctly what Judge Huxman has accomplished so far in the pre-trial, it has resulted in the receipt in evidence of all of these exhibits here, is not that correct, gentlemen?

Mr. Charles Scott: That is correct.

Judge Mellott: I am wondering if we shouldn't just turn these exhibits over to the clerk and let him mark them as exhibits admitted in evidence for all purposes, and then they constitute a part of the formal record.

Mr. Brewster: We have additional ones, supplemental requests.

[fol. 65] Judge Huxman: I think that is a good suggestion, Judge Mellott, and the parties have agreed to it.

Mr. Goodell: If Your Honor please, we were going back to the preceding paragraphs which were passed for the moment in the light of this last exhibit.

I am willing to amend paragraph 3 by substituting for "curricula" the words, "course of study."

Judge Huxman: Mr. Goodell, let me ask you, for my information, these exhibits, I forget what the numbers of them are, set out the courses of study.

Mr. Goodell: "F-1."

Judge Huxman: The "F" series of exhibits sets out the actual courses of study that are taught in all of these schools.

Mr. Goodell: That's right.

Judge Huxman: What does your request for admission No. 3 add to what those exhibits actually show?

Mr. Brewster: How would it be if on 14 we just added, "And said program includes all courses of study prescribed by the law of the State of Kansas." Is that what you are getting at?

Mr. Goodell: I wanted to make that plan that we were following the prescribed course of study.

Judge Huxman: You have actually set out the courses of study that you say are taught.

[fol. 66] Mr. Goodell: All it takes to pick it up and make it complete——

Judge Huxman: There is no contention made that they don't conform to the state requirements. If they want to claim it, let them prove it. You say those are the courses of study.

Mr. Goodell: I don't care to belabor the point.

Judge Huxman: What would 3 add?

Mr. Goodell: Three supplements 14 only in respect, that it ties up and shows that it's a legal course of study being followed or taught.

Judge Mellott: May I suggest that the reporter read what Mr. Brewster interpolated and see if, perhaps, his interpolation may not be added as a part of your admission with reference to Exhibit "F".

(Portion referred to by Judge Mellott read aloud by the reporter.)

Judge Mellott: Is there any reason why you couldn't supplement No.——

Mr. Carter: I think, if I may, Your Honor—

Judge Mellott: Any reason why you couldn't supplement No. XI which you have agreed to, by the addition of what Mr. Brewster just said.

[fol. 67] Mr. Carter: I frankly am unable to see where it adds anything. We have admitted the facts.

Judge Mellott: I don't think it adds much. You are not contending that Topeka in the operation of its school system is refusing to abide by the statutes of Kansas and the orders of the state superintendent of public instruction with reference to courses of study, are you; you are not making that contention.

Mr. Carter: I would prefer, however, Your Honor, if the exhibit which sets out the courses and they are admitted in the record, I think they speak for themselves.

Judge Mellott: You haven't answered my question. I think you should answer it. Do you contend that the board of education of the City of Topeka, Kansas, is not complying with the state law and the regulations and the orders of the state superintendent of public instruction?

Mr. Carter: That is not our contention, no.

Judge Mellott: All right.

Judge Huxman: Then why do you object to this addition? The only reason you could object to it is that you claim they aren't complying.

Mr. Carter: Well, Your Honor, the point is that we have admitted the courses of study. These are facts which [fol. 68] they have set forth in the record; these are the courses of study which are taught.

Judge Mellott: Well, I think we would take his statement as an admission that of course he is not contending that the Board of Education of Topeka is doing other than complying with the Kansas statutes so far as course of study is concerned. I would certainly spell that out of counsel's statement.

Judge Huxman: With that statement by counsel perhaps the addition isn't necessary.

Judge Mellott: I don't think so.

Judge Huxman: Let's take up the supplemental requests for stipulations which have been filed by the defendants.

No. 15:

"That Exhibit G, attached hereto and made a part hereof, is a correct statement taken from the records of the Board of Education of the City of Topeka, Kansas, pertaining to bus schedules for colored elementary school children for transportation furnished said children by the said Board of Education for the 1950-1951 school year."

Is there any objection to agreeing to that stipulation?

