UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, LOCAL 127

and **Case 16-CB-335527**

AIDEN WHISENHUNT, an Individual

***Maxie Miller* and *David Rout*, *Esqs.*,**
for the General Counsel.
Hal Gillespie*, *Esq. (Gillespie Sanford LLP),
for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This hearing was held in Fort Worth, Texas on March 3, 2026. The complaint alleged that the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL–CIO, Local 127 (the Union or Local 127) violated the National Labor Relations Act (the Act) by removing Aiden Whisenhunt from its exclusive hiring hall roster. On the record, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

Upstage Center, Inc. (Upstage), a Texas corporation, provides labor and other services to concerts and events. Annually, it purchases and receives goods and materials at its Texas facility worth more than $50,000 directly from points outside of Texas,[2] and is, therefore, an employer

[1] Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence. The controlling facts are mostly undisputed.

[2] The parties' *Joint Motion to Supplement the Record* dated March 6, 2026, which contains several jurisdictional stipulations, is **GRANTED**.

engaged in commerce under §2(2), (6) and (7) of the Act. The Union is a labor organization under §2(5) of the Act. On these bases, the Board has jurisdiction over this matter.

II. UNFAIR LABOR PRACTICES

A. RECORD EVIDENCE

1. Introduction

Through the operation of its exclusive hiring hall, Local 127 refers stagehands, riggers and technicians to work at concerts and shows in the Dallas-Fort Worth area.[3] (JT Exhs. 2-4). On August 21, 2023, the Union contracted with Upstage and agreed to refer workers for a September 2, 2023 Karol G concert at the Cotton Bowl (the Contract).[4] The Contract ran from August 21 to December 31, 2023; it set wages, breaks, overtime policies and pension fund contributions, but, lacked a grievance procedure. Local 127 referred Whisenhunt to work under the Contract.

2. Whisenhunt's Background and First Last Chance Agreement (the 1st LCA)

To say that Whisenhunt had a checkered history over his 8-year tenure with Local 127 is an understatement. He was, by all accounts, a highly competent worker, whose repeated behavioral issues triggered intermittent job removals and a string of complaints.[5] In fall 2022, after being released from 2 referrals over 2 weeks for various behavioral issues, Local 127 reached its first tipping point and removed him from its hiring hall roster. He was, thereafter, reinstated in exchange for signing the 1st LCA, where he agreed that the Union could permanently remove him if his poor behavior continued. (JT Exh. 4(a)). The tide, unfortunately, never turned and his behavioral deficiencies persisted. On March 9, 2023,[6] he was disciplined for leaving a Dallas Opera worksite without authorization. (JT Exh. 5; R Exh. 15). On May 14, he was disciplined for making inappropriate comments. (JT Exh. 5; R Exh. 16)(telling coworkers to "get AIDs and die" and causing safety concerns)). On May 30, he was disciplined for berating coworkers. (JT Exh. 5; R Exh. 17). These incidents prompted Local 127 to remove him under the 1st LCA.

3. Second Last Chance Agreement (the 2nd LCA)

On June 28, at a Local 127 Executive Board Meeting, the Union reconsidered its decision to permanently remove him from its referral roster under the 1st LCA, turned yet another cheek, and benevolently afforded Whisenhunt another final chance to preserve his livelihood. Local 127's discussions are summarized below:

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[3] Venues include the Music Hall at Fair Park, the Cotton Bowl, AT&T Stadium and Bass Performance Hall.

[4] The sell-out concert had 68,000 attendees.

[5] His behavioral problems included an employer complaint that he "seemed like he was spun out on dope," altercations with coworkers, requests to not work with him due to erratic behavior, telling a coworker that he hoped that he "catches AIDs and dies slowly," threatening that "[because] he got arrested … no one should mess with him because he's a bad guy," and bragging that he "bust[ed a coworker] … in the head with a mag light." (R. Exhs. 12, 14).

