

**Aclang, Inc. and Tran Van Bich, Diem Thi Vo and  
Nguyen Chi Long and Nguyen Thi Ky-My. Cases  
28-CA-2186, 28-CA-2203**

September 10, 1971

**DECISION AND ORDER**

**BY CHAIRMAN MILLER AND MEMBERS  
FANNING AND JENKINS**

On May 19, 1971, Trial Examiner Herman Corenman issued his Decision in the above-entitled proceeding finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found the Respondent had not engaged in certain other unfair labor practices as alleged in the complaint and recommended dismissal as to them. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief. The General Counsel filed an answering brief.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the proceeding and hereby adopts the findings,<sup>1</sup> conclusions, and recommendations of the Trial Examiner.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner as modified below and hereby orders that the Respondent, Aclang, Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order as modified below.

Add the following as paragraph 1(c) of the Trial Examiner's recommended Order:

"(c) In any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, including the Union herein, to bargain collectively through a bargaining agent chosen by the

employees, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any such activities."

<sup>1</sup> In adopting the Trial Examiner's finding of the 8(a)(1) violation based on the coercive interrogation of Miss Kim-Cuc by Gary Moore, we specifically find that Respondent was bound by the statements attributed to Moore. The obtaining of a proper visa status was a prerequisite to employment as an instructor with Respondent, and Moore was responsible for assisting the instructors in obtaining this status. Since Moore's statement was in connection with the performance of his principal duties for Respondent, and at least in part concerned Kim-Cuc's visa status, we find that Moore had apparent authority, if not actual authority, to speak for Respondent in such matters and that Respondent is bound by his conduct. We note additionally that Moore receives hourly compensation far in excess of other employees, that he was a vice president of Respondent's predecessor corporation, that his wife holds the office of secretary with Respondent, and that his office is located proximate to others possessing managerial authority.

**TRIAL EXAMINER'S DECISION**

**STATEMENT OF THE CASE**

HERMAN CORENMAN, Trial Examiner: Upon a charge filed by Nguyen Chi Long, Tran Van Bich, and Diem Thi Vo in Case 28-CA-2186 on September 30, 1970, and a charge filed by Nguyen Thi Ky-My on October 15, 1970, in Case 28-CA-2203, the General Counsel of the National Labor Relations Board (herein called the Board) on behalf of the Board issued a complaint December 24, 1970, against Aclang, Inc., herein referred to as the Respondent, alleging that the Respondent in refusing to hire the four charging individuals and by certain employee threats and interrogation engaged in, and was engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein referred to as the Act.

Respondent duly filed its answer admitting certain allegations of the complaint but denying the commission of any unfair labor practices.

Pursuant to notice, a hearing thereon was held before the undersigned Trial Examiner at El Paso, Texas, on February 23, 24, and 25, 1971. All parties appeared at the hearing, were represented by counsel, and were afforded full opportunity to be heard, to produce and examine, and cross-examine witnesses. Briefs submitted by counsel for the General Counsel and counsel for the Respondent have been carefully considered.

Upon the entire record in this case and from my observation of the witnesses, I make the following:

**FINDINGS OF FACT**

**I. THE BUSINESS OF THE RESPONDENT**

It is established by the pleadings, and I find, that the Respondent is a Texas corporation with its principal office and place of business at Biggs Field, El Paso, Texas, where it is engaged in the operation of a language school teaching the Vietnamese language to military personnel of the Armed Services of the United States. During the last calendar year, the Respondent, in the course and conduct of its business operations, received gross revenues in excess of \$500,000 for services furnished to the United States

having a substantial impact on the national defense. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE UNION INVOLVED

The Union of Language Teachers, American Federation of Teachers, Local 1949, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

### A. *Background*

The Respondent, Aclang, Inc., was created as a Texas corporation to take the place of its predecessor, the Academy of Language Studies, Inc., a Virginia corporation, which was dissolved after Mr. and Mrs. Kenneth Schiweck moved their administrative headquarters from Virginia to Texas. The Schiwecks owned and controlled both corporations. Although Mrs. Schiweck is the owner of all the stock of Respondent and its president, it is clear and undisputed that both Mr. and Mrs. Schiweck assume executive direction of Respondent.