Mr. Carter: We agree to that, Your Honor, with the exception of line 9.

[fol. 69] Judge Huxman: Line 9?

Mr. Carter: Line 2 under "Monroe"; that is on the exhibit itself.

Judge Mellott: That is on the exhibit.

Mr. Carter: Line 2 under "Monroe."

Judge Huxman: Which says, "8:10—First and Kansas." You don't agree to that.

Mr. Goodell: You mean that is erroneous? What should it be?

Mr. Charles Scott: Should be First and Quincy.

Mr. Goodell: Is that correct, First and Quincy?

Judge Mellott: Let's change it to First and Quincy, then.

Mr. Goodell: I am writing that in as an amendment then.

Judge Huxman: And, as amended, plaintiffs agree to request 15 for admissions.

Mr. Carter: Your Honor, Mr. Scott brought something to our attention. This addendum down here, "Bus picks up students also anywhere along route."

Judge Mellott: You haven't gotten to that yet, have you?

Mr. Carter: That is on the same exhibit—on the exhibit.

[fol. 70] Judge Huxman: "Bus picks up students also anywhere along route." You don't agree to that?

Mr. Carter: I understand that they picked them up at these various stops.

Mr. Goodell: They do and, in addition, along the way at not designated stops they will pick them up. That is what they tell me; I don't know. That is what the clerk's office tells me has been the practice for years.

Judge Mellott: Well, do you Topeka lawyers especially, do you know whether that is a fact or not?

Mr. Charles Scott: No, sir.

Judge Mellott: Suppose we admit the exhibit, then, eliminating from it the parenthetical clause and let that remain as an item requiring proof, if that is required.

Judge Huxman: If requested. As so modified, do you agree to the admission?

Mr. Charles Scott: Yes, sir.

Judge Huxman: All right.

No. 16:

"That Exhibit H attached hereto and made a part hereof, is a correct statement of facts from the records of the Board of Education of the City of Topeka pertaining to teacher load in the kindergartens of the Topeka public schools for [fol. 71] the 1950-1951 school year."

Any objection to agreeing to that?

Mr. Carter: Our witness informs us that this is not correct.

Judge Mellott: Who is your witness?

Mr. Carter: Dr. Speer.

Judge Mellott: What does he know about it; has he checked the records?

Mr. Carter: Yes, sir.

Judge Mellott: Is he here now?

Mr. Carter: No, he isn't.

Judge Mellott: How much of that is covered here in exhibits which are already in evidence.

Mr. Carter: I don't know.

Judge Mellott: You have stipulated with referee, I believe it was "E" or "F", has already been covered. Let me refer back here.

Mr. Brewster: Series "B", I imagine.

Judge Mellott: You have shown here what the number of kindergarten children were in each of the schools, and you have shown what the average daily attendance of the kindergarten was. I don't know what is shown by "H".

Mr. Carter: Isn't this the teacher load? These are facts taken from that other report, isn't it, Mr. Goodell?

[fol. 72] Mr. Goodell: Sure. It's a breakdown of each school in the City of Topeka showing the teaching load per teacher. In other words, children each teacher has under her for particular grades starting with kindergarten.

Judge Mellott: What I am asking is simply this: Isn't Exhibit "H" a mere assembling of the data which is already in Exhibit "B"?

Mr. Goodell: It's calculations drawn therefrom from that other data; it's a mathematical, in other words, reduction of what the other exhibits show. I can prove that; I don't care to argue it.

Judge Huxman: Now, gentlemen, the Court is of this view, that this exhibit is just a compilation of the other exhibits already in there.

Mr. Carter: But, Your Honor, Mr. Goodell himself says it's a calculation based upon it which is entirely different.

Judge Huxman: That is what I mean, a compilation made from data already in. It's a simple calculation, and it's either right or it's wrong.

Mr. Goodell: Calculation—it's a reduction of the figures used down to teaching load.

Judge Huxman: The Court is of this view, that we will not ask for an admission at this time, and we will give both parties an opportunity to check this exhibit again, against [fol. 73] the basic data which is contained in these other exhibits, and then, before we start into the trial Monday morning, we will again ask Mr. Goodell whether he is satisfied with the correctness, and we will also ask plaintiff—then if they still contend that this computation is not correct, to have for the benefit of the Court your computation in which you point out the manner and respect in which this is not correct. Now if it is not correct, it shouldn't go in. If it is correct, I know both parties want to agree to it.

