

Electrical District Number Two, Pinal County, State of Arizona and International Brotherhood of Electrical Workers, Local Union 387, Petitioner Case 28-RC-3080

June 16, 1976

DECISION ON REVIEW AND ORDER

**BY CHAIRMAN MURPHY AND MEMBERS JENKINS
AND WALTHER**

On January 15, 1976, the Regional Director for Region 28 issued his Decision and Direction of Election in the above-entitled proceeding in which he concluded that, notwithstanding the Employer's public characteristics, it was not a political subdivision of the State of Arizona within the meaning of Section 2(2) of the Act.¹ Accordingly, the Regional Director directed an election among certain employees of the Employer. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review contending, *inter alia*, that the Regional Director erred in finding that the Employer is not a political subdivision specifically exempted from the Board's jurisdiction under Section 2(2) of the Act.

On February 11, 1976, the National Labor Relations Board by telegraphic order granted the Employer's request for review. The Employer then filed a brief, and the Petitioner requested that its brief to the Regional Director, and its statement in opposition to the Employer's request for review, be considered as its brief on review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issue under review, including the briefs filed by the parties, and finds as follows:

As found by the Regional Director, the Employer was formed in 1923 for the purpose of supplying electrical energy to a specific geographical area located within Pinal County, Arizona. As this land is largely agricultural, the Employer was formed primarily for the purpose of providing electricity to pump water from below ground to irrigate the area farmland. The Employer also provides electrical power for business and residential use within its geo-

graphic boundaries, but does not generate or produce any electrical power itself. It purchases its power from various outside sources.

The State of Arizona has established the procedure for the formation of an electrical district in chapter 3 of its revised statutes. Pursuant to that statute, a petition for the formation of an electrical district must first be filed with the board of supervisors for the county in which the proposed district is to be located. Such petition must be signed by at least one-third of the number of resident freeholders within the proposed district. The county board of supervisors may then authorize the calling of an election to determine if the district should be formed and who should serve on its board of directors.

The board of supervisors then appoints three resident freeholders from the proposed electrical district to act as an election commission for the purpose of nominating nine resident freeholders from the proposed electrical district to be candidates for election as members of the board of directors of the proposed electrical district. Pursuant to the enabling statute, persons qualified to vote at the election must be property taxpayers of the proposed district who are qualified electors in the State of Arizona and in the proposed electrical district. If the election results favor the organization of an electrical district the county board of supervisors, by resolution, declares the district duly organized and a certified copy of this resolution is filed with the county recorder.

Once the district has been organized, the district requires that in order to be eligible to vote in district elections, such as voting for succeeding directors, an individual must not only own real property within the district but must own a minimum of five acres of irrigable land within the district. Thus, residents of the district not meeting this requirement would not be eligible in such elections.

Regarding the finances and authority of the electrical district, the record discloses that the operating funds for the district come from various sources. Pursuant to the enabling statute, electrical districts are allowed to levy taxes for administrative expenses and for refunding debts. Additionally, a service charge may be collected which is over and above the cost of the electrical energy purchased by customers. The district has, on occasion, issued bonds which are exempt from taxation, and it pays no taxes of any kind, either state or Federal, on any real property it owns or income it has earned. Arizona law also provides that electrical districts possess the power of eminent domain, which includes authority not only to condemn private property but public property as well, when an electrical district has a higher use for such property than is presently being applied to it.

¹ Sec. 2(2) of the Act provides in relevant part: "The term 'employer' shall not include any State or political subdivision thereof."

The constitution of the State of Arizona specifically provides that electrical districts are "political subdivisions" of the State.

Pursuant to the Arizona open meeting law relating to public bodies, the Employer permits the general public to attend meetings of its board of directors. The district considers its documents public records and annually files a certificate of estimate of expense with the Pinal County Board of Supervisors. The Employer participates in the social security system, but this participation is pursuant to state law which provides that political subdivisions may contribute to the program voluntarily. The Employer has a separate retirement plan for its employees,² but claims that it could participate in the State's retirement plan if it elected to do so.

With regard to recall or removal of members of its board of directors, the Employer asserts that the provisions of the constitution of the State of Arizona and the Arizona State Statutes pertaining to the removal of public officials are applicable.³ However, it appears that there has not been any decision by the Supreme Court for the State of Arizona concerning the applicability of the recall provisions to members of the board of directors of electrical districts, and no evidence was introduced to establish that a recall petition had ever been filed against any member of a board of directors of any electrical district.

In determining whether an entity falls within the meaning of "political subdivision," the Board inquires into whether (1) the entity was created directly by the State, so as to constitute a department or administrative division of government, or (2) is administered by individuals who are responsible to public officials or to the general public.⁴ The Employer concedes that it was not created directly by the State of Arizona. The Regional Director concluded that the Employer was not administered by individuals who are responsible to public officials or to the general public. We disagree.