The Academy of Language Studies, Inc., owned and controlled by Mr. and Mrs. Schiweck, was awarded the government contract at Biggs Field, El Paso, Texas, to teach Vietnamese to Air Force and Army personnel for fiscal 1969 (July 1, 1968, to June 30, 1969). The Sanz School, a competitor, was awarded the contract for fiscal 1970 (July 1, 1969, to June 30, 1970), and the Respondent, also owned and controlled by Mr. and Mrs. Schiweck, was awarded the contract for fiscal 1971 (July 1, 1970, to June 30, 1971). All three schools had entered into collective-bargaining agreements with the Union as the representative of the Vietnamese teachers. The Respondent's collective-bargaining agreement was executed September 15, 1970, and continues in force as long as the duration of the Respondent's government contract.

The evidence shows, without dispute, that there exists an intraunion division between essentially two groups in the Vietnamese community, which comprise the union members. This division or conflict of interest between the two groups is part cultural and based on differentiation in status related to degree and excellence of education and in part based on the immigration status of these teachers. Generally, these Vietnamese teachers who have secure status as "immigrants," as contrasted with those teachers who hold only temporary visas, were more likely to manifest a harder line and to hold out for greater benefits in collective bargaining, whereas the temporary visa holders, dependent on a job in order to retain visa eligibility, were more inclined to accept the Respondent's contract proposals.

The four charging individuals in this case are all "immigrants," a secure status which precludes their vulnerability to deportation. Their education is superior. The ideological leader of the four of them is Miss Ky-My who was the chief instrument in founding the Union. She is

highly educated and extremely fluent in the English language. The four charging individuals are fast friends and Miss Ky-My is the acknowledged leader who in addition to her educational attainments commands their loyalty because "she stands for the good cause."<sup>1</sup>

### 1. Events preceding the Respondent's refusal to hire Miss Ky-My

Miss Ky-My had been employed as a language instructor for the Academy of Language Studies, Inc., at Biggs Field in El Paso from October 14, 1968, to October 1969, and with the loss of the contract to the Sanz School, she worked as an instructor for Sanz School until September 25, 1970. Miss Ky-My is an "immigrant," and in such status she is considered a legal resident of the United States who may engage in any occupation for anyone and she is eligible for U. S. citizenship. Her status is more secure than the holder of an H-2 or temporary visa who thereby becomes dependent on the government contractor, as the temporary visa holder must work for a specific employer, and the visa automatically expires when his work for that employer ends.

Miss Ky-My, resentful of abuses by governmental contractors toward the Vietnamese instructors and motivated by a desire to improve their wages and working conditions, gave much of her time and energy to organize the Union and secure its charter. She wrote the Union's bylaws and completed its organization. She was elected president of the temporary committee. She declined the presidency of the Union to become its first secretary-treasurer where she served from May 1969 to May 1970 when she refused to seek further office because she wanted to work on her doctorate degree. She was a member of the committee that negotiated the first collective-bargaining agreement with Mr. Schiweck who then operated as the Academy of Language Studies, Inc., and she negotiated the second collective-bargaining agreement with Mr. Sanz.

### 2. The July 17 union meeting

She attended a union meeting at the Sanz School on July 17, 1970. At this meeting the union president, Mr. Trung, having opened the meeting, told the members, according to Miss Ky-My's credible and uncontradicted testimony, that "all of us who wanted to apply for Aclang had to go through the union, but there was one member, Miss Nguyen Thi Ky-My who went directly to Aclang and filed an application. She went against the interests of the union. She is not a good member of our union." Although Miss Ky-My had raised her hand to speak, the president gave the floor to two other members who both said "that Miss Ky-My was going against the interest of the union." Then the president gave Miss Ky-My the floor. Miss Ky-My, according to her own credible and undisputed testimony, told Mr. Trung and the membership "that the act of filing an application for employment is an act of freedom on my part. No one can stop me looking for a job." Then, according to Miss Ky-My, the "whole room shouted at me,

interest of the instructors."