Now, that is 16, isn't it?

Mr. Goodell: Yes.

Judge Huxman: That will be passed until Monday morning.

Both parties here have shown a spirit of fairness and cooperation and I see no reason in the world why you shouldn't get together on the question of whether this exhibit is or is not correct.

No. 17:

"That Exhibit I attached hereto and made a part hereof is a correct statement of facts from the records of the Board of Education of the City of Topeka pertaining to

teacher load in the first six grades of the elementary schools of the Topeka public school system for the 1950-1951 school year."

[fol. 74] Mr. Carter: We could shorten this, Your Honor, if we might have the same ruling as you made on the last one apply to this one.

Judge Huxman: All right. We pass No. 17 to Monday.

Mr. Brewster: As I understand it, their claim is, using the first series of exhibits, we haven't computed correctly, is that what they mean?

Mr. Goodell: No, they are challenging the reductions we made there.

Judge Huxman: No. 18:

"That Exhibit J attached hereto and made a part hereof is a correct statement of facts from the records of the Board of Education of the City of Topeka pertaining to auditoriums and gymnasiums in the elementary schools of the City of Topeka, Kansas."

Mr. Goodell: I think there is a typographical error in that which I would like to correct.

Judge Huxman: All right. Where is that.

Mr. Goodell: Exhibit "J". On the Monroe School where I have in my exhibit "combination", meaning that they have combination auditorium and gymnasium, that is erroneous, according to my later information, that they do not have a gymnasium, only an auditorium.

Judge Huxman: Only an auditorium.

[fol. 75] Judge Mellott: What do you want to do, strike out the word "combination" and put in the word "yes" under "Auditorium."

Mr. Goodell: That's right and "no" under "Gymnasium."

Judge Huxman: And "no" under "Gymnasium", all right. That correction will be made.

Mr. Carter: Your Honor, we don't feel that we can accept this at this time. We are today, as of today, our experts are now checking these items, and we cannot say whether they are true or not, so we are not willing to accept them as of now.

Judge Huxman: We will pass that as we have some of these others until Monday morning.

Judge Mellott: May I inquire if counsel understand that we are expecting you to tell us Monday morning whether these are correct and, if they are not, you will give us what you say the correct data is.

Mr. Carter: I understand that completely.

Judge Huxman: No. 19:

"That no distinction is shown by the Board of Education of the City of Topeka in school plant facilities and equipment, because of race or color. Instead, the same factors are considered and applied by said Board of Education as to plant facilities and equipment in both white and colored [fol. 76] elementary schools."

Mr. Carter: We can't agree to that.

Judge Huxman: All right, plaintiffs will not be required to agree to No. 19.

No. 20:

"That Exhibit K attached hereto and made a part hereof, is a correct statement of facts from the records of the Board of Education of the City of Topeka pertaining to original cost of school buildings in the City of Topeka, Kansas, and correctly states the following:

- "1. Name of building or school.
- "2. Year of construction.
- "3. Structural cost.
- "4. Land cost.
- "5. Equipment cost."

Mr. Carter: We agree.

Judge Huxman: 20 is agreed to.

No. 21:

"That Exhibit L attached hereto and made a part hereof, is a correct statement from the records of the Board of Education of the City of Topeka pertaining to the present appraised value of the school buildings and equipment, for both white and colored elementary schools; that said appraised value is the appraised value furnished by the appraisers for the insurance underwriters for the purpose of

[fol. 77] fixing values of said buildings and equipment for issuing insurance thereon."

Mr. Carter: We agree to that.

Judge Huxman: No. 21 is agreed to.

Now, that completes the defendants' request for agreement.

Judge Mellott: In the light of what has just been gone through, the Exhibits "G" and "K" and "L" seem now to be ready for admission formally, is not that correct, gentlemen?

Mr. Charles Scott: That is correct.