[6] All dates that follow are in 2023.

> He had, historically, 26 different write ups and … three separate write ups currently.[7] Lawyer assures us that there is no possible case … if the local follows through in removal ….
>
> President Callahan brings up the moral issue of helping someone … with a mental illness, and the union's duty to support its charges. [He proposes that] … instead of expulsion we should consider how best we can correct the situation ….
>
> Gregg Pearlman proposes requiring proof that Aiden is pursuing efforts to improve his situation ….

(JT Exh. 6).[8] This discussion prompted the Union to offer him the 2nd LCA. On July 5, he signed the 2nd LCA, which provided a 2-month suspension, 18-month probationary period, required counseling sessions, and another acknowledgement that the Union could remove him, if his behavioral issues persisted. (JT Exh. 4(b)).

4. September 2: Incident at the Karol G Loadout

Whisenhunt testified that the following incident occurred during the Karol G loadout:

> We were on call for about two and a half hours, and [Union Vice-President] Jason Bowman approached me and … told me to take a break per our Union agreement …. I quietly slipped off …. when I got to the top of the dock, I lit my cigarette …. [A]n unknown man jumped out of the truck and hollered, "who sent you on break?" …. I was confused ….it was shown in my tone [,… and] I replied, "my Union." He then approached … Jerry, and had a … conversation with him. I heard something along the lines of him not knowing about a break. And then he … hollered, "that's bullshit," and … I replied, "it wouldn't be bullshit if y'all unionized." I then turned and walked away to go take my break. And he hollered, "What did you say?" And I repeated myself because I did not realize that the social cue was to not repeat myself.

(Tr. 20-21).

Union Vice-President Jason Bowman testified that rock and roll concert workers are generally not given breaks for loadouts (i.e., disassembling and packing), which was the job that Whisenhunt had on September 2. Bowman said that, although this was the norm, Local 127 still asked Upstage's Production Manager Rollin for a break that night and he consented, with the

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[7] See, e.g., (R. Exh. 4)(hitting coworker in head with softball-sized tape ball); (R. Exh. 7)(arguing with coworker); (R. Exh. 9)(behavioral issues); (R. Exh. 10) (failing to timely return from break)); (R. Exh. 11)(negativity).

[8] During cross-examination, Whisenhunt surprisingly denied that he was unaware that he had been accused of previous behavioral issues. He claimed that the tape ball incident was accidental and did not recall wishing that his coworkers contracted AIDs and died. He did, however, after reviewing his affidavit, recall wished that a coworker "die[d] alone." He defended that he was victimized and attacked at jobsites, and never listened to.

sole caveat that breaks would not be taken simultaneously. Bowman recollected Upstage's representative Jerry Hicks relating that Whisenhunt had been released because he "mouthed off" to Production Manager Rollin. Bowman said that he tried to lobby Rollin to reconsider, but, was told, "I don't have time for people to be rude during loadout." Bowman said that Upstate signed a rate sheet and there was no collective bargaining agreement with a grievance procedure. Bowman said that Whisenhunt's actions represented a recurring behavioral problem covered by the 2nd LCA. He added that referrals are barred from directly arguing with managers at jobsites and required to discuss concerns with their Union stewards before challenging an employer, which was Whisenhunt's failing. He said that Whisenhunt was repeatedly warned about this policy, when he was counseled about his several earlier behavioral lapses and disciplines.

Union President Callahan indicated that he also tried to dissuade Production Manager Rollin from ousting Whisenhunt. He said that Rollin was adamant and extremely upset that Whisenhunt had been rude to him. He said that Rollin stated that he had no time for a poor attitude, wanted him off the jobsite immediately and was prepared to call security.

