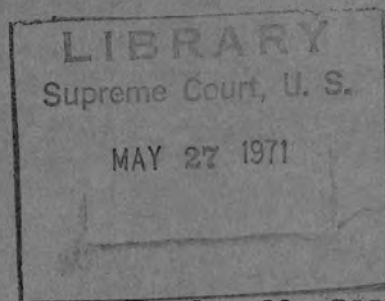


# Supreme Court of the United States

OCTOBER TERM 1970



In the Matter of:

Docket No. 785

-----  
NATIONAL LABOR RELATIONS BOARD,

Petitioner

va

THE+NATURAL GASS UTILITY DISTRICT

OF HAWKINS COUNTY, TENNESSEE

-----  
Respondent

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Date April 21, 1971

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

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 NATIONAL LABOR RELATIONS BOARD,  
 Petitioner  
 vs  
 THE NATURAL GAS UTILITY DISTRICT  
 OF HAWKINS COUNTY, TENNESSEE,  
 Respondent  
 -----  
 No. 785

The above-entitled matter came on for argument at  
 11:15 o'clock a.m. on Tuesday, April 21, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice  
 HUGO L. BLACK, Associate Justice  
 WILLIAM O. DOUGLAS, Associate Justice  
 JOHN M. HARLAN, Associate Justice  
 WILLIAM J. BRENNAN, JR., Associate Justice  
 POTTER STEWART, Associate Justice  
 BYRON R. WHITE, Associate Justice  
 THURGOOD MARSHALL, Associate Justice  
 HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

DOMINICK L. MANOLI,  
 Associate General Counsel,  
 National Labor Relations Board  
 Department of Justice  
 Washington, D. C. 20530  
 On behalf of Petitioner

EUGENE GREENER, JR., ESQ.  
 1601 - 100 North Main Building  
 Memphis, Tennessee 38103  
 On behalf of Respondent

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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 Number 785, National Labor Relations Board against the Natural Gas Utility District.

Mr. Manoli, You may proceed whenever you are ready.

ORAL ARGUMENT BY DOMINICK L. MANOLI, ESQ.

ON BEHALF OF PETITIONER

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

This case is here on writ of certiorari to the Sixth Circuit. The Board issued its order directing the Respondent Utility District to bargain collectively with the union which employees of the district in an appropriate unit designated as their bargaining representative.

The District, contending that under the laws of the State of Tennessee that it is a political subdivision or an -- of instrumentality of the state, it has refused to comply with the order.

The statute specifically excludes from the definition of the term "employer," the United States or any State or any political subdivision thereof.

The two questions presented here are first: whether, for purposes of the Labor Act, Federal standards or state law governs the determination whether an entity is a political subdivision within the meaning of the statute or an



1 employer within the meaning of the statute.

2 Secondly, if Federal standards and not state law  
3 govern that determination, whether the board's finding that  
4 the district here is not a political subdivision within the  
5 meaning of the Labor Act, but is an employer, is entitled to  
6 affirmance.

7 The Court below, rejecting the Board's view, held  
8 that state law is controlling with respect to the determination  
9 of whether an entity is a political subdivision or not, and on  
10 the basis of the State Code of the State of Tennessee, as a  
11 decision of the Supreme Court of Tennessee as confirming con-  
12 cerning the legislation, it held that the District here was a  
13 political subdivision within the meaning of the Labor Act, and  
14 therefore not an employer.

15 Q I do not recall from the briefs, Mr.  
16 Manoli, but does the Tennessee Law permit private corporations,  
17 that is, the telephone company, for example, to exercise the  
18 right of eminent domain?

19 A Yes, sir; it does. There are cases that  
20 are cited in our brief indicating --

21 Q I wasn't sure that they applied to  
22 Tennessee cases.

23 A They are Tennessee cases --

24 Q It's fairly common everywhere?

25 A Yes, it is. Eminent domain is not a

1 unique characteristic of political subdivisions. Private  
2 concerns, quasi public, you might say, have been given that  
3 sort of authority.

4 Now, I want to summarize a little bit more at  
5 length than is normally done in this Court, but I do want to  
6 summarize the facts, the salient facts that relate to the  
7 District's status as an employer under the act or as --  
8 would have it, as a political subdivision, under the act.

9 The District sells and distributes natural gas  
10 without profit to residential homes, commercial businesses and  
11 industrial firms in Hawkins County, Tennessee. It was incor-  
12 porated in December 1957 under the Tennessee Utility district  
13 Law. Under the provisions of that law a group of local real  
14 property holders in Hawkins County filed a petition with the  
15 County Court setting forth a statement of the need for the  
16 circuit to be supplied, the estimated cost and the names of  
17 three local residents proposed as commissioners of the district.

18 After a hearing the Chairman of the County Court  
19 -- the Chairman of the County Court is a Judge -- the Chairman  
20 of the County Court found that public convenience and neces-  
21 sity justified the creation of the proposed district, that it  
22 was economically sound and desirable and accordingly, granted  
23 a petition.

24 The Chairman of the County Court, as required by  
25 the state law, appointed as commissioners of the newly created

1 district the three persons nominated in the petition. The  
2 District was financed with a private sale of bonds and no  
3 public money was used. The District constructed a natural gas  
4 distribution system with the proceeds of the bond sale.

5 Under the statute the gas system became subject  
6 to a lien in favor of the bondholders until the debt was paid.  
7 The principal and interest on the bonds are payable solely  
8 from the revenues from the district. The rates charged by the  
9 district must be sufficient to pay expenses and its bonded in-  
10 debtedness. The district has no power to levy or collect  
11 taxes and its service charges are not to be construed as  
12 taxes.

13 The powers of the district are vested in and  
14 exercised by a three-member board of commissioners. The  
15 commissioners are not subject to county or state regulations.  
16 They adopt the necessary rules and regulations and set the  
17 district service fees. They control the labor relations of  
18 the district and under their supervision the matters of the  
19 district, hires and fires employees and sets their wages.  
20 Neither the state nor the county has any control over the  
21 district's employees.