Judge Mellott: The clerk, then, will mark them as admitted in evidence. The others just covered, namely, the others, "H", "I" and "J" may be handed to the clerk and marked for identification only.

How has the map been marked, if at all.

Mr. Goodell: Exhibit "A", Your Honor.

Judge Mellott: Exhibit "A". It may be marked and admitted in evidence, subject to any corrections that counsel may desire to call to the Court's attention based upon the draftsmanship of the map.

Mr. Goodell: I do think this, Your Honor, I want to re-check it. I think since this map was prepared, the copy prepared which came from the map that the Board of Education clerk's office keeps, that there is a segment of that southwest territory that may have been annexed so it wouldn't be correctly outside of the city now.

[fol. 78] Judge Huxman: Yes.

Judge Mellott: Well, I believe we all know and can take judicial notice of the fact that under the statutes of Kansas pertaining to cities of the first class, schools within and adjoining cities of the first class, that the statutes contemplate, and most of the cities of Kansas do, attach to the cities for school purposes territory which is outside of the city, and that is what you refer to as property attached to the city for school purposes.

Mr. Goodell: Yes.

Judge Mellott: Now since your map indicates that certain of that territory has been attached for school purposes but that there may be some inaccuracies in that, you have not

checked to see if subsequently some of the territory has actually been annexed to and brought into the city for all purposes.

Mr. Goodell: I will reconcile that with all the later annexations.

Judge Huxman: Let me ask you this, Mr. Goodell, is it your understanding that this map is accurate and correct as to the close of the school year?

Mr. Goodell: Yes.

Judge Huxman: Then it would seem to me, that is, on the questions which we have, that what has taken place in the last three or four months or as to the annexation of [fol. 79] additional territory, would not be any factor in determining the constitutionality — the questions before us in this case, do you gentlemen agree with that?

Mr. Charles Scott: Yes.

Judge Huxman: And if this map is correct as drawn, any changes since would not need to be shown.

(A brief recess was here had at the conclusion of which the following further proceedings were had:)

Judge Huxman: Let me address this remark to attorneys for plaintiffs: Has your request for admission No. 1 not already been met by defendants' request for admission 1. There is no difference in them, is there?

Mr. John Scott: Except for the latter part, Your Honor, "That Negro children of elementary school age are compelled to attend one of the four Negro schools aforementioned because of their race and color, pursuant to the custom and usage provided in General Statutes 1949, 72-1724."

Judge Huxman: That is a fact, isn't it?

Mr. John Scott: Yes, sir.

Judge Huxman: I am asking Mr. Goodell now. That latter part is a fact now, isn't it?

Mr. Goodell: I think it's embraced in our stipulation.

Judge Huxman: You do not have that—you do not have [fol. 80] in your request the statement, "Negro children of elementary school age are compelled to attend one of the four negro schools because of their race and color pursuant to the custom and usage provided in G. S. 1949, 72-1724." You do not have that in your—

Mr. Goodell: We don't use the statute; we say they are required to attend instead of compelled.

Judge Huxman: That is a fact that it is because of their—

Mr. Goodell: That's right.

Judge Huxman: All right, then—is it then agreed, gentlemen, that it is a fact and so stipulated for the purpose of this trial that negro children of elementary school age are compelled to attend one of the four negro schools provided for in Topeka because of their race and color pursuant to the custom and usage provided in G. S. 1949, 72-1724.

Mr. Goodell: Well, that is a fact. I don't think the "custom and usage" is provided by the statute. It's simply an authorization, but we won't quibble about that.

Judge Huxman: Suppose we eliminate "custom and usage" as authorized.

Mr. Goodell: That is all right.

Judge Mellott: I understand there isn't any dispute.

[fol. 81] Mr. Goodell: We will admit it.

Judge Mellott: —that they are, you say, required—the word "required" connotes about the same thing as compelled.

Judge Huxman: He objected to the words "custom and usage" provided by the statute. The statute doesn't perhaps provide a custom.

Mr. Goodell: I would say pursuant to the statute.

Judge Huxman: All right. We will put in the word "pursuant", is that agreed to?

Mr. Goodell: Yes.

Judge Huxman: All right.