5. September 5: Callahan's Steward's Report

Callahan's report stated as follows:

> Whisenhunt was asked to leave the site for a disagreement with the Production Manager Rollin over comments that were made during his break. Aiden says to Rollin [I'm] going on my break. Rollin says we don't do breaks on load outs. Aiden['s] reply was maybe you should unionize! Rollin, I want him off my site.
>
> So, I tried to calm the situation down but Rollin was persistent …. I went to Jerry from Upstage about it since he was a witness to the incident and Jerry said he must leave. I spoke with Aiden … and he feels he did nothing wrong ….

(JT Exh. 7).

6. October 3: Executive Board Meeting

On this date, Local 127's Executive Board reluctantly determined that Whisenhunt's actions at the Karol G concert violated the 2nd LCA and warranted removal from the referral list. (JT Exh. 8). Union President Callahan explained that his behavioral issues were a recurring problem, which rendered him unfit for continued referrals and undermined the Union's ability to maintain harmonious relationships with signatory employers.[9] He added that, if Whisenhunt had simply followed the same protocol he was repeatedly counseled about (i.e., diplomatically returning to work when confronted by management and then informing the Union about the issue for resolution), he would have easily addressed the matter and insured that he received a break. Callahan explained that Whisenhunt's removal from the hiring hall list did not stem from what he said (i.e., Local 127 wholeheartedly endorsed the principle that breaks should be given to

[9] Union Vice-President Jason Bowman added that he met with Whisenhunt in March 2023, and warned him that he needed to control his behavioral issues, avoid being the center of attention and to stop creating "chaos."

employees not covered by §8(f) agreements), but, from: his gratuitously hostile and rude approach to Upstage's management; his failure to follow Upstage's directive to return to work; his failure to seek counsel from the Union stewards at the jobsite; his voluminous history of behavioral issues; his needless escalation of the situation; and the clear application of the 2nd LCA. On these bases, the Union concluded that he could not change his behavior and separation was warranted.

Business Agent Gregory Pearlman testified that the Union prioritized fostering positive business relationships that encouraged hiring hall usage. He said that Whisenhunt's behavioral problems undermined this priority and caused Local 127 to lose employers. By way of example, he said that Gemini Lighting ended its business relationship with the Union because of Whisenhunt, and that Upstage has not used its hiring hall since the Whisenhunt incident. He said that Whisenhunt stands out as having the most behavioral issues in Local 127's history, without a close second. He noted that Union referrals are repeatedly told not to directly raise grievances (i.e., absent emergency or safety situations) and to first raise concerns with their stewards.

B. ANALYSIS

The Complaint alleged that Whisenhunt performed protected activity, when he told Upstage's management that his break "wouldn't be bullshit if y'all unionized" (Tr. 20-21; Complaint, ¶6(c)-(d)). It further alleged that, when Upstage fired him on this basis, the Union violated its duty of fair representation (DFR) by using this exchange to trigger a breach of the 2nd LCA. (Complaint, ¶¶6(e)-(g), 7–8). I will first consider if his activities were concerned and if Upstage's discharge of him violated the Act.[10] I will then consider if the Union's actions violated its DFR.

1. Concerted Activity

a. Precedent

Concerted activity includes not only conduct "engaged in with or on the authority of other employees," (*see Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984) (applying *Wright Line),* remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), but, also individual conduct. The Board has found that an individual's actions were concerted, when he sought to initiate, induce, or prepare for group action. *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986), aff'd sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) (citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964)). It has also identified concerted activity, when an individual brought truly group complaints to the attention of management. Id. Concerted activity also occurs when an individual engages in conversations that

[10] Although the Complaint does not expressly allege that Upstage violated §8(a)(1) by discharging Whisenhunt from the Karol G jobsite, this issue is relevant to assessing whether Local 127 validly removed him from its referral list. It logically follows that, if Upstage's discharge of Whisenhunt were legitimate, this would support the validity of Local 127's connected decision to remove him (i.e., consideration of the validity of Upstage's actions is a condition precedent to assessing the Union's resulting response). The legality of Upstage's discharge was fully litigated at the hearing and, in fact, represents the bulk of the record.