<sup>1</sup> The above quote is from Mrs. Long's testimony Mrs. Vo testified, "I support the union and Miss Ky-My, because she always fight for the

and stopped me from talking, and I was so nervous I said these other words, I said 'I wish I could insult all of you,'<sup>2</sup> and the noise came back again, and Mr Trung [the union president] came to me and he wanted to hit me in the face."<sup>3</sup>

After this incident at the July 17, 1970, union meeting, the five members of the union committee signed and circulated among the members for signature a petition to expel Miss Ky-My from the Union with the following preamble.

We, the undersigned members of the Union of Language Teachers local #1949, assembled on a general meeting on July 17, 1970 unanimously request to expel NGUYEN-THI-KY-MY, a member of this Union, for her misbehavior (calling names, shouting insults, and vociferations) and her misconduct with the membership in particular and the Union in general.

Sixty-five members signed the petition Dr. Vinh's<sup>4</sup> wife, a union member, attended this meeting

### 3 The August 7 union meeting

A union meeting was held at the Sanz School on August 7, 1970, to consider the Respondent's contract proposal. Mr. Givens, the Union's supervisor, who was in attendance recommended against acceptance and, by a secret ballot vote of 85 to 1, the membership rejected Respondent's proposal

#### 4. Respondent's acts of restraint and coercion on August 12

On August 12, 1970, Gary Moore upon instruction from Mr. Schiweck called in a number of Vietnamese instructors, ostensibly to check on their visa status.<sup>5</sup>

Miss Kim-Cuc, employed as a Vietnamese instructor by Respondent at Biggs Field since July 23, 1970, and the holder of an H-2 temporary worker visa, was told by her supervisor to report to Mr. Moore on August 12, 1970. Miss Kim-Cuc testified credibly that she reported to Mr. Moore in the Teacher Room, and he talked to her alone although there were other people in the room. Miss Kim-Cuc's testimony, which I credit, is as follows:

Mr. Moore talked to me about the previous union meeting, and he tell me about there are 85 votes against the school proposal, and have only one accept that school proposal. He also tell me he know who is that person. Then he tell me about, they have two salaries, 500 for beginning teacher, . . . and 525 for experienced teacher, and he asked me do I accept the Aclang School proposal, and he tell me about if I accept it, I will not get in any trouble about my visa or anything else. If I don't, I want to work for \$550 for one month, I could work one month, or two months, and I say O.K., I accept Aclang School proposal about the last meeting.

Miss Kim-Cuc further credibly testified that after Mr. Moore finished talking to her "he check my name on the list

. . . a yellow sheet of paper." She further testified credibly that Mr. and Mrs. Schiweck came into the room and Mrs. Schiweck said, "why Vietnamese person have 85 vote against her, and she said she helped them to send money to their country and to buy house or something like that, and how come, why they are not nice to her." Miss Kim-Cuc further testified that before it was her turn to talk to Mr. Moore, she saw other instructors, namely, Miss Hai, Mr. Do, Miss Psuonganh, and Miss Yen, talk to Mr. Moore but she did not hear the conversation.

Called as a witness by Respondent, Mr. Gary Moore conceded that he had called in a number of instructors to the teacher's ready room on August 12, that he spoke to them in groups of two or three; and he "assumes" that Miss Kim-Cuc was among them. Moore testified that he didn't remember speaking to Miss Kim-Cuc individually. Mr. Moore offered no evidence as to the content of his conversation with Miss Kim-Cuc individually or in a group, and it is apparent that his testimony did no more than gloss over his meeting with Miss Kim-Cuc in a studied effort to obscure the content of the conversation with the excuse that he didn't remember talking to her. Miss Kim-Cuc's testimony was simple, direct, and forthright, with conscientious attention to accuracy and detail. I credit Miss Kim-Cuc's testimony, and I find that Mr. Moore, as an agent of the Respondent, by summoning Miss Kim-Cuc to the Respondent's office and carrying on with Miss Kim-Cuc the conversation related by her, thereby interrogated her concerning her union activity and threatened her with possible loss of her visa status and loss of work if she did not accept the Respondent's wage proposals. I make no finding concerning the content of conversations carried on by Mr. Moore with other instructors on that same day in the absence of competent nonhearsay evidence on the matter. By the foregoing conduct of Mr. Moore, I find that the Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights. The Respondent, I find, thereby violated Section 8(a)(1) of the Act.