Now, we will take up No. 2:

"2. That the distance be computed based on city blocks from given points of residence of infant plaintiffs and other Negro children similarly situated, to the designated Negro schools where they must attend as outlined on the official map of the City of Topeka."

Judge Mellott: Since we did not require you to go into that average one, it seems to me that you wouldn't want to insist upon this, would you, Mr. Scott?

Mr. John Scott: Well, if Your Honor please—

Judge Huxman: In other words, do you want to go back [fol. 82] now to the defendants' request No. 8 and add to it what you now have, is that what you want to do?

Mr. John Scott: No, sir. We will withdraw that.

Judge Huxman: You will withdraw request No. 2.

Mr. Carter: No, sir. We are talking about an entirely different point there, Your Honor.

Judge Mellott: I don't understand what you are talking about.

Mr. Carter: I will try to explain it for a moment. When the defendants are talking about averages, insofar as we are concerned, we feel that that is irrelevant because it has nothing to do with the individual disadvantage. When we speak here of a distance which is travelled by individual plaintiffs we are attempting to show an individual disadvantage which these plaintiffs have in making the trip. We are not talking about general averages; we are talking about what affects the individual plaintiff, and I think that is entirely a different point.

Judge Huxman: Mr. Counsel, we didn't permit the defendants to commit you to a yardstick of measuring distances and why should we—

Mr. Carter: We will put on proof to that effect.

[fol. 83] Judge Huxman: Let me just finish my sentence for the record so it doesn't stand up there in the air. Why should we permit you to commit them to a yardstick of measurement?

Request for admission No. 2 is withdrawn.

Request No. 3:

"Infant plaintiffs and other Negro children similarly situated are transported by buses to the Negro schools where they attend and are picked up by said buses at designated points along prescribed routes in accordance with schedules and designated pick-up points outlined by the School Board or its agents. A copy of the schedule of routes is hereto attached marked Exhibit 'A' and made a part hereof."

That schedule has already been agreed to, hasn't it, and request No. 3 will therefore, I presume, be withdrawn.

Judge Mellott: That is Exhibit "G" which has been ad-

mitted in evidence with the parenthetical clause, "Bus picks up students also anywhere along the route." eliminated.

Now you gentlemen did tell us, did you not, that you would make inquiry and find out, if you can, by Monday morning whether the parenthetical clause is or is not applicable, can you not do that?

[fol. 84] Mr. John Scott: Yes, sir.

Judge Huxman: That's right.

Judge Mellott: Then that probably covers everything that you have. Now you have a copy of the schedule of routes.

Mr. John Scott: Yes, sir.

Judge Huxman: Is it any different from Exhibit "G"?

Mr. Charles Scott: No.

Mr. John Scott: No, it's exactly the same.

Judge Mellott: Do you propose to offer it in evidence as an additional exhibit?

Mr. John Scott: No, sir. The one that the defendants offered—

Judge Huxman: The entire request No. 3 is withdrawn in view of the admissions already made.

Mr. John Scott: That's right, sir.

Judge Huxman: Request for admission No. 4:

"That no provision made for shelter or protection against inclement weather conditions or safety regulations at designated pick-up points for infant plaintiffs and other Negro children similarly situated while waiting for the arrival of their respective buses."

[fol. 85] What do the attorneys for the defendant say as to that request?

Mr. Goodell: We don't have shelter-houses, so I would say we do admit that. "Safety regulations" is pretty broad. I don't know what they mean by that.

Judge Huxman: Well, what would you say to this: Safety regulations other than those provided for traffic generally.

Mr. Brewster: The board of education doesn't provide the lights anyway.

Mr. Goodell: In Topeka the Police Department and the

traffic control division have jurisdiction over those matters.

Judge Huxman: Don't you gentlemen feel that the question of safety regulations could be deleted? What value is there to——

Mr. John Scott: Well, if Your Honor please——

Judge Huxman: Now you can show, if you want to, that there are no added regulations or precautions. Of course the Court will take knowledge, in the absence of anything else, that the usual conditions with respect to traffic and travel in the city obtains, and no other, unless it's shown.

Mr. John Scott: Yes, I think that is sufficient, don't [fol. 86] you?

Mr. Carter: Yes.