have "some relation to group action in the interest of" employees. Id. (quoting *Mushroom Transportation*, 330 F.2d at 685). Finally, concerted activity is present, when it is the logical outgrowth of earlier concerted activity. *See, e.g., Needell & McGlone, P.C.*, 311 NLRB 455, 455–456 (1993) (complaints to management about preferential treatment were concerted as logical outgrowth of prior discussion with coworkers), enfd. mem., 22 F.3d 303 (3d Cir. 1994); *Mike Yurosek & Son, Inc*., 306 NLRB 1037, 1038–1039 (1992) (uncoordinated refusals to work overtime were logical outgrowth of prior protest over hour reductions), enfd., 53 F.3d 261 (9th Cir. 1995); *Salisbury Hotel*, 283 NLRB 685, 685–687 (1987) (call to Department of Labor about lunch hour policy logically grew out of employees' concerted opposition to policy). It is also noteworthy that, when an individual seeks to enforce a collective-bargaining agreement by, by filing a grievance involving only himself, this action is still deemed concerted because it promotes enforcing a collectively bargained contract. *NLRB v. City Disposal System*, 465 U.S. 822 (1984).

The framework for analyzing whether a discharge connected to protected activity violates §8(a)(1) is set out in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. den. 455 U.S. 989 (1982), which requires the General Counsel (the GC) to show, by a preponderance of the evidence, that the worker's protected conduct was a motivating factor in the adverse action. This initial burden is satisfied by showing protected activity, knowledge and animus. If the GC meets this initial burden, the burden shifts to the employer to prove that it would have taken the same adverse action, absent the protected activity. *Mesker Door*, 357 NLRB 591–592 (2011). The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action, absent the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086, 1087 (2011). If the employer's proffered reasons are pretextual (i.e., either false or not relied upon), it fails to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). Further analysis is required if the defense is one of "dual motivation," i.e., the employer avers that, even if an invalid reason played some part in its motivation, it would have still taken the same action for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

b. Analysis

The GC made a prima facie showing that Whisenhunt engaged in concerted activity, when Upstage interrupted his break and he protested by stating, that his break "wouldn't be bullshit if y'all unionized." His response was, arguably, a clumsy grievance seeking to enforce the break time provision in Local 127's contract. (JT Exh. 3 at Art. 5). See *City Disposal*, supra. Although Local 127's labor agreement with Upstage lacked a grievance mechanism, and unlike *City Disposal*, Whisenhunt's concerns were not safety-related, he nevertheless engaged in concerted activity during his altercation with the Upstage Production Manager. On these bases, I find that the GC made a prima facie showing that his comments were concerted activity.[11]

[11] The evidence fails to demonstrate that Whisenhunt's conduct was concerted activity under other Board precedent. *First*, when he repeated to Upstage's Production Manager that his break "wouldn't be bullshit if y'all unionized," he was not seeking to initiate, induce, or prepare for group action. *Meyers Industries (Meyers II)*, supra. There was no