22 The state statute also gives the district the  
23 power of eminent domain, as the Chief Justice has already  
24 alluded to, and it authorizes the Board of Commissioners to  
25 inquire into any matter relating to the business of the

1 district and to carry out this function and to issue sub-  
2 poenas and administer oaths.

3 Finally, the enabling Tennessee statute provides  
4 that a utility district is a municipality or a public corpora-  
5 tion and exempts it from state, county or local taxation. The  
6 Supreme Court of Tennessee has upheld this tax exemption on  
7 the grounds that such a district is an arm or instrumentality  
8 of the state.

9 As I stated earlier, the Court below concluded  
10 that state law governs determination of whether an entity is  
11 a political subdivision or not, and under the laws of  
12 Tennessee, as confirmed by the highest court of that state,  
13 the district here is a political subdivision and therefore  
14 refused to enforce the Board's bargaining order.

15 The Fourth Circuit, on the other hand, in dealing  
16 with a related type of problem, has rejected the contention  
17 that state law governs the determination of whether an entity  
18 is a political subdivision or not and has held the Federal  
19 standards govern the determination of whether or not a particu-  
20 lar entity is a political subdivision or not.

21 Here --

22 Q Well, there doesn't seem to be any  
23 difference between you and your brother on the other side this  
24 morning as to this issue. He agrees that the Federal law is  
25 absolute.



1                   A           The --- I'm not entirely sure if he agrees  
2 on that.

3                   Q           Well, it seems to me he says so in his  
4 brief.

5                   A           The Court below, of course, took a --

6                   Q           Yes, but there is no issue between you  
7 here today ---

8                   A           I have not fully appreciated that.

9                   Now, both the act and its legislative history are  
10 silent; are silent as to the meaning that Congress ought to  
11 attribute to the phrase "political subdivision of the state."  
12 The obvious purpose, of course, of Congress was to avoid inter-  
13 ference into the labor relations, the employment relations  
14 between a governmental entity and its employees.

15                   Now, I shall not attempt to give any kind of a  
16 comprehensive definition of what a political subdivision is.  
17 Indeed, the cases tell us. The cases tell us that an entity  
18 may be a political subdivision for the purpose of one statute  
19 and not another.

20                   Now, any definition of a political subdivision  
21 for the purpose of the statute, must, I think, take into  
22 account the basic purpose which underlies the governmental  
23 exemption in the statute: namely, the avoidance of interfer-  
24 ance, the avoidance of interference into the employment and  
25 labor relations between a governmental entity and its employees.

1                   So, therefore the threshold question in this  
2 case, as it was in the Missouri Transit Workers case decided  
3 by this Court several years ago, the threshold question in this  
4 case here is: do we have the kind of state involvement in the  
5 creation, the administration, the operation and particularly  
6 the labor relations, the employment relations of the district.  
7 Do we have the kind of state employment here that you bring  
8 into play the Congressional purpose to bar the Labor Board  
9 from intruding, intruding into the labor relations of the  
10 governmental entity.

11                   I submit that the answer to that question is:  
12 that we do not have that kind of state involvement. The state  
13 did not directly create the district. It was formed by private  
14 individuals. It is not administered by publicly-elected  
15 officials or their designees. It has not become assimilated  
16 or incorporated into the state or local government as to  
17 become one of its constituent parts. The County Judge exer-  
18 cises no independent judgment in applying to the district  
19 commissioners, except in a remote contingency that two of the  
20 commissioners may not be able to agree on filling a vacancy.  
21 The Tennessee statute requires him to appoint those persons  
22 nominated in a petition filed by the local property owners.

23                   The utility system is owned by the district  
24 itself and is not state property.

25                   Q                   (Inaudible)

1                   A           There are three commissioners, Your Honor,  
2                   and they serve -- those who are first appointed according to  
3                   the filing of this petition and the affirmation by the County  
4                   Court, they serve, as I recall it, for staggered periods of  
5                   two and three and four years.    Thereafter any successors will  
6                   serve for four years, as I recall it.

7                   Q           Suppose --

8                   A           I'm sorry, I didn't hear it, sir.

9                   Q           Suppose they resolve -- ?

10                  A           There is in Tennessee an ouster statute  
11                  and under this ouster statute -- this ouster statute provides  
12                  that where an official of a municipality or political sub-  
13                  division,<sup>is</sup>/failing to perform his duties, that the attorney  
14                  general of the state or the city attorney or the county attorney,  
15                  as the case may be, may bring ouster proceedings in a court.  
16                  Whether any such power has ever been exercised with respect to  
17                  any of these districts -- we are told ~~that~~ there are approxi-  
18                  mately 270 of them in the State of Tennessee -- I don't know.

19                               Now, the utility system is owned by the district  
20                               itself and is not state property. It has no authority to levy  
21                               taxes and must meet its expenses and obligations from its  
22                               revenues.

23                               The district is completely autonomous in the  
24                               conduct of its affairs and the state exercises no supervisory  
25                               power over the conduct of the district's day-to-day affairs or

1 its operations. Indeed, the Tennessee statute expressly bars  
2 any state public utility commission from exercising any juris-  
3 diction over the management or control of the system or its  
4 rates or charges.

5 Finally, the District alone exercises the power  
6 to hire and fire employees. The state does not control, either  
7 directly or indirectly the terms and conditions of employment  
8 for the district. And apparently, on the basis of a decision  
9 by the Circuit Court of Appeals in the State of Tennessee,  
10 apparently these employees are not deemed to be subject to the  
11 state restrictions applicable to state or municipal employees  
12 with respect to strikes and picketing.

13 Essentially, the district appears to be more  
14       . Essentially it's a private venture, to be sure,  
15 for the benefit of the community, but nonetheless, a private  
16 venture having no identity or relationship to the state.

17 Now, of course, the State of Tennessee has seen  
18 fit in its legislature here to characterize, to label this  
19 district here as a political subdivision of the state, a  
20 municipality. But that factor could not be dispositive; that  
21 factor could not be dispositive of the status of this district  
22 here for purposes of Federal legislation.

23 As this Court said some years ago: "The Labor Act  
24 is Federal legislation administered by a national agency to  
25 solve our national problems on a national scale."