Mr. John Scott: I think that is sufficient.

Judge Huxman: Then is it agreed that request for admission No. 4, as follows, is agreed to:

“That no provision made for shelter or protection against inclement weather”—“That no provision is made for shelter or protection against inclement weather conditions.”

Do the defendants agree to that?

Mr. Goodell: That is correct.

Judge Huxman: And we will omit from your request the reference to any additional safety regulations.

Mr. John Scott: Yes, sir.

Judge Huxman: I didn't go quite far enough, Mr. Reporter. The admission should read as follows:

“That no provision is made for shelter or protection against inclement weather conditions at designated pick-up points for infant plaintiffs and other Negro children similarly situated while waiting for the arrival of their respective buses.”

That is the admission as it is agreed to.

Judge Mellott: The affirmative answer was made by counsel for the School Board.

Mr. Goodell: Yes.

[fol. 87] Judge Huxman: No. 5:

“That said buses make only two trips a day to and fro to the respective all Negro schools in the morning as prescribed”——

Judge Mellott: We don't have the exhibit, so I suppose—

Judge Huxman: Would you object if we substituted for your Exhibit "A" the number of their exhibit to which—

Judge Mellott: Exhibit "G".

Mr. John Scott: That will be perfectly all right.

Judge Huxman: "in the morning as prescribed in Defendants' Exhibit 'G' admitted in the record and in the evening at the close of school."

Judge Mellott: I understand that is admitted.

Mr. John Scott: Yes, sir.

Judge Mellott: Correct, Mr. Goodell?

Mr. Goodell: Yes.

Judge Huxman: I wanted to stop there purposely; so far you admit that much of the request of No. 5.

Mr. Goodell: The schedule shows that they are taken to the school in the morning and returned at night.

[fol. 88] Judge Huxman: Now, we will take up the rest of the request because we might run into trouble there. The further request is made for an admission, "As a result, infant plaintiffs and other Negro children similarly situated are required to spend the entire day at their respective school without the opportunity and benefit of seeing their parents during the noon hour and are required to eat cold lunches which are prepared by their parents before leaving home in the morning."

Mr. Goodell: We are not prepared to admit. It's a conclusion.

Judge Huxman: That is a conclusion, isn't it, that flows from the admission.

Mr. John Scott: We can prove that, Your Honor.

Judge Huxman: That portion of the request will be denied.

Mr. Goodell: I don't think it's a proper issue in the case because they are treated no differently than white children. If they want to go home for lunch, they go, and if they don't, they stay and eat lunch.

Judge Huxman: That is argumentative, in any event.

Request No. 6:

"That the respective buses are without any supervisor other than the driver to exercise disciplinary measures [fol. 89] and control of said children."

Is that agreed to?

Mr. Goodell: I don't think we send a guard along; I believe that is accurate; we just have a driver.

Judge Huxman: You agree to that, then.

Mr. Goodell: I would like to check it. I think it's correct.

Judge Huxman: Let's put it this way, you agree to that, subject to your right to check and withdraw your agreement if your further investigation shows otherwise.

Mr. Goodell: Yes.

Judge Huxman: No. 7:

"That Buchanan School does not have an auditorium or gymnasium; such facilities are available at Sumner,"—before we go further, gentlemen, we have already covered the question of auditoriums and gymnasiums in the series of exhibits designated "J".

Mr. John Scott: Yes, sir.

Judge Mellott: We have not yet admitted "J", but you were to—

Mr. John Scott: —check it.

Judge Mellott: —check it and give us any corrections on Monday morning.

Mr. John Scott: That's right.

Judge Huxman: Then we should not agree to request [fol. 90] No. 7 here and that can be ironed out on your investigation as to Exhibit "J", as proffered by the defendant.

Mr. John Scott: Yes. We will withdraw that.

Judge Huxman: Request for admission No. 7 is withdrawn because of these other matters in the record.

No. 8:

"That Monroe School's playground or a portion thereof is separated by a public thoroughfare adjacent to the building and located on the easterly side of said playground is the A. T. S. F. Railroad right-of-way and track."

Is that a fact, Mr. Goodell?

Mr. Goodell: I believe that is accurate, yes.