The Regional Director found that, notwithstanding its public characteristics, the Employer District here was not administered by individuals who are responsible to public officials or the general public,

in view of the minimum landowning requirements of the electorate in district elections. The Regional Director concluded, as urged by Petitioner, that the electorate did not include even the entire class of voters permitted by the enabling statute and therefore the Board's test was not met.

In the *Hawkins County* case,⁵ the Supreme Court concluded that the gas utility district involved therein was a political subdivision primarily because the commissioners administering the district were appointed by an elected county judge and were subject to removal under the State's General Ouster Law, thereby bringing the district squarely within the second of the Board's tests. Additionally, the Court also considered numerous other factors in an effort to determine whether the district operated in a manner "so as to constitute a department or administrative arm of government." The Court deemed that the following facts were relevant to the inquiry: (1) the state statute establishing the district referred to it as a "municipality" or "public cooperative" with all of the powers necessary for accomplishment of its purpose capable of being delegated by the legislature, (2) the district possessed the power of eminent domain which could be exercised even against other governmental entities, (3) all district property and revenue was exempt from all local taxes and from Federal income tax, (4) social security benefits for district employees were voluntary, (5) the district's records were "public records," open to inspection, and the district was required to make public disclosure of its financial position, and (6) the individuals charged with administration of the district's affairs were appointed by an elected public official and subject to removal by either certain government officials or the general public.

Based on the factors the Court found relevant to its determination in *Hawkins County*, many of which are present here, we conclude, contrary to the Regional Director, that the Employer is a political subdivision of the State of Arizona and not an employer within the meaning of the Act. Thus, here, as in *Hawkins County*, (1) the state statute establishes the District as a political subdivision, (2) the District possesses the power of eminent domain, (3) all district property and revenue is exempt from local and Federal income taxes, and (4) the District's records are considered "public documents," and the general public is permitted to attend meetings of its board of directors. While the individuals charged with the administration of the District's affairs are not appointed by an elected public official nor subject to removal by certain government officials, as in *Hawkins*

² One employee transferred from a state job continues his participation in the state retirement plan.

³ The constitutional article in question art VIII part 1 sec 1 provides as follows:

Every public officer in the State of Arizona holding an elective office either by election or appointment is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office. Such electoral district may include the whole State. Such number of said electors as shall equal twenty five per centum of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer may by petition which shall be known as a Recall Petition demand his recall.

⁴ *Natchez Trace Electric Power Association*, 193 NLRB 1098 (1971).

⁵ *NLRB v. The Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971).

County, they are elected by the property owners and apparently are subject to removal by the electorate of the District and are therefore responsible to the electorate. Thus, the state statute provides that directors can be removed by a majority of the qualified voters "as provided by the Constitution and laws of the State for the recall of county officers" ⁶

We do not agree with the Regional Director that a different result is warranted in the instant case from that in *Hawkins County* primarily on the ground that the District is not "administered by individuals who are responsible to public officials or the general public, especially where, as here, the electorate for the District's administrative body does not include even the entire class of voters permitted by the enabling statute." Our reading of the applicable statute indicates that *all* property owners within the District are eligible to vote in the election for the formation of the District and the board of directors. Although in subsequent elections, after the District is formed, the vote is limited to owners of 5 acres or more of irrigable land within the District, we do not believe that

such a limitation on voting eligibility, in the other circumstances present here, is sufficient to justify a finding that the Employer is not a "political subdivision" of the State of Arizona. Rather, we find it is excluded under Section 2(2) of the Act. In a similar factual situation where voting was limited to property owners, the United States Court of Appeals for the Ninth Circuit, in denying enforcement of the Board's order, found such limitation did not prevent the district there from qualifying as a political subdivision of the State ⁷

Accordingly, we find, contrary to the Regional Director, that the Employer is not an employer within the meaning of Section 2(2) of the Act, and we shall dismiss the petition herein.

ORDER

It is hereby ordered that the petition be, and it hereby is, dismissed.

⁷ *NLRB v Lewiston Orchards Irrigation District*, 469 F.2d 698 (CA 9, 1972). In *Lewiston* as here, the procedure for forming a district required the filing of a petition with the county and an election among eligible landowners in the proposed district. There, the Board, in asserting jurisdiction, concluded that the directors were not elected by qualified voters of the District but by a special class of voters, *landowners*, for the benefit of the particular number of landowners. The court of appeals, disagreeing with the Board, found the case fell within the purview of the *Hawkins County* decision. Member Jenkins does not rely on the *Lewiston Orchards* decision nor the text for which it is cited in reaching his decision.

⁶ Title 45-1624 regarding the recall of directors provides as follows:

A Director elected or appointed under this chapter shall be subject to recall by the vote of a majority of the qualified electors of the division which he represents. The proceedings for recall shall be in all respects as provided by the Constitution and laws of the State for the recall of County officers.