1           And the general principle is that normally that  
2 Congress intends that its law shall have uniform application  
3 so that its programs shall not be impaired.

4           Now, of course the State has an important inter-  
5 est in defining its political subdivisions and the board of  
6 course paid considerable attention to the State's legitimate  
7 interest in defining its political subdivisions. But that  
8 interest, it seems to us, must be weighed against the policies  
9 of the statute and the uniform application of those policies  
10 which this Court has repeatedly confirmed Congress intended.

11           Now, local considerations, local problems may prompt  
12 a state to characterize as a political subdivision what is  
13 essentially -- take private ventures, having no real identity  
14 or relationship to the state and over which the state exercises  
15 no control.

16           If state-by-state characterizations have an interest  
17 as a political subdivision, were to be determinative of the,  
18 problem then the result might well be a patchwork of policies  
19 and exempt from the provisions of the statute which have no  
20 relation to the underlying purpose of the governmental exemp-  
21 tion in this statute, namely the avoidance of interference in  
22 the employment and labor relations between a governmental  
23 employee and its employees.

24           I don't believe it's wide of the mark to say that in  
25 this particular case that the State of Tennessee has since seen

1 seen fit to label a district as a political subdivision, not  
2 because it really regards it as an arm or instrumentality or  
3 department of the state, but rather because it sought to give  
4 it some kind of a tax exemption and thereby encourage local  
5 citizens, local property holders here to create these districts.

6 Q What about the normal governmental corpora-  
tion at the state level, say a housing authority?

8 A A housing authority?

9 Q Does the Board exercise authority?

10 A The Board never has had that case, Your  
11 Honor.

12 Q Well, what about it; do you have some  
13 general, any other experience with local governmental corpora-  
14 tions that are spun off with state authority?

15 A Yes, there have been a number of cases which I  
16 have cited in our brief, and the principle which the board has  
17 applied to these cases and of course it turns upon the  
18 particular --

19 Q Well, you wouldn't say a city is a state,  
20 would you?

21 A Sir?

22 Q You wouldn't say a city is a state?

23 A No; that's a political subdivision; it's a  
24 political subdivision. I don't think anybody would quarrel  
25 that cities and political subdivisions --

1                   Q           What about a home rule city where the  
2 state hasn't any business running local affairs whatsoever?

3                   A           But, I would still regard that as being a  
4 political subdivision.

5                   Q           But the state doesn't exercise any day-to-  
6 day control --

7                   A           Well, of course, one of the elements of this  
8 problem here is whether or not there is that kind of control.  
9 We don't single out any particular single fact, but as a whole  
10 what do you have here? Do you have that kind of connection,  
11 that kind of relationship to the state, to the state, whereas  
12 they have --

13                  Q           I thought you said a city is the state,  
14 that you would look at the city as a political subdivision.

15                  A           Yes.

16                  Q           Whether the state has got any control over  
17 it or not?

18                  A           Well, this statute specifically exempts a  
19 political subdivision of the state; that's what the statute  
20 says. And I don't --

21                  Q           Well, why an irrigation authority or a water  
22 district -- why isn't an irrigation authority or a water  
23 district a political subdivision? The state says it is; it's  
24 -- this is an entity that is doing a job that the state is  
25 authorized to do and the state has chosen them an instrumentali.

1 to do it through.

2 A Well, the state has not really chosen that,  
3 Your Honor, because here it's --

4 Q Well, it's got a statute on the books  
5 that --

6 A It says no more really -- to have a statute  
7 on the books, just like an incorporation statute which permits  
8 private individuals to set up a private corporation. I mean,  
9 really this is not much different than that. To be sure this  
10 particular district has been given certain advantages; it  
11 has been given the advantages of no taxation and again they  
12 use the --

13 Q You would say that a municipality that sets  
14 up a separate municipal corporation to own and operate its  
15 electrical and water system, would not be a political sub-  
16 division?

17 A Oh, yes; the board has exempted that very  
18 kind of -- that kind of distinction.

19 Q For heaven's sakes. The city just creates,  
20 pursuant to a state law, a separate municipal corporation  
21 which condemns and then operates the formerly private electri-  
22 cal system?

23 A Yes.

24 Q Same building, same general set up as before  
25 same employees and the board of directors -- this is what a



1           A       Well, Your Honor, the board has taken the  
2 position in defining the term "political subdivision," under  
3 the statute so as to limit a political subdivision as that  
4 kind of an entity which has either been directly created by  
5 the state so that it is either a department of the state or  
6 an arm, administrative arm of the state or those entities  
7 which are administered by individuals who are either directly  
8 responsible to publicly elected officials or to the electorate  
9 at large, the general electorate.

10           Q       What about the new Post Office?

11           A       The new Post Office? The new Post Office  
12 Corporation, Your Honor? But that has been specifically  
13 brought under the Federal -- under the Labor Act.

14           Q       (Inaudible)

15           A       Well, the -- I don't know precisely what the  
16 set-up of the new Post Office is but the statute also excludes  
17 wholly-owned government corporations, whether the new Post  
18 Office Corporation is a wholly-owned corporation or not --  
19 but in any event, Congress under the new legislation has  
20 specifically brought the new Post Office System under the  
21 Labor Act.

22           Q       If the State of Tennessee had specifically  
23 created this specific corporation --

24           A       Yes.

25           Q       -- and assigned --

1           A           I would think not.   That's right, because  
2 it's been directly created by the state and it's an arm or  
3 department of, instrumentality of the state itself.

4           Q           Suppose this coproration was created by  
5 a statute and the board has --

6           A           I suppose that the crux of the matter is:  
7 how closely are the publicly officials identified with the  
8 running of the employment and labor relations of the particular  
9 entity. That's a very important factor in this case.

10          Q           But you have declared the board of directors  
11 as --

12          A           In this case here?

13          Q           Yes.

14          A           They are not public officials because they  
15 are nominated in the petition that's filed by the property  
16 owners and the county court has no discretion with respect to  
17 designating them as the commissioners. The county court has  
18 an opportunity to name one of the commissioners only in the  
19 event there is a vacancy and the two commissioners cannot  
20 agree.