Judge Huxman: Then you admit request No. 8 as read.

Mr. Goodell: Yes.

Judge Huxman: All right.

No. 9:

"That no provisions are made for electrically operated school stop signs and safety signals at any of the Negro schools and no safety measures are provided for Infant Plaintiffs and other Negro children similarly situated who are required to cross the intersection of First and Kansas [fol. 91] Avenue at a time when the vehicular traffic is dense, while they are enroute to the designated bus pick-up points and at other busy intersections throughout the City of Topeka where Infant Plaintiffs and other Negro children similarly situated are required to cross enroute to designated bus pick-up points."

Mr. Goodell: We can't admit that because it isn't an accurate statement. Furthermore, we have no control over traffic lights, electric devices. The City of Topeka Police Department takes traffic counts at various points in town and, from their determination, decide that a designated point should have school blinker signs, and we have several cases, the evidence will show if we get in that point,—in several cases requested signs which they on the traffic count didn't think it was justified and wouldn't put them in. We don't have any control over it.

Mr. John Scott: If Your Honor please—

Judge Huxman: Didn't we, when we had up defendants' request for agreement, agree that there were no extra safety or traffic regulations provided at these places.

Mr. Goodell: I don't think so. There are some—

Judge Mellott: Let me ask this question: You agree, do you not, Mr. Scott and counsel for the plaintiffs, that Mr. [fol. 91a] Goodell is correct in his statement that the Board of Education has nothing whatever to do with putting in blinker lights and safety devices for school children and others to cross the public streets, but at best, can only request that the traffic department of the state and the city police department take care of those matters; do you not agree that that is a fact?

Mr. John Scott: We agree that that is a fact and also, to extend that, Your Honor, I think the first part of that request is a fact, that there are no—

Judge Mellott: Well, I suppose that if you divide the

request, there may be some merit, "That no provisions are made for electrically operated school stop signs and safety signals at any of the Negro schools." Now, I suppose——

Mr. Goodell: If the Court please, that is not accurate.

Judge Mellott: Then you should not agree upon it.

Mr. John Scott: It is accurate.

Mr. Goodell: No, it isn't accurate.

Mr. John Scott: We can prove it, Your Honor.

Judge Huxman: The Court feels that that is a very minor matter, whatever the electrical arrangements are or aren't, and, if you can't agree on it, it will take only fifteen [fol. 92] minutes of evidence to establish what the fact is.

Mr. Goodell: They make a broad statement, as I understand it, no safety devices in any of the areas traversed by the colored children to go to their schools——

Judge Huxman: They don't say that at all.

(Colloquy was here had off the record.)

Mr. Goodell: For example, on 10th Street, you have Parkdale School and Washington School in very close proximity. The negro children who have to cross 10th Street to get to Washington School that walk and don't ride, they use that traffic sign—I mean there is a designated crossing for school children where they cross over 10th there for Parkdale. Now it's splitting hairs to say that is solely for Parkdale and no benefit to Washington.

Judge Huxman: Well, the Court feels that is a minor matter.

Mr. Goodell: We have got that situation in other parts of town.

Judge Huxman: It's a simple matter, and we will not require the parties to agree on that—request No. 9.

Mr. John Scott: We can prove it very easily, Your Honor.

[fol. 93] Judge Huxman: I believe the attorneys for the plaintiff's will agree that this case, the outcome, doesn't hinge upon that one little factor; I doubt whether it's going to be determinative too much.

Now, does that conclude plaintiffs' requests for admissions?

Mr. John Scott: Yes, sir.

Judge Huxman: We want to ask at this point counsel for the State of Kansas whether they have at this time any requests for admissions of fact in addition to what has been agreed to and, if not, whether they go along with, and agree to, these admissions which have been made by the respective parties to this litigation.

Mr. McQueary: If Your Honor please, the position of the State of Kansas, insofar as this lawsuit or this controversy is concerned, is going to be to endeavor to uphold the constitutionality of the statute in question, and our participation will be limited to that field, and so far as equal facilities or the conditions provided by the Board of Education of the City of Topeka or the facilities enjoyed by the negro, by the plaintiffs, we are not going to make that a matter of issue insofar as we are concerned. We have no knowledge as to that; we haven't investigated it. That will be left solely to the other parties in this matter.