### 5. The August 14 union meeting

Notwithstanding instruction from the Union's supervisor, Mr. Givens, not to hold any union meetings during his absence from the city, the union committee, having received an improved proposal on certain benefits from Mr. Schiweck, called a meeting on August 14, 1970, in Mr. Givens' absence. Obedient to Mr. Givens' instructions, none of the four charging individuals in this case attended that meeting. The membership voted by secret ballot 68 to 18 to accept the Respondent's contract proposal.

### 6. The August 22 union meeting

On Mr. Givens' return to the city another union meeting was called on August 22, 1970, to reconsider the Union's

supervision of the instructors

<sup>5</sup> Mr Moore at the time was employed in the front office to handle the immigration visa status of the instructors. He was an intimate acquaintance of long standing with Mr. Schiweck and was paid \$75 for a 10-hour week. Mr Moore's wife also worked in the front office and holds the office of secretary of Respondent Mr Moore had served as vice president of the Academy of Language Studies, Inc

<sup>2</sup> Mr. Trien, the secretary-treasurer of the Union, who was present at the meeting, testified that Miss Ky-My said, "you are all stupid and dumb."

<sup>3</sup> Union Secretary-treasurer Trien's testimony corroborates Miss Ky-My Trien testified that "a very hot tempered man . . . after she said it, he was so angry . . . he almost hit her . . ."

<sup>4</sup> Dr. Vinh is vice president of the Respondent and he directs the

action of August 14. At this meeting, Mr. Givens, the Union's supervisor, told the membership he had convened the meeting to consider whether employees had been threatened by Mr. Moore. Four persons arose and told of their conversations with Mr. Moore concerning their visas and the August 7 membership 85 to 1 vote rejecting the Respondent's contract proposal.<sup>6</sup> Mr. Givens expressed his opinion to the group that Mr. Moore's action in attempting to influence these instructors constituted unfair labor practices. Although Mr. Givens recommended against accepting the Respondent's proposal, the membership voted 31 to 30 by show of hands to reaffirm the Union's August 14 action in accepting the Respondent's contract proposal and to put off filing unfair labor practice charges against the Respondent. The four charging individuals in this case were among the 30 who voted to reject the Respondent's contract proposal.

### B. *The Refusal to Hire Miss Ky-My*

Aware that the Sanz School's government contract would soon expire and that Respondent had been awarded the contract for fiscal 1971, Miss Ky-My made written application for work with the Respondent in July 1970. Her name was also submitted along with 36 other union members as an applicant in the Union's August 10, 1970, letter to the Respondent.

On September 10, 1970, having received a 2-week notice of her pending layoff by Sanz, Miss Ky-My went to the Respondent's office and inquired of Respondent's vice president, Dr. Vinh, if there was an opening. Dr. Vinh replied, "You are a special case You have to see Mr. Schiweck." Miss Ky-My saw Mr. Schiweck the following day regarding an opening and related to him her conversation with Dr. Vinh. Mr. Schiweck told Miss Ky-My he had no opening—she could come back and ask him later. Miss Ky-My was laid off by Sanz on September 25, 1970. In the second week in October 1970, she phoned the Respondent's office and talked to Mrs. Schiweck who told her that Mr. Schiweck was out of the city—that she would have to talk to him. Miss Ky-My sought advice from the Board's El Paso office and she then returned to the Respondent's office where she saw Mr. Schiweck about employment. Mr. Schiweck told Miss Ky-My, according to her credible testimony:

I am not going to hire you because some teachers told me they would walk out on the job if I hired you

Miss Ky-My then told Mr. Schiweck that she had just come from the N.L.R.B., to ask another time if he has an opening, but since he had refused to hire her she was going to file charges. Miss Ky-My then filed her unfair labor practice charges in this case with the Board's El Paso office on October 15, 1970.