21                   So the county and the state have not appointed the  
22 commissioners, other than just simply ratified, other than  
23 just simply ratifying here the nominess that have been made by  
24 the local property owners in their original --

25          Q           (Inaudible)

1                   A           Well, I think I can't answer that  
2 question categorically because school systems may differ.  
3 I don't want to, as I say, give any categorical answer because  
4 I don't know just what --

5                   Q           Mr. Manoli.

6                   A           Yes, sir.

7                   Q           How important is this case to the Board?  
8 How -- do you have a lot of cases such as this or is this just  
9 a spare one that happens to come along?

10                  A           No; over the years I think that board has  
11 had, at least those which are now incorporated in its official  
12 records, there have been in the neighborhood of a dozen or so  
13 cases. But the problem, however, is much broader than that  
14 because in this particular state, for example, in Tennessee,  
15 we are told that there are 270 of these particular districts.  
16 Now, what the situation may be in other states, there may be  
17 difference, of course. In some cases perhaps the district  
18 similar to this one here may be regarded by the board itself  
19 as a political subdivision. Here it is not.

20                  Q           I had understood that some of those very  
21 districts  
22 /in Tennessee had been held to be exempt by your regional  
23 director.

23                  A           Yes, there is one case, Your Honor --

24                  Q           I think they were in Wheatley, Carroll and  
25 Benton Counties. Is that correct?

1           A           We had that case, and of course that was  
2 only a regional director who made that decision.

3           Q           I know but isn't that the holding of --

4           A           Well, there was never any appeal from that  
5 decision to the board itself; the board has expressly over-  
6 ruled that decision of the regional director -- the holding,  
7 rather, the holding of the regional director in that parti-  
8 cular case.

9           So, that particular case has no more precedential  
10 value, if I may use a somewhat exaggerated example, than the  
11 decision of a district court after this Court has come down  
12 with a decision on the same type of issue.

13          Q           So would you say that in Wheatley, Carroll  
14 and Benton Counties that they are subject to the jurisdiction  
15 of the board?

16          A           A           If the union were to seek representation or  
17 if somebody was fired there, if somebody was fired there  
18 because, say, he became a union member and charges were filed  
19 with us today or a representational petition were filed today  
20 that regional director would entertain the representation  
21 petition for the unfair labor practice charged on the merits.  
22 He would be bound by the board, was bound by the board decision  
23 in this area, of course.

24          Q           Mr. Manoli, your hesitations in answering,  
25 I think, Justice White's question about the school board



1 makes me put this question to you: does the board ever  
2 assert jurisdiction over school teachers employed by the state  
3 or a city or municipality or any public school teachers?

4 A I know of no such case; no such instance.

5 Q Well, I assumed that was the case and yet  
6 I am wondering why you --

7 A Well, I think I was being asked the ques-  
8 tion whether they were public officials and it's been a long  
9 time since I was associated with a school and it may vary,  
10 perhaps, how these people are appointed to run the school  
11 system of a particular area. That was the reason for my  
12 hesitation. If school officials are appointed by the city and  
13 if the school is a part of the city when I would say obviously  
14 the board --

15 Q They would be school teachers, firemen and  
16 policemen. At least those three categories?

17 A Yes.

18 Q Municipal employee --

19 A The board has never had any such case and  
20 I would be surprised if we would ever undertake any such cases  
21 there.

22 Q Mr. Manoli, do you reach outside the exemp-  
23 tion for a political subdivision any agency, even though it  
24 performs a local governmental function so long as that  
25 agency is the creature, not only an arm of the state legislature

1 or some executive arm of the state, but comes into being  
2 only if local citizens create it; is that it? Is that the  
3 crux of the board's position; the crux of the distinction you  
4 make?

5 A The crux of the board's position is this:  
6 that it limits the term "political subdivisions" to those  
7 entities that are either directly created by the state so as  
8 to constitute either a department or an administrative arm of  
9 the state, or those entities where the individuals administer-  
10 ing that particular entity are either responsible directly to  
11 publicly elected officials or to the general electorate.

12 That's the distinction that the board has drawn.

13 Q Well, I know, but what's it bringing in.  
14 What's brought within the board's jurisdiction? What's the  
15 mark of such an entity that it is within the board's juris-  
16 diction.

17 A If they are not within --

18 Q Well, not if they are not --

19 A Well, I am not sure that I get this  
20 question.

21 Q Well, as I understand it this kind of  
22 entity is created only if a group of local citizens get to-  
23 gether and decide to create it. It's not created whether they  
24 like it or not, by the legislature or by any other state or  
25 something --

1                   A           Simply an enabling statute.

2                   Q           Well, then, my question is: is that the way  
3 you distinguish entities within from entities without the  
4 board's jurisdiction, whether or not local citizens -- it  
5 come into being only if local citizens take an election.  
6 Is that an oversimplification of your position?

7                   A           Well, I think it is certainly an important  
8 element in the board's thinking here that underlies the  
9 classification or the interpretation of the political sub-  
10 division here. But what the board is looking to is to what  
11 extent, if it's a political subdivision of the state that  
12 we're concerned with, to what extent is the state administer-  
13 ing that particular entity; to what extent has the state  
14 become involved in the operation and the administration of  
15 that particular entity and particularly its labor and employ-  
16 ment relationships.

17                   And where you have a case such as we have here,  
18 where there is simply an enabling statute which permits  
19 private citizens to create this kind of a district with all  
20 the various characteristics which I have not described yet, the  
21 board says: "Well, we don't have that kind of involvement;  
22 we don't have that kind of involvement by the state that  
23 should bring into play the Congressional purpose to bar the  
24 Labor Board from intruding into the employment or labor  
25 relations of a governmental entity and its employees.

1 Q I was a little confused by the distinction  
2 you made with Justice White about here you have a gas distri-  
3 bution company but you said a water company would not be  
4 within the reach of the board. Did I understand that  
5 correctly?

6 A All local water? No; no. Under this local  
7 statute -- No; the board didn't draw a distinction between gas  
8 and water, Your Honor or electricity. It depends upon --

9 Q In most cities I am acquainted with the  
10 water supply is controlled by the municipality and municipal  
11 employees. Do you reach them?