Judge Huxman: Then I understand your position is that you have no request for admissions of fact.

[fol. 94] Mr. McQueary: We have none, Your Honor.

Judge Huxman: And that the state has no interest in these admissions which have been made by the parties, the plaintiff and defendant, other than the state, because you do not think that they touch the state's phase of this case.

Mr. McQueary: That is a correct statement.

Judge Huxman: All right.

Mr. Goodell: I have one more matter. I would like to request a stipulation that the—as an exhibit, that seventeen cities, first and second class cities of the State of Kansas, operate separate colored and white schools in the elementary grades, and I have an exhibit.

Judge Huxman: I am not sure that I understand that, Mr. Goodell.

Mr. Goodell: I have an exhibit with the names of the cities showing that seventeen cities in the State of Kansas are operating their elementary school systems similar to Topeka—strike that—operating separate white and colored schools in the elementary grades pursuant to the same statute.

Judge Huxman: Is there any objection to that admission?

Mr. Greenberg: Yes, Your Honor. We object on the [fol. 95] ground that what may happen in any other city in the State of Kansas is not relevant to the rights of our particular plaintiffs who operate in this school system here and now.

Judge Huxman: Since there is one member of the Court not here, in any event we will—and since this is the trial court, we will receive it. You have no objection to the correctness of the statement.

Mr. Greenberg: We don't know, as a matter fact; we haven't—

Judge Huxman: You have no reason to doubt the correctness of the statement.

Mr. Greenberg: We have had no occasion to investigate it because we haven't thought it pertinent.

Judge Huxman: The exhibit will be received subject to its materiality.

Judge Mellott: It will be marked as Exhibit "M", Defendants' Exhibit "M".

Judge Huxman: Also subject to the right of counsel before trial, if he so desires, to attack it as to its correctness.

Mr. Greenberg: That is agreeable.

Judge Huxman: Is there anything else?

Judge Mellott: That may be taken up Monday also.

[fol. 96] Judge Huxman: Is there anything else now, gentlemen?

Judge Mellott has a matter that he would like to inquire about. Go ahead, judge.

Judge Mellott: I was only going to suggest to my associates on the bench that we may not have covered categorically sub-division (6) of Rule 16 which says that it's proper for us at a pre-trial to give consideration to such other matters as may aid in the disposition of the action. That is, of course, only a general statement. Does either side care to suggest, in line with that sub-section, any other matters which you think might be taken up with the Court at this time which would aid in the disposition of the action.

Mr. Goodell: I think of none, Your Honor.

Judge Mellott: Very well. The concluding sentences of the rule under which we are now functioning provides that, "The court shall make an order which recites the action taken at the conference, the amendments allowed to the

pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel;''.

Now, where a pre-trial is handled as intelligently and as expeditiously as this has been handled by reason of the [fol. 97] preliminary requests for admissions having been made and secured to some extent, it seems to me that perhaps it is wholly unnecessary for this tribunal to make any order because your record itself shows just what disposition has been made.

Counsel may desire to secure from the reporter copies of what has been accomplished, but I believe that the way in which this has been handled that everybody has it pretty well in mind, and I am suggesting that perhaps it would be mere supererogation and wholly unnecessary for the Court in this particular instance to dictate into the record a lengthy order inasmuch as Judge Huxman has pretty well covered that as we have proceeded.

Do you think this Court should make a separate order or not?

Mr. Goodell: No, I think not.

Judge Huxman: All right. Anything else that anyone has to suggest which might tend to expedite this hearing before we recess. If not, the pre-trial conference will be recessed until 10:00 o'clock Monday morning when we will take up for final disposition the matters that we have left here in abeyance and which you gentlemen on your respective parts will investigate and see if you can satisfy yourselves, and we will then make final disposition of that and immediately go into the trial of this case at the conclusion—final conclusion of the pre-trial conference.

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[fol. 98] (Reporter's Note:) The further proceedings in the pre-trial conference had on June 25, 1951, are contained in the transcript of proceedings of the hearing proper.

* * * * *

Reporter's Certificate (omitted in printing).