The GC similarly made a prima facie showing under *Wright Line*. Protected activity (i.e., his break comment), knowledge and animus were adduced.[12] For several reasons, however, I find that the record reflects that Upstage would have removed him from the jobsite absent his protected activity; in short, it reveals that he was gratuitously rude during his interaction with the Production Manager. *First*, he acknowledged during his limited testimony that he responded to a high-level manager with profanity, turned his back, walked away during the conversation and "did not realize that the social cue was to not repeat myself." (Tr. 20–21). In addition, Callahan and Bowman provided credible and unrebutted testimony that Upstage insisted that he be removed because of his rudeness and poor attitude. *Second*, it is implausible that Upstage would have reacted so staunchly, if it were not genuinely offended by his rude behavior, given that there was no evidence that it had any real world concerns about being organized. Simply put, it was in Upstage's interest for Whisenhunt to remain and finish the job; the fact that it vociferously insisted upon his removal cuts against its own interests and supports a finding that his delivery (i.e., as opposed to his message) was genuinely offensive.[13] *Finally*, Whisenhunt's actions were deeply consistent with his lengthy rap sheet of behavioral disciplines and jobsite altercations (i.e., he had almost 30 reported transgressions). This entrenched and well-defined pattern resulted in 2 last chance agreements. These circumstances suggest that Whisenhunt's response at the Karol G jobsite was likely gratuitously obnoxious, whether he realized it or not. On these bases, it becomes apparent that Whisenhunt would have been removed by Upstage because he reacted to the manager with hostility and rudeness, regardless of his concerted activity.[14] His discharge from the Karol G jobsite, thus, did not violate the Act.[15] Or put another way, I find that Upstage did not violate the Act, when it removed Whisenhunt; implicit in this finding is that *Local 127 found that Whisenhunt violated the 2nd LCA on the basis of Upstage's lawful discharge*. I will next turn to whether the determination that he violated the 2nd LCA and his connected removal from the referral list violated the DFR that Local 127 owed to Whisenhunt.

evidence that he ever discussed any workplace matters, i.e., breaks or otherwise, with other statutory employees. *Second*, the record fails to show that he was presenting a group complaint or addressing a matter of group interest, when he made the comment at issue. Again, there was no showing that he talked with any other statutory employees about these subjects. It mostly appears that his comments were a reactive comeback because he felt ambushed when questioned about his break and nothing more. *Third*, there is no evidence that his comments were a logical outgrowth of earlier concerted activity. *Needell & McGlone, P.C.*, supra. Group interaction (i.e., there was none) is key here.

[12] For the purposes of the GC's prima facie case, it will be assumed that the timing between Whisenhunt's protected activity and his removal from the jobsite demonstrate animus.

[13] There was, as discussed, no showing that Upstage even had a single statutory employee at the jobsite.

[14] As noted, a finding of whether Upstage's reaction was valid, is the condition precedent to determining whether Local 127's connected response was lawful. It is necessary to first ask whether Upstage reacted to Whisenhunt for unlawful reasons before gauging whether the Union validly applied the 2nd LCA.

[15] Whisenhunt's claim that he reacted neutrally to Upstage's Production Manager has been discredited. Given his history of altercations, his claim of a calm response is less that credible. He admitted that he failed to "realize … the social cue," which makes it more plausible that he reacted aggressively. Finally, it appears likely that he was caught off guard and defensive about his break, and reacted in kind.

2. DFR

a. Precedent

A DFR breach occurs "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Mere negligence, ineptitude or poor judgment is insufficient to establish a DFR breach. See, e.g., *Teamsters Local 692 (Great Western Unifreight System)*, 209 NLRB 446 (1974). A union owes a DFR to all applicants using its exclusive hiring hall. *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 87–88 (1989).[16] It may not, as a result, run is exclusive hiring hall in an arbitrary, discriminatory, or unfair manner. *Miranda Fuel Co*., 140 NLRB 181, 184 (1962). It acts arbitrarily "if, in light of the factual and legal landscape at the time, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). Arbitrariness can be shown by disparate treatment of one worker compared to similarly situated others. See, e.g., *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1170 (2006) (disparate treatment undermined union's argument that it refused to refer worker due to poor performance, because it referred others with worse performance), enforced, 315 F. App'x 318 (2d Cir. 2009).

