



NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

(202) 692-5000

In the Matter of the
Application of the

**METRO-NORTH RAILROAD
PROFESSIONAL FIREGHTERS
ASSOCIATION**

alleging representation disputes
pursuant to Section 2, Ninth, of
the Railway Labor Act, as
amended

involving employees of
METRO-NORTH RAILROAD

49 NMB No. 21

CASE NO. R-7585
(File No. CR-7226)

FINDINGS UPON
INVESTIGATION-
AUTHORIZATION OF
ELECTION

April 20, 2022

FINDINGS UPON INVESTIGATION

This determination addresses the application of the Metro-North Railroad Professional Firefighters Association (MNRPFA or Organization) alleging a representation dispute pursuant to the Railway Labor Act (RLA)¹, 45 U.S.C. § 152, Ninth (Section 2, Ninth), among “Fire Brigade Employees Below the Rank of Fire Chief” (Fire Brigade) at Metro-North Railroad (Metro-North or Carrier). For the reasons set forth below, the National Mediation Board (Board or NMB) concludes that “Fire Brigade Employees below the Rank of Fire Chief” constitutes an appropriate craft or class.

¹ 45 U.S.C. § 151, *et seq.*

PROCEDURAL BACKGROUND

On March 30, 2021, MNRPFA filed an application alleging a representation dispute involving the “Fire Brigade Employees Below the Rank of Fire Chief” at Metro-North. At the time of the application, these employees were not represented by any organization or individual. The application was given NMB File No. CR-7226 and Eileen M. Hennessey was assigned as the Investigator. The Carrier provided an Initial Position Statement on May 5, 2021.² MNRPFA responded to the Carrier’s Initial Position Statement on June 11, 2021.

ISSUE

Is “Fire Brigade Employees Below the Rank of Fire Chief” an appropriate craft or class at Metro-North?

CONTENTIONS

The Carrier argues that the MNRPFA’s application should be dismissed because the Organization has not applied for an appropriate craft or class. The Carrier states that the employees in question serve an important role in the safety of Grand Central Terminal (GCT) operations and Metro-North service and these employees have been classified as management personnel since the time that the GCT Fire Brigade was established as a full-time operation for the railroad in 2011. The Carrier argues that all of the employees covered by the application perform managerial duties and are management officials, or serve as the alter ego of management officials. In addition, the Fire Brigade employees oversee and direct emergency response and life-saving measures at GCT. They have the authority to stop Metro-North operations in GCT, direct action to be taken by other Metro-North employees as well as outside agencies (e.g., Metropolitan Transit Authority Police Department) and oversee and control emergency response in GCT. Metro-North believes that the GCT Fire Brigade must remain unrepresented based on their responsibility to perform critical life/safety emergency management functions at GCT, a historic landmark in New York City. If the NMB does not dismiss the application in its

² On July 26, 2021 the Carrier notified the Board that the Organization was holding itself out as the representative of professional firefighters at Metro-North. The Carrier argues that this representation “rise[s] to the level of election interference or the appearance of influence from the potential union.” The Organization responded to this on July 30, 2021 by stating that there is nothing inaccurate or misleading about its statements regarding representing employees; that the statements do not constitute election interference; and that the NMB should continue to process its application for representation. Section 17.0 of the NMB’s Representation Manual (Manual) states “[e]xcept in extraordinary circumstances, the NMB will only investigate allegations of election interference when filed by participants after the tally.” The circumstances necessary for a pre-tally interference investigation are not present at this time. The Carrier may raise any claims of election interference post-tally should it so choose.

entirety, the Carrier asserts that the Board should find the Assistant Fire Chief and the Fire EMS Supervisor are management officials and should be excluded.