Concerning the reason he refused to hire Miss Ky-My, Mr. Schiweck testified that personally he liked her and he considered her "well qualified." But he had refused to hire

<sup>6</sup> Because of the hearsay rule, I make no findings as to the truth of the facts related by these four people to the union membership, with the exception of Miss Kim-Cuc who testified at the hearing concerning her conversation with Mr. Moore on August 12

<sup>7</sup> The quote is from the credible testimony of union secretary-treasurer, Mr. Tien, who gave the above quote as the translation from the

her because. "The feeling in the community . . . at the moment would be that they would prefer not to work with her. . . . I would like to maintain a smooth operation primarily with 100 and some teachers. It is essential that we don't have strife in this country among the teachers. . . . I am not saying she will be a troublemaker. . . . it would lead to some disagreements now whether she would be at fault, I don't know." Mr. Schiweck testified other people had told him they didn't want to work with Miss Ky-My. Mr. Schiweck conceded he had also heard of the petition to expel Miss Ky-My from the Union, and this in part caused him to refuse to hire Miss Ky-My, and he so advised the U.S. Department of Labor in a letter dated October 1, 1970, in which he said with respect to Miss Ky-My:

Miss Nguyen Thi Ky-My has had and continues to have personality conflicts with fellow instructors. She has exhibited a violent temper and has almost come to blows. Seventy-nine of the instructors in the El Paso area have signed a petition to expel her from the local Union because of her actions and attitude.

Testifying further, Mr. Schiweck said: "I eventually heard of that petition, . . . but the initial encounter with this situation was they had a meeting one night, . . . but the next morning when the teachers came in they were quite agitated and it looked like it might have disrupted some of our operations, so I inquired what was going on and at that time I found out allegedly what happened at the meeting and some feelings were very strong about it, . . . it is just as well to keep trouble out. . . . I heard of one statement that she had made . . . I would have to believe it."

### C. *Analysis and Conclusionary Finding Concerning Respondent's Refusal to Hire Miss Ky-My*

Although there is evidence that Miss Ky-My was the leader of a group composed of immigrants who opposed acceptance of the Respondent's contract proposal, it has not been established on the record that the Respondent's refusal to hire her was based on her opposition to acceptance of the Respondent's contract proposal. I find, in accordance with Mr. Schiweck's testimony on the record, that he refused to hire Miss Ky-My because of his apprehension of discord from other teachers who resented Miss Ky-My's conduct at the July 17 union meeting and because of the petition to expel Miss Ky-My from the Union. At the July 17 union meeting the union president and two other members from the floor criticized Miss Ky-My because she had applied in person to the Respondent for an instructor's position and condemned her as not a good union member. Miss Ky-My took the floor to defend her freedom to look for work and was provoked by shouts from the membership which prevented her from speaking out. In anger and frustration, she told the group "you are all stupid and dumb."<sup>7</sup>

It is clear, and I find, that the conduct of Miss Ky-My at

Vietnamese idiom I do not credit Miss Ky-My's testimony that she told the membership "I wish I could insult all of you." Mr. Tien impressed me as a fair and objective witness, and in view of the provocation and the moment of Miss Ky-My's anger, it is more likely that she uttered the remarks as testified to by Mr. Tien

the July 17 union meeting was protected by Section 7 of the Act.<sup>8</sup> It is well settled law that an employer, even in the interest of promoting harmony or preventing discord in his establishment, may not discharge or refuse to hire an employee to appease an opposing faction of union or nonunion employees who harbor an opposition to that person's employment which grows out of that person's union or Section 7 activity. Here, it is clear that the opposing faction, which happened to be headed by the union leadership, resented Miss Ky-My's remarks and ideology expressed in union debate. It is common knowledge that the expressing of opinions and positions at union meetings often becomes heated and is the cause for division among factions. It is clear that a faction of the union members, which included the union president, was resentful of and disapproved Miss Ky-My's asserted freedom to look for work without going through the Union. They shouted their disapproval of her stand taken at the meeting and when she further provoked them by calling them stupid, the union president in anger assaulted her person and 65 members, led by the union committee, signed a petition to expel her. Mr. Schiweck was apprised of these circumstances and refused to hire Miss Ky-My because a faction opposed to Miss Ky-My threatened they would not work with her. Under the circumstances, it became the duty of the Respondent not to yield to such pressures resulting in his refusal to hire Miss Ky-My.