When a union operating an exclusive hiring hall prevents an employee from being hired or causes their discharge, the Board presumes a DFR breach because such action unlawfully encourages union membership, i.e., it unequivocally displays the union's power over employees' livelihoods to all hiring hall users, which encourages union membership. *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1, 2 (2000), revd on other grounds sub nom. *Lucas v. NLRB*, 333 F.3d 927 (9th Cir. 2003); *Stage Employees IATSE Local 412 (Various Employers)*, 312 NLRB 123, 127 (1993); *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681, 681 (1973), enforcement denied on other grounds and remanded per curiam, 496 F.2d 1308 (6th Cir. 1974), reaffd., 220 NLRB 147 (1975), enforcement denied, 555 F.2d 552 (6th Cir. 1977).This presumption of a DFR breach can, however, be rebutted in multiple ways. *First*, it can be rebutted, when the union's response was necessary to the effective performance of its representative function. See, e.g., *IATSE Local 838 (Freeman Decorating)*, 364 NLRB 1062, 1063–1065 (2016) (union can rebut presumption if its actions were "reasonably designed to preserve the integrity of contractually prescribed referral practices, even though those actions bring changes in job status to individual employees …." quoting *Painters Local 487 (American Coatings, Inc.)*, 226 NLRB 299, 301 (1976)). *Second*, a union can rebut this presumption, when the employee's conduct interfered with the mechanics of the referral process. See, e.g., *Carpenters Local 522 (Caudle-Hyatt)*, 269 NLRB 574, 576 (1984) (union lawfully caused discharge of employees who had circumvented hiring hall and obtained work directly from employer); *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432, 433 (1983) (union lawfully denied employee referral after employee had circumvented hiring hall by applying for work directly from employer). *Third*, a union can rebut this presumption, when the employee's conduct harmed its reputation and relationship with employers to which it supplied labor. See, e.g., *Stage Employees IATSE Local 150 (Mann Theatres)*, 268 NLRB 1292, 1295–1296 (1984) (union lawfully refused to refer employee with history of misconduct and incompetence

[16] DFR does not apply to non-exclusive hiring halls. *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174, 174 (2000) (citing *Teamsters Local 460 (Superior Asphalt)*, 300 NLRB 441, 442 (1991)).

on various jobs to which he had been referred); *Longshoremen ILA Local 341 (West Gulf Maritime Assn.)*, 254 NLRB 334, 337 (1981) (union lawfully refused to refer employee who had engaged in wildcat strike in violation of contractual no-strike clause). *Finally*, the union may rebut this presumption, when the employee's continued misconduct might be expected to endanger employees on future jobs or expose the union to liability. *Philadelphia Typographical Union No. 2 (Triangle Publications)*, 189 NLRB 829, 830 (1971) (union lawfully caused employee's layoff because employee, while serving as union treasurer, embezzled substantial union funds, threatening the union's financial survival; in these circumstances, union's actions would not be "construed as having a foreseeable consequence of encouraging union membership.").

b. Analysis

Local 127 did not breach its DFR, when it removed Whisenhunt from its referral list. As a preliminary matter, the GC's case-in-chief created a presumption of a DFR breach. The GC adduced that Local 127's removal of Whisenhunt from its hiring hall list unlawfully encouraged Union membership (i.e., Local 127 displayed to its hiring hall users that it retained comprehensive power over their livelihoods). *Stage Employees IATSE Local 720 (AVW Audio Visual)*, supra. In this case, however, Local 127 successfully rebutted this presumption by both showing: (1) that Whisenhunt's ongoing behavioral issues unacceptably harmed its reputation and relationship with employers to which it supplied labor; and (2) that his continued referrals and anticipated misconduct could endanger employees and expose the union to potential liability.