12 A No, sir; there is a board case which is  
13 cited in our brief where the board declined to assert juris-  
14 diction over a gas system of the kind that Your Honor is  
15 describing.

16 Q Well, the nature of the service; how do you  
17 distinguish water and gas? Or electricity?

18 A Well, it's not so much a distinction between  
19 what kind of service: water, gas or electricity, but rather  
20 it goes to the question what is the entity that is performing  
21 that service?

22 Now, in the case that I have referred to where the  
23 board -- there the gas district was part of the city of the  
24 city's operations. It was run by a board of utilities com-  
25 missioners, as I recall them, under the supervision of the



1 mayor and the city had financial responsibility for the  
2 operation of that particular gas district as I recall it.

3 So, the decision is not being made upon whether it's  
4 water or gas or electricity or what have you, but what is the  
5 nature of the particular corporation or entity that is per-  
6 forming this kind of service and what is its relationship;  
7 what is its relationship, whatever the service may be: water,  
8 gas or whatever, to the state government to the city govern-  
9 ment or the general electorate.

10 MR. CHIEF JUSTICE BURGER: Thank you.

11 Q Could I ask you one question: (Inaudible)

12 A The record is silent on that, Your Honor,  
13 and all that I have, that is, there is no state law as far as  
14 I know, but we do have the statement of the manager of this  
15 particular district here who testified that neither the county  
16 nor the state has any control over the labor relations of this  
17 particular district.

18 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Manoli.

19 Mr. Greener.

20 ORAL ARGUMENT BY EUGENE GREENER, JR., ESQ.

21 ON BEHALF OF RESPONDENT

22 MR. GREENER: Mr. Chief Justice and may it please  
23 the Court:

24 It is the position of Respondent here that the  
25 question presented is not whether the state or Federal

1 determination controls whether the utility district is a  
2 political subdivision under Section 2.2 of the National Labor  
3 Relations Act. Respondent agrees that state law is not  
4 controlling, but that state law is a factor, along with all  
5 the other factors to be considered in reaching this determina-  
6 tion.

7 It is Respondent's position further that there was  
8 no conflict between the Hawkins County case in the Sixth  
9 Circuit below and the Randolph case, which is referred to by  
10 the Board. Respondent accepts the ruling in the Randolph  
11 case, which is: to the extent that the Board has considered  
12 the economic realities and the statutory purposes its deter-  
13 mination is entitled to great respect.

14 It is simply submitted that the board inadequately  
15 and improperly considered the economic realities of the  
16 statutory purposes, and that to the extent the Court of  
17 Appeals below in the last two sentences of the opinion, which  
18 was several pages long, stated that "state law is controlling,  
19 Respondent explains this the same way that the board has  
20 explained one of its decisions in its brief that state law  
21 is controlling. The board has held state law to be control-  
22 ling but now on page 19 on a footnote to its brief it states  
23 that that language was not necessary for the result reached, and  
24 that is exactly the position of Respondent here.

25 Because, what the Court of Appeals did for several

1 pages is take the rule in the Randolph case and apply it by  
2 examining the economic realities one at a time and deciding  
3 that the Board had inadequately and improperly considered  
4 them.

5 would We have here basically a jurisdictional matter.  
6 The board bestowed jurisdiction upon itself and has repeatedly  
7 thereafter refused to reconsider this.

8 Q Well, can you tell me -- of what subdivision?  
9 It is not a state agency is it?

10 A It is, if Your Honor please, a subdivision  
11 of the state. It is created --

12 Q Are the board members officers of the state?

13 A They are public officials.

14 Q Are they officers? Do they take oath?

15 A Yes, sir; they will take an oath of office.

16 Q Do they take the same oath that the other  
17 state officers take?

18 A I'm not informed on that, but I know that  
19 they take an oath before they serve.

20 Q What is the oath? You don't know?

21 A No, sir; I do not know that.

22 Q Well, can you be a state officer if you  
23 don't take an oath?

24 A Yes, sir; you can be a state official.

25 Q I said state officer.

1                   A           State officer.

2                   Q           I think you would settle for them being  
3 state officials?

4                   A           Yes, sir, I would settle for that. I  
5 would reply, Your Honor, the many county boards which this is  
6 analogous to, no official oath of office is taken and the  
7 members are state officials, whether or not they are deter-  
8 mined to be state officers, I don't know the exact distinction  
9 between the two.

10                  Q           How are they compensated?

11                  A           They receive very nominal compensation,  
12 Your Honor. They get \$25 each time the board meets, the  
13 utility board meets. It is paid by the county. No; it's paid  
14 by the district out of its own funds, Your Honor. We con-  
15 sider that to be a part of the county, though.

16                  Q           How often are they selected?

17                  A           They are selected every two, four and six  
18 years.

19                  Q           By the --

20                  A           They are selected originally by the county  
21 judge and I would like to state --

22                  Q           How are vacancies --

23                  A           Vacancies are filled by the members of the  
24 board unless there is, they cannot agree, and then they are  
25 filled by the county judge. But I would like to add also,



1 Your Honor, that in certain counties the members of the board  
2 are elected in general elections. Now, this doesn't apply in  
3 Hawkins County, but we submit that this clearly shows the  
4 political nature of the utility district.

5 And also, the county judge himself is a constitu-  
6 tional officer and is the highest elected public official in  
7 a county, highest administrative official in a county and is  
8 the same to a county as the governor is to the state or mayor  
9 to the city. And that frankly, if we had had a mayor make  
10 these appointments rather than a county judge possibly we  
11 wouldn't be here today.

12 Q The county judge then is not primarily a  
13 judicial officer?

14 A No, sir.

15 Q He's more like what a county judge is in  
16 Missouri, for instance?

17 A Yes, sir; he is an executive --

18 Q What is elsewhere called a County Commis-  
19 sioner?

20 A Yes, sir. He is the top administrative  
21 official elected by the public officials -- I mean by the  
22 voters of the county.

