that he agrees with resp on this point. Moreover, if the issue actually was raised below, the CA10 was required to reach it first before turning to the substantive issue of whether the jury instructions properly stated the law. The Rule provides: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto ...." The CA10 has held that in the absence of an objection, the Rule "precludes consideration of the instruction." Union Pacific Railroad Co. v. Lumbert, 401 F.2d 699, 702 (CA10 1968). Thus, the Court's statement that, in light of the fact that the CA10 reached the merits, "it seems clear that respondent did not refer to [Rule 51] below" is entirely appropriate. To the extent that there is an error in this case, it is the CA10's. Finally, nothing in the Court's opinion would preclude the CA10 from rectifying this possible error when the case is returned to it. The Court did not actually reach the question of whether resp had raised the failure-to-object point below; rather it held only that the argument was waived here. If resp has lost her opportunity to raise this argument, it is not as a result of any action by the Court.

I recommend denial.

There is no response.

August 5, 1985 Cassell No op in petn

Resp. does not seek rehearing on holding that single issue instruction was reversible error. Rather, resp wants CA10 to rehear question of whether petr presented sufficient Rule 51 objection and whether resp. adequately preserved that issue in CA10. One of Resp's failure to present this argument in her brief in opposition to petition for cert. counsels against granting rehearing, notwithstanding the notes made at argument by one CA10 judge.

X BAT 8/12/85