What the Court of Appeals for the Second Circuit said in *N.L.R.B. v. Local 138, Operating Engineers (Zara Contracting Co.)*, 293 F.2d 187, is appropriate here:

There seems to be no doubt that an employer who denies employment . . . because the applicant or employee has been expelled from a union for causes other than failure to tender dues and initiation fees or is otherwise in disfavor with the union because of activities protected by Section 7 finds himself in violation of Section 8(a)(1) and (3), even though he acts under the economic duress of a threatened work stoppage, *N.L.R.B. v. Bell Aircraft Corp.*, 206 F.2d 235, 237 (2 Cir. 1953); *N.L.R.B. v. Imparato Stevedoring Corp.*, 250 F.2d 297, 302 (3 Cir. 1957); *N.L.R.B. v. United States Steel Corp.*, 278 F.2d 896, 898 (3 Cir. 1960).

The Trial Examiner's decision in *Altamont Shirt Corporation*, 131 NLRB 112, adopted by the Board, at page 120 aptly states the employer's duty not to surrender his right to hire to employee groups as follows:

This case is governed by principles which are now well established. Both the Board and the courts agree that there is an affirmative duty imposed upon an employer by the Act to insure that its right to discharge is not delegated or surrendered to any union or antiunion group, and that an employer who acquiesces in the exclusion of employees from his plant by such a group will be regarded as having constructively discharged the excluded employees in violation of Section 8(a)(3). *Fred P. Weissman Co.*, 69 NLRB 1002, 1025; enfd. 170 F.2d 952 (C.A. 6); cert. denied 336 U.S. 972; *D. D. Newton*,

*an Individual d/b/a Newton Brothers Lumber Co.*, 103 NLRB 564, 567; enfd. 214 F.2d 472, 475 (C.A. 5); *N.L.R.B. v. Goodyear Tire & Rubber Company*, 129 F.2d 661, 664 (C.A. 5); *N.L.R.B. v. Hudson Motor Car Company*, 128 F.2d 528, 532-533 (C.A. 6); *Detroit Gasket and Manufacturing Company*, 78 NLRB 670, 671; *J. P. Florio & Co. Inc.*, 118 NLRB 753, 754, 756. And as the court held in the *Goodyear Tire* case, *supra*, whether Respondent had, or had not, responsibility for any part of the feeling which existed is beside the mark, for the evidence here plainly established that union adherents were repeatedly excluded, to Respondent's knowledge, except on condition they sign a renunciation of the Union. Difficult as an employer's position may be under such circumstances, his duty requires him to resist the domination of his managerial prerogative to employ, whether manifested by or against a union faction. *Id.*, and see also *Majestic Metal Specialties, Inc.*, 92 NLRB 1854, 1862.

Upon the entire record, I find that by refusing to hire Miss Ky-My on and after September 15, 1970, the Respondent thereby discriminated against her and coerced and restrained employees in the exercise of rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) and (3) of the Act.

#### D. *The Refusal to Hire Mr. Bich, Mrs. Vo, and Mrs. Long*

Mrs. Vo, Mrs. Long, and Mr. Bich are, like Miss Ky-My, among the group of approximately 120 Vietnamese teachers who comprise the community and like all the other teachers are members of the Union. The three are well educated and admittedly competent Vietnamese instructors who have taught for a number of government contractors at Biggs Field in El Paso, Texas. As related earlier in this Decision, they are fast friends of Miss Ky-My and accept her leadership in union matters.