Regarding the Union's reputation and business relationship defense, Local 127 adduced that Whisenhunt committed almost 30 workplace transgressions, which resulted in 2 last chance agreements, and numerous employer and coworker complaints. His transgressions included dangerously throwing a baseball-sized tape-ball at a coworker, telling colleagues that he wished that they contracted AIDs and died, and other derogatory remarks. His actions routinely caused friction at jobsites. The Union logically saw his latest kerfuffle at the Karol G concert as the last straw and rationally concluded that continuing to refer him would further harm its reputation and irreparably undermine its relationship with signatory employers. See, e.g., *Stage Employees IATSE Local 150 (Mann Theatres)*, supra (union lawfully refused to refer employee with history of misconduct and incompetence on various jobs to which he had been referred); *IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1 (2000) (employee with a 15-year history of misconduct toward fellow employees, employers and their clients).[17] Notably, Local 127 has already lost 2 employers as a result of Whisenhunt's misconduct (i.e., Gemini Lighting and Upstage). His removal fit within the scope of the 2nd LCA, given that it involved another behavioral issue. In viewing the Union's reaction through the eyes of a reasonable hiring hall employee, it is simply unreasonable that anyone would view its handling of Whisenhunt as something more than the removal of a problem employee with an ongoing history of altercations, who compromised their

[17] Contrary to the GC, I do not find that the Union's handling of Whisenhunt's situation unlawfully encouraged Union membership. The Union afforded Whisenhunt, a non-member, an unbelievably generous number of chances to improve his behavior and maintain hiring hall eligibility. Local 127 likely gave him at least 20 more chances than most labor organizations would afford someone, and could have parted ways with him years earlier. If anything, the Union undermined its own interests and was irresponsibly kind to Whisenhunt by affording him the great leeway that it did. Its handling does not, as the GC suggests, show that they unlawfully encouraged Union membership.

livelihoods by repelling employers.[18] It is implausible that a rational employee would view the Union's actions as a powerplay designed to unlawfully encourage Union membership; on the contrary, this matter can only be viewed as a rational, democratic and legitimate exercise of Local 127's hiring hall authority.[19] On these bases, Local 127 persuasively adduced that it removed him because his ongoing behavioral issues unacceptably harmed its reputation and relationship with employers.

Regarding its liability defense, Local 127 persuasively demonstrated that Whisenhunt was a highly unpredictable and volatile employee, with a proven history of behavioral misconduct, who embraced altercations to the extent that he even bragged about an assault. This scenario begs the question of whether the Union might potentially be liable if Whisenhunt escalated his hostility against a coworker or signatory employer at some point and irreparable damage ensued. Simply put, the Union has been placed on repeated knowledge of his behavioral problems and the ongoing risk of referring him. The Union's decision to remove him from its referral list after breaching the 2nd LCA was, as a result, a sound exercise of its discretion to avoid potential liability.

The Union, on these bases, rationally removed him from its referral list. It persuasively rebutted the presumption that the effect of his removal unlawfully encouraged Union membership.[20] It adduced that he was rationally removed for non-arbitrary, good faith and non-discriminatory reasons because of his ongoing behavioral issues, which held the great potential to harm its reputation, irreparably undermine employer relationships, and trigger liability.

CONCLUSIONS OF LAW

Respondent, Local 127, has not violated the Act in any way. On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended.[21]

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[18] It is also noteworthy that the GC presented no evidence of disparate treatment of Whisenhunt. See *Stagehands Referral Service*, 347 NLRB 1167 (2006). On the contrary, by offering Whisenhunt 2 last chance agreements and enduring almost 30 jobsite altercations, the Union likely treated Whisenhunt more benevolently that his hiring hall colleagues. There was unrebutted testimony that Whisenhunt was in a class by himself and no other hiring hall worker even approached his volume of behavioral issues. In sum, this is not a case of disparate treatment.

[19] It also follows that if Upstage fired him lawfully, a rational hiring hall member would reasonably conclude that Local 127's reliance on Upstage's bases for its actions was similarly lawful.

[20] The Board has held that, once a union acts "for legitimate, nondiscriminatory reasons, [it] will not scrutinize the harshness of the penalty," because the issue is not whether the penalty was overly harsh, but, whether it was unlawfully arbitrary. *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432, 433 (1983).

[21] If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Complaint is dismissed.

Dated Washington, D.C., April 28, 2026

Robert A. Ringler
Administrative Law Judge