23 Q How are the personnel in the district  
24 employed?

25 A The district has a manager and the manager

1 hires and fires and sets the wages, but we might add that this  
2 is the logical and reasonable and expected way for such a  
3 district --

4 Q Do you have a civil service system in  
5 Tennessee?

6 A No, sir; we do not. If Your Honors please,  
7 I think --

8 Q Are these employees treated on a basis  
9 comparable to other employees of the county or city, or are  
10 they --

11 A Yes, sir. They are; as a matter of fact in  
12 a late board decision, which incidentally involves Tennessee  
13 -- I'm answering Your Honor's question -- coincidentally  
14 involves the State of Tennessee, an exemption was granted  
15 to the Fayetteville Lincoln County Electric System. Now, this  
16 is a June 1970 board decision and in that case we have nearly  
17 identical facts to the case here. We have enabling legisla-  
18 tion, the Tennessee Municipal Electric Plant Law.

19 We also have a private act of the state legislature  
20 by which a city took over a local electric company but once  
21 the system was set up the mayor nominated a board of directors.  
22 The board of directors then had a manger. The manager employed  
23 all the employees.

24 Now, there is absolutely, we submit, no distinction  
25 between the Fayetteville Lincoln County System which was --

1 the exemption was granted and the case at bar with the one  
2 exception, that there the mayor appointed the board of public  
3 utilities and here the county appointed the board of  
4 utilities. And we submit that that is not a legitimate basis  
5 for award or not award coverage under the National Labor  
6 Relations Act.

7 Q Mr. Greener, maybe I misunderstood, but I  
8 did not understand that the county judge performed that  
9 function. I thought that he more or less accepted the nomina-  
10 tions as they came to him, and secondly if there was a  
11 vacancy the board was self-perpetuating unless they couldn't  
12 agree.

13 A Let me clarify that, Your Honor. As in  
14 numerous civil entities, for instance, the Fayetteville Lincoln  
15 County System that I just referred to, individuals are  
16 nominated to the county judge and usually, customarily he  
17 appoints the nominees.

18 Q Who does the nominating?

19 A The original persons seeking to serve the  
20 district. They nominate property owners in the county.

21 Q Do they --

22 A As we pointed out in our brief, the power  
23 to appoint, and we have referred to some municipal law in  
24 McQuillan(?), includes the power not to appoint. Now, we are  
25 not faced with that particular problem here, but we submit that

1 if the county judge felt that a nominee was incompetent or  
2 should not be placed in this position that he would not have  
3 to make this appointment. There is nothing in the statute  
4 that says that.

5 And secondly, as we aforesaid in certain counties  
6 the commissioners are elected by qualified voters. This  
7 happens to be a smaller county and it doesn't operate in this  
8 fashion.

9 Now, next progressing to Your Honor's question about  
10 vacancies. Vacancies are filled by the remaining commissioners.  
11 But this is something that many county boards have this  
12 administrative procedure. However, if they cannot agree it is  
13 specifically provided that the county judge will fill these  
14 vacancies.

15 And I might add: one of Your Honors asked about the  
16 ouster law. The Ouster Law of Tennessee applies specifically  
17 to publicly elected officials -- public officials; they don't  
18 all have to be elected.

19 Let's take a county road commissioner who is  
20 guilty of dereliction or malfeasance in office. An action  
21 would be brought against him in an action brought against him by  
22 the / county attorney. There would be a jury trial. He would be  
23 removed or not removed, based on the findings of the jury.  
24 This Ouster statute applicable to public officials applies to  
25 utility district commissioners.



1 Q How do you know?

2 A Your Honor, there is an annotation so hold-  
3 ing and we have referred to it in the record in our brief,  
4 and this is not controverted in this record.

5 I might add one other thing about responsibility:  
6 the district must file a copy of its annual report with the  
7 county judge.

8 I feel that --

9 Q May I ask you a question?

10 A Yes, sir.

11 Q Are there districts like that everyplace in  
12 the state?

13 A Yes, sir.

14 Q Same kind?

15 A No, sir; they are all kinds of districts  
16 and that was a point I wanted to make --

17 Q I'm trying to find out really what's behind  
18 this controversy.

19 A Your Honor, that I do not know, but I will  
20 say this, and also in answer to the Chief Justice's remarks  
21 earlier: we have districts in Tennessee that provide fire  
22 protection, police protection, sewage, natural gas. There are  
23 all kinds of services that a district can provide and when  
24 counsel informed the court that there are 270 districts;  
25 right; there are, but they perform a myriad of services in

1 areas where usually in rural areas, and this was set up by  
2 the legislature with that in mind. "To provide governmental  
3 services where there was no other entity to do so.

4 Q Is there any difference between the  
5 quality of -- between East Tennessee and West Tennessee?

6 A No, sir; they are identical. As a matter  
7 of fact, they were both natural gas district. The Benton,  
8 Carroll County District is a natural gas district. This is a  
9 natural gas district. But a district can perform any one of  
10 these other types of services and often performs more than  
11 one type of service. It can have fire and police and natural  
12 gas, depending on what is needed in a particular area in-  
13 volved.

14 I think --

15 Q Is it governed by general state law or --

16 A Yes, sir.

17 Q And election is by general election, state  
18 election?

19 A Yes, sir; where the commissioners are  
20 elected or where the county judges are elected they are  
21 elected by the qualified voters in the county at a general  
22 election.

23 Now, I feel that --

24 Q What happens if you win and what happens if  
25 the others win?

1 A Well, if Your Honor please --

2 Q I'm trying to find out what it's about.

3 A Well, the board simply cannot order one of  
4 these districts to bargain with a labor organization if we  
5 prevail and if the board prevails the district would have to  
6 bargain with a labor organization; I suppose depending on --

7 MR. CHIEF JUSTICE BURGER: We will recess for  
8 lunch now, Counsel.

9 (Whereupon, at 12:00 o'clock p.m. the argument in  
10 the above-entitled matter was recessed to be resumed at 1:00  
11 o'clock p.m. this day)

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1 1:00 o'clock p.m.

2 MR. CHIEF JUSTICE BURGER: Mr. Greener, you may  
3 proceed.

4 MR. GREENER: Mr. Chief Justice and may it please  
5 the Court:

6 In accordance with the rule of law that we contend  
7 is applicable here we would like to bring to the Court's  
8 attention several undisputed, relevant facts in this record  
9 that have not been mentioned heretofore, some of which we  
10 submit have not been properly understood by the board.

11 In the first place, Section 62615 TCA, the same  
12 utility district law designates a utility district's records  
13 as "public records."

14 Secondly, as referred to by counsel, a utility  
15 district has the power to issue subpoenas for witnesses and  
16 has the power to administer oaths to witnesses.

17 Now, reference was made by the board's counsel to  
18 that section of the Act, 62613 that specifically exempts a  
19 utility district from regulation by the Tennessee Railroad  
20 and Public Utilities Commission.

21 What the board has done since the outset of this  
22 litigation is not understand the significance of that. This  
23 entity is exempt, privately-owned public utilities and rail-  
24 roads are regulated.

25 Also, under several Federal statutes acknowledgment



1 has been made that the utility district is a municipality.  
2 For instance, the employees of the district are covered under  
3 the Social Security law on a voluntary rather than a mandatory  
4 basis, which is of course a test for private enterprise.

5 Q That's under the Social Security Act  
6 provisions?

7 A Yes, sir. Federal Social Security has been  
8 so acknowledged by the responsible Federal officials and the  
9 district is so operated.

10 Q Do you know what -- under what language of  
11 that legislation?

12 A Yes, sir. The code section allowing  
13 voluntary coverage is 42 USC 418, allowing voluntary coverage  
14 for municipal employees and the district has operated under  
15 this language. There is a counterpart section in the  
16 Tennessee Code, allowing a municipality to adopt this.

17 Q Is it also for nonprofit corporations, that  
18 same provision?

19 A No, sir; I don't think so. I'm not positive  
20 about it, but I believe it's only for municipalities.

21 Q Well, nonprofit corporations of Tennessee,  
22 are they subjected to the will of the county judge?

23 A Not in --

24 Q If you restricted this to government entities,  
25 aren't there also nongovernment and nonprofit corporations

1 who enjoy the same privilege.

2 A I do not know, sir. I believe you are  
3 probably right, that this benefit may extend to nonprofit  
4 corporation which may or may not be a municipality.

5 Q This was not --

6 A Yes, sir; I do not know that for sure.

7 In addition to this, interest on a utility district's  
8 bonds is tax exempt for Federal income tax purposes under the  
9 well-known provision exempting income on tax-free  
10 municipal bonds.

11 A district is required to publish --

12 Q Why do you say that. Do you have a special  
13 ruling to that effect?

14 A No, sir; we do not, but we have made this  
15 contention from the lowest court and it has not been contro-  
16 verted by the board. As a matter of fact, this is the way  
17 the district operates. It advertises its bonds in such a  
18 fashion and there is no controversy about this in the record.  
19 But as far as a special ruling, we do not have this.

20 Q And as far as you know it has never been  
21 litigated?

22 A No, sir; it has not.

23 Q Was it based in some allegation in the  
24 pleadings at some time?

25 A Yes, sir.

1 Q No evidence on it; it is just an undisputed  
2 allegation.

3 A The record probably may have this in it.  
4 I am not positive about this but as a matter of law we have  
5 made this contention repeatedly in every pleading and in every  
6 list of authorities that have been filed and it has never  
7 been controverted by the board, that when its bonds are ad-  
8 vertised for public sale they are advertised as tax-free  
9 municipal bonds.

10 Q What do you see as the relevancy of that  
11 to this issue?

12 A The only relevancy, Your Honor, is this is  
13 one more of a series of indicia showing this to be a muni-  
14 cipality.

15 In other words, we contend that in all of the  
16 board's decision granting the exemption, and we will refer to  
17 a few of them, there is no case that has more factors or  
18 stronger individual factors and which add up to the result  
19 that you have an exempt municipality than you do here.

20 Q Are you described as a municipality in any  
21 law?

22 A Yes, sir; the state statute calls it a  
23 municipality, repeatedly. The State Supreme Court has held  
24 it to be a municipality. The board has taken a position  
25 which we agree with, that state law is not controlling, but

1 it is our contention, strong contention that state law is  
2 definitely a factor and it has been held to be a municipality.  
3 It is called a municipality in the statute in so many words.

4 Q What benefits do you get from it if it is  
5 a municipality?

6 A We get tax exemptions. It is not subject  
7 to state tax at all.

8 Q Would that be highly relevant in the  
9 question before us?

10 A Yes, sir. Yes, sir; I feel that that is  
11 relevant. It is also exempt from the state Railroad and  
12 Public Utilities Commission because it is a municipality.

13 Q What about Federal income taxes?

14 A No Federal income tax, either. Any of  
15 these factors standing alone may not -- they must be con-  
16 sidered together to get the picture. It's like a tapestry  
17 and we contend that when all of the factors are added up you  
18 have a stronger case for the municipality exemption than has  
19 ever been allowed by the board in its other decisions.

20 And that the only real difference here is that  
21 you've got a county judge rather than a mayor making the  
22 appointments.

23 Q Let me follow through on the Federal income  
24 tax exemption. Do you have a certificate of exemption under  
25 501(c)(3)? You must, if you make that statement.

1           A           Your Honor, it's not in the record, but  
2 they are exempt and -- yes, they do.

3           Q           Do you have an income tax in Tennessee?

4           A           Yes, sir; but it's not applicable to this.  
5 It's an unearned income.

6                   Now, sir, we do have a corporation income tax and  
7 it's exempt from that.

8           Q           Well, you don't have income, do you?  
9 Your client doesn't have any income.

10          A           Yes, sir.

11          Q           Well, no wonder it doesn't pay any income  
12 tax; it doesn't have any income.

13          A           It's also exempt specifically from all  
14 state taxation, Your Honor, by the statute itself.

15          Q           Is it privately owned?

16          A           It's owned by the citizens of the district.

17          Q           All of it?

18          A           Sir?

19          Q           All of it?

20          A           Yes, sir. It has an exclusive franchise to  
21 provide the service that is set up to provide to all in-  
22 habitants of the district, and it can be fire protection,  
23 police protection --

24          Q           You mean fully and completely publicly  
25 owned with no private directors or officers?



1           A           Yes, sir. No private directors; none. And,  
2 as a matter of fact, utility district commissioners, as I  
3 have said earlier, in certain counties are elected by the  
4 general electorate.