The husbands of Mrs. Vo and Mrs. Long, together with Mr. Bich, organized a language school under the name School of Vietnamese Language and Culture on January 30, 1970, and on that date filed a Certificate of Business under assumed name with the county clerk of El Paso County. This firm, in competition with the Respondent and others, submitted bids for the government teaching contract at Biggs Field in El Paso as well as at Monterey, California. The formation of this competing firm came to Mr. Schiweck's attention when he saw the published record of the filing of the Certificate of Business in a news publication known as "The Commercial Recorder" in early February 1970. Later Mr. Schiweck learned from government sources that this firm had submitted competing bids at Biggs Field and in Monterey, California. None of the three notified the Respondent that they or their husbands had set up a school in competition with the Respondent. Like Miss Ky-My, Mr. Bich and Mrs. Vo attended the August 22 union meeting and all three voted against the Respondent's contract proposal by show of hands. Mrs. Vo

<sup>8</sup> Section 7 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or

protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

put up both hands, one for herself and the other as proxy for Mrs. Long who was absent. As related earlier in this Decision, the vote was 31 to 30 to accept the Respondent's contract proposal.

During the first or second week in September 1970, Mr. Bich and Mrs. Long went to the Respondent's office and talked to Respondent's vice president, Dr. Vinh, about employment. They were told by Dr. Vinh that their case was too special, they must see Mr. Schiweck. Near the same date Dr. Vinh had also told Mrs. Vo that she too was a special case requiring that she see Mr. Schiweck. On the following day, the three, Mr. Bich, Mrs. Vo, and Mrs. Long, called on Mr. Schiweck together to inquire about employment. Mrs. Long asked when there would be an opening for the three. Mr. Schiweck replied he had no openings; he would let them know when there would be an opening. Mr. Schiweck inquired if they had applied through the Union, and they replied they had.<sup>9</sup> Mr. Schiweck never called the three to offer them employment. Nothing was said by Mr. Schiweck to the three about their competing firm.

Mr. Schiweck credibly testified that he refused to hire the three, namely, Mr. Bich, Mrs. Vo, and Mrs. Long, because "They are directly affiliated with a competitor . . . . The Vietnamese School of Language and Culture . . . . Mrs. Chi Long is the wife of the president of the company. Mrs. Diem Thi Vo is the wife of the vice-president, and Mr. Tran Van Bich is secretary-treasurer of the company." Stating his further reasons for refusing to hire the three, Mr. Schiweck testified that it was important not to hire these people because he considered them a "definite threat to our business. . . . we felt that it was necessary to keep them out of our main offices primarily because there is too much information that goes over those desks. . . . if we know someone is going to spy on us we don't want them."

Counsel for the General Counsel contends that the assigned reason for Mr. Schiweck's refusal to hire these three individuals is pretextual, arguing that it is possible that any of his instructors or other personnel could submit bids in competition with the Respondent. He further argues that the three charging individuals were not hired because they were against accepting the Respondent's contract proposal. On the basis of the record, I must disagree with the counsel's argument. Initially, it should be observed that it is the common practice in the every day business world not to give employment to one's competitors and it is pointed out that the Respondent was following what is generally regarded as prudent business practice. Indeed, the Board itself has disclosed its philosophy in this regard in *Bausch & Lomb Optical Company*, 108 NLRB 1555, where it refused to sanction a union's representation of Bausch & Lomb's employees because the union at the same time was engaged in a business in competition with Bausch & Lomb. The Respondent could not be expected to give employment to *no one* for fear that such persons would some day compete with it. To employ no one based on such an unnecessary fear would mean that the Respondent could not function. But certainly it is understandable that the

Respondent would not employ viable and active competitors. One does not as a rule permit the competitor to enter its camp.

Considering the second point in counsel's argument, namely, that the three were not hired because they had opposed Respondent's contract proposal, it is pointed out (1) that there is no evidence that the Respondent was aware that the three had opposed Respondent's contract proposal. In this connection, it is noted that the vote at the August 7 meeting was by secret ballot and 85 members opposed the contract proposal. The three did not attend the August 14 meeting, and although the August 22 meeting's vote was by show of hands, there is an absence of evidence that Respondent's officials were informed how each member voted. Additionally it is pointed out that 26 other union members openly voted against the Respondent's contract proposal at the August 22 meeting and there is no showing that any discrimination was practiced against them.