MNRPFA argues that the Carrier fails to provide any proof that Fire Brigade personnel actually perform any of the managerial duties considered by the Board when making determinations of managerial status. In addition, the actual authority possessed and exercised by Assistant Chiefs and EMS Supervisors demonstrates that they are not management officials. Furthermore, the Carrier's claim that Fire Brigade employees are ineligible because they are the alter ego of management must fail because the NMB has never excluded an entire group of employees through the alter ego doctrine.³

FINDINGS OF LAW

Determination of the issues in this case is governed by the RLA, as amended, 45 U.S.C. § 151, *et seq.* Accordingly, the Board finds as follows:

I.

Metro-North is a common carrier as defined in 45 U.S.C. § 151, First.

II.

MNRPFA is a labor organization and/or representative as provided by 45 U.S.C. § 151, Sixth, and § 152, Ninth.

III.

45 U.S.C. §152, Fourth, gives employees subject to its provisions "the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter."

IV.

³ MNRPFA also contends that although an election is warranted, a certification by card check is appropriate due to the percentage of authorization cards submitted. Manual Section 7.0 states, in part: "If the employees involved in the craft or class are unrepresented and only the applicant organization is involved, certification on the basis of a check of authorizations may be appropriate provided the participants agree in writing." The participants in this case do not agree to a certification by card check. Therefore, the Organization's request is denied.

45 U.S.C. §151, Fifth, defines employee as “[E]very person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board now in effect”

IV.

45 U.S.C. § 152, Ninth, provides that the Board has the duty to investigate representation disputes and shall designate who may participate as eligible voters in the event an election is required.

STATEMENT OF FACTS

In support of its Initial Position Statement, the Carrier provided position descriptions for each position at issue and an organization chart for the Metro-North Fire Safety Department; all of the positions at issue are in the Fire Safety Department. In support of its Response to the Carrier’s Initial Position Statement, the Organization provided a sworn statement from a Metro-North EMS Supervisor.

The Organization’s application for representation includes all Metro-North GCT Fire Brigade employees below the title of Fire Chief. The titles covered by this application are as follows:

- Assistant Fire Chief (2 Employees)
- Fire EMS Supervisor (4 Employees)
- Fire EMS Specialist (2 Employees)
- Fire EMS Officer (5 Employees)
- Control Center Coordinator (2 Employees)

Assistant Fire Chief

This position is a salaried position. The average salary for the Assistant Fire Chief position is \$97,897. This position reports to the Fire Chief-GCT. Duties include:

- Supervise staff for daily operations and during emergency operations.
- Responsible for creation/maintenance/compliance of all applicable policies, guidelines, procedures, codes, standards and protocols.
- Responsible for staff development, oversight and discipline as needed.

- Ensure adequate 24/7 staffing and resources for operations; includes personnel scheduling, inventory, supplies ordering, etc.
- Perform firefighting, rescue, hazardous materials response, and other tasks as outlined by New York State Office of Fire Prevention and Control/Division of Homeland Security and Emergency Services (NYS OFPC/DOH), National Fire Protection Association (NFPA), Occupational Safety and Health Administration (OSHA), New York City Fire Department (FDNY), Metro-North and all other applicable standards and guidelines.
- Represent Division/Department at executive level meetings regarding major capital and or long-range projects as they pertain to Fire Life/Safety, Emergency Management, and Safety programs and goals.
- Administer Metro-North fire prevention and safety programs by assigning and overseeing inspections, drills, assessments, and employee/tenant/public education and training.
- Conduct construction and event plan and specification review, and other code enforcement duties as needed.

Fire EMS Supervisor

This position is a salaried position. The average salary for the Fire EMS Supervisor position is \$82,137. Incumbents in this position report to the Assistant Fire Chief. Duties include:

- Supervise staff for daily operations and during emergency operations.
- Responsible for staff development, oversight and discipline as needed. Ensure adequate 24/7 staffing and resources for operations; includes personnel scheduling, inventory, supplies ordering, etc.
- Responsible for the efficient scheduling, prioritization and completion of own and staffs' tasks and responsibilities.
- Responsible for associated documentation and administrative tasks.
- Perform firefighting, rescue, hazardous materials response, and other tasks as outlined by NYS OFPC/DOH, NFPA, OSHA, FDNY, Metro-North and all other applicable standards and guidelines.
- Provide pre-hospital emergency medical care according to state and local medical protocols.
- Inspect and maintain equipment and facilities in support of these tasks. Create/maintain accurate and detailed reports regarding all activities.
- Interface and coordinate with other Metro-North forces and outside agencies during incidents in order to facilitate safe and efficient

resolution of emergencies involving Metro-North facilities, personnel, and customers.