5           Now, in reference to the power of eminent domain  
6 that the Chief Justice asked originally about: this district  
7 not only has the power of eminent domain but has it against  
8 other governmental entites, which certainly is a stronger form  
9 of the power of eminent domain than let's say a telephone  
10 company might have.

11           In addition to these factors that we have referred  
12 to, Section 62612 of the Utility District Act grants to the  
13 district all the powers necessary and requisite, capable of  
14 being delegated by the legislature.

15           So, we contend that when all of these factors are  
16 added up and the totality of the picture is before this  
17 Court the conclusion must follow that we have an exempt  
18 municipality.

19           I would like, in addition to the Lafayette-Lincoln  
20 case, which is an electric system under the Tennessee Muni-  
21 cipal Electric Plant Law, and which is practically identical  
22 to the case at bar, the June 8, 1970 decision by the board  
23 granting the exemption.

24           We also have another late board case granting an  
25 exemption to the City of Austell Natural Gas System.

1 This natural gas system and the electric system were both  
2 granted exemptions as being municipalities. The difference,  
3 if you can call this a difference, is that in these cases the  
4 Board of Trustees was appointed by a mayor rather than by a  
5 county judge and the board's standard which the board states  
6 in its brief, and is controlling, that is: how the labor  
7 relations are carried on, it is submitted that the labor ere-  
8 lations in the district and the labor relations in the Austell  
9 Natural Gas case and the Lafayette-Lincoln Electric System  
10 case carry on exactly the same way. That is: there is a  
11 manager who hires the employees and that as far as the com-  
12 missioners are concerned, they more or less direct the  
13 operations of the gas system in the Austell case or the gas  
14 system in the Utility District of Hawkins County case.

15 So, we submit that considering these two cases we  
16 can find no distinction between then and the case that is  
17 before us. We think we also should refer to the board's  
18 standards which it alleges it has been uniform and reasonable  
19 in its application.

20 Q Before you proceed, has it ever been decided  
21 whether your client has sought an immunity as a defendant in  
22 a tort action for example?

23 A No, sir, I don't believe it has. If there  
24 is such a case in Tennessee, I am not aware of it.

25 Q Do you have a doctrine of sovereign

1 immunity in Tennessee? For torts?

2 A Yes, sir; we do.

3 Q Or does -- and then is it applicable when  
4 the government is acting in a proprietary capacity? That is  
5 a distinction we used to have in Ohio.

6 A Yes, sir. That law has been changed  
7 recently and, according to my recollection the sovereign is  
8 now required to carry liability insurance, and to that extent,  
9 can be sued, but there has been no such suit against the  
10 utility district of which I am aware, and I have read the  
11 cases on utility districts.

12 Q Thank you.

13 Q Do you challenge the Government's right if  
14 it wished to do so, to subject the employees of an agency like  
15 yours to the National Labor Relations Act?

16 A Yes, sir. I contend that we are exempt  
17 under the specific language of the act.

18 Q I say do you claim any constitutional exemp-  
19 tion?

20 A No, sir; it's statutory. We are a political  
21 subdivision in the State of Tennessee and specifically under  
22 Section 2(a) of the Act, a state or political subdivision  
23 thereof, is exempt.

24 Q Does the District have a president like a  
25 corporation?

1                   A           No, sir; it does not. It has three com-  
2 missioners who serve with nominal compensation who are  
3 appointed by the county judge and it is much the same as a  
4 county utilities board, if this were a county utilities board,  
5 or if this were as in the Fayette- Lincoln case, the board  
6 of trustees to run the electric system. We say it's exactly  
7 the same except that there are so many more factors here than  
8 there are in these cases where the board has granted an  
9 exemption.

10                   I would like to, if I have just a moment, to make a  
11 comment on the board's alleges reasonable and uniform stan-  
12 dard. The board's standard has actually changed between 1967  
13 when the decision of the director of elections here was made  
14 and his brief today.

15                   And we state that under the original standard of the  
16 board and under the revised standard, that this district is  
17 administered by state appointed officials if we go by the  
18 board's standard.

19                   The board's standard now says that the exemption is  
20 applicable if it's administered by persons responsible to  
21 public officials. Apparently the board feels that we may be  
22 able to persuade the Court that the utility district commis-  
23 sioners are state-appointed, that is appointed by a county  
24 judge, but that they would be held not to be responsible to  
25 the -- we say they are responsible to the publicly-elected

1 officials, too.

2 We believe that even with the changed standard  
3 between 1967 and the brief today the Utility District is  
4 exempt.

5 Q Who fixes the rates?

6 A The utility district commissioners but they  
7 are limited by statute, Your Honor, only to recover enough to  
8 cover the costs of operating the district. They cannot  
9 operate at a profit and if they get a surplus of funds by  
10 statute they must make a rebate to the persons who enjoyed the  
11 services in the district.

12 Q The customers.

13 A Yes, sir. This is by statute a  
14 strictly a nonprofit entity.

15 Q Since you couldn't conceivably -- the  
16 commissioners couldn't conceivably anticipate precisely their  
17 income and their outgo, I suppose we can assume that there is  
18 some moderate surplus each year which is rebated?

19 A Your Honor, that is theoretically the case.  
20 This particular district has been in a deficit position almost  
21 from the beginning. But, they have increased their rates  
22 with the hope that they would have a surplus and would be in  
23 a position to make a rebate.

24 They had to borrow funds in order to extend the  
25 lines out into the rural areas, which is their purpose for



1 being and they have not had a surplus.

2 Q Who has paid its deficits?

3 A Sir?

4 Q Who has paid its deficits?

5 A Their deficits have remained unpaid. They  
6 will increase their rates in order to do so.

7 Thank you, sir.

8 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greener.

9 I think your time has expired, Mr. Manoli.

10 Thank you, gentlemen. The case is submitted.

11 (Whereupon, at 1:17 o'clock p.m. the argument in the  
12 above-entitled matter was concluded)