I am satisfied that there is insufficient evidence in the record to sustain General Counsel's contention that Mrs. Vo, Mrs. Long, and Mr. Bich were refused employment in violation of Section 8(a)(1) or (3) of the Act. On the contrary, I find that they were refused employment for reasons not violative of the Act. I will, therefore, recommend that the complaint be dismissed insofar as it alleges violations with respect to the Respondent's refusal to hire those three Charging Individuals.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminated in regard to the hire and tenure of employment of Miss Ky-My by refusing to hire her on and after September 15, 1970, I will recommend that Respondent offer her immediate employment as an instructor at Biggs Field or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of pay she may have suffered by reason of said discrimination against her by payment to her of a sum of money equal to that which she would have earned from the date of the discrimination against her to the date of her reinstatement less her net earnings during such period in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest

<sup>9</sup> The names of all four charging individuals in this case were included in a list of applicants submitted by the Union to Respondent August 10,

thereon at 6 percent per annum, *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact and upon the entire record,<sup>10</sup> I make the following:

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the definition of Section 2(6) and (7) of the Act.

2. The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminating in regard to hire and tenure of employment of Miss Ky-My because of her union and protected concerted activities, Respondent has engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(3) and Section 8(a)(1) of the Act.

4. By interrogating Miss Kim-Cuc and by threatening her as found above, the Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:<sup>11</sup>

#### ORDER

Aclang, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercing and restraining its employees from engaging in union activities and the exercise of other rights guaranteed by Section 7 of the Act

(b) Discriminating with respect to the hire and tenure of employees or applicants for employment because of their union activity or their exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative actions which, I find, will effectuate the policies of the Act:

(a) Offer Nguyen Thi Ky-My immediate and full employment to an instructor's position at Biggs Field or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, as provided in section V, above, entitled "The Remedy," and make her whole according to the formula and method prescribed in said section V.

(b) Preserve until compliance with any order for reinstatement or backpay made by the National Labor Relations Board in this proceeding is effectuated, and make available to the said Board or its agents, for examination and copying, all payroll records, social security records, timecards, and personnel records which may be relevant to a determination of the amount of backpay due, and to the reinstatement and related rights provided by such order.

(c) Notify Miss Ky-My, in the event that she is now serving in the Armed Forces of the United States, of her

right to full employment, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(d) Post in conspicuous places at the Respondent's place of business in El Paso, Texas, including all places there where notices to employees are customarily posted, copies of the notice attached hereto marked "Appendix." Copies of the said notice to be furnished by the Regional Director for Region 28 of the National Labor Relations Board, shall, after being duly signed by an authorized representative of the Respondent, be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in such conspicuous places. Reasonable steps shall be taken by the said Respondent to insure that said notice is not covered, altered or defaced by any other material.<sup>12</sup>

(e) Notify the Regional Director for Region 28, in writing, within 20 days from the date of the receipt of a copy of this Decision, what steps the Respondent has taken to comply therewith.<sup>13</sup>

IT IS ALSO RECOMMENDED that the complaint be dismissed to the extent that it alleges that the Respondent engaged in unfair labor practices by refusing to hire Mrs. Long, Mrs. Vo, and Mr. Bich.

<sup>10</sup> In accordance with the General Counsel's unopposed motion, the record is corrected.

<sup>11</sup> In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>12</sup> In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>13</sup> In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

WE WILL offer to Nguyen Thi Ky-My an instructor's position at Biggs Field, El Paso, Texas, or, if that job no longer exists, a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and we will pay her for any loss of pay she may have suffered by reason of our discrimination against her together with interest thereon at 6 percent.

WE WILL NOT discharge, refuse to hire, or otherwise discriminate in regard to the hire and tenure of employment or any term or condition of employment of our employees because of their membership in and activities on behalf of the Union herein or any other labor organization of their choice.

WE WILL NOT in any manner interfere with, restrain,