- Support Metro-North fire prevention and safety programs by assisting with and conducting inspections, drills, assessments, and employee/tenant/public education and training.
- Assist with construction and event plans and specification review, and other code enforcement duties as directed. Complete associated documentation and administrative tasks.

Fire EMS Specialist

This position reports to the Fire EMS Supervisor and supervises the Volunteer Fire Brigade Members. Duties include:

- Respond to Fire, EMS and other emergencies as indicated by policy and guidelines and supervision. Perform firefighting, rescue, hazardous materials response, and other tasks as outlined by NYS OFPC/DOH, NFPA, OSHA, FDNY, Metro-North and all other applicable standards and guidelines.
- Provide pre-hospital emergency medical care according to state and local medical protocols. Inspect and maintain equipment and facilities in support of these tasks.
- Create/maintain accurate and detailed reports regarding all activities.
- Interface and coordinate with other Metro-North forces and outside agencies during incidents in order to facilitate safe and efficient resolution of emergencies involving Metro-North facilities, personnel, and customers.
- Support Metro-North fire prevention and safety programs by assisting with and conducting inspections, drills, assessments, and employee/tenant/public education and training.
- Assist with construction and event plans and specification review, and other code enforcement duties as directed. Complete associated documentation and administrative tasks.

Fire EMS Officer

This position reports to the Fire EMS Supervisor and supervises the Volunteer Fire Brigade Members. Duties include:

- Respond to Fire, EMS and other emergencies as indicated by policy and guidelines and supervision. Perform firefighting, rescue, hazardous

materials response, and other tasks as outlined by NYS OFPC/DOH, NFPA, OSHA, FDNY, Metro-North and all other applicable standards and guidelines.

- Provide pre-hospital emergency medical care according to state and local medical protocols. Inspect and maintain equipment and facilities in support of these tasks.
- Create/maintain accurate and detailed reports regarding all activities.
- Interface and coordinate with other Metro-North forces and outside agencies during incidents in order to facilitate safe and efficient resolution of emergencies involving Metro-North facilities, personnel, and customers.
- Support Metro-North fire prevention and safety programs by assisting with and conducting inspections, drills, assessments, and employee/tenant/public education and training.
- Assist with construction and event plans and specification review, and other code enforcement duties as directed. Complete associated documentation and administrative tasks.
- Assist in management and administration of various projects and programs in support of emergency management, fire life safety and other Office of System Safety goals as required.

Control Center Coordinator

This position reports directly to the Fire Chief and has no direct subordinates. Duties Include:

- Receive, process, and manage emergency requests, dispatch emergency responders and support their operations, notify internal /external groups as appropriate, and create and maintain proper documentation in regards.
- Monitor and control fire and life-safety systems in the terminal, this includes but is not limited to fire alarm systems, ventilation systems, elevators and escalators, public address and information systems, security and CCTV systems, building management and other related systems.
- Support emergency management projects and initiatives both in the Terminal and System-wide as needed.

- Respond to emergency incidents both in the Terminal and System-wide as needed. Administrative tasks as needed and or directed.

Fire EMS Specialists and Fire EMS Officers provides direct, frontline supervision of the volunteer members of the GCT Fire Brigade, who are called upon as needed to assist with emergency management response e.g. firefighting, EMS, etc.) The volunteer members of the GCT Fire Brigade are Metro-North employees who work in other Metro-North operating departments. When the volunteers are called to assist, the GCT Fire Brigade oversees and supervises the volunteers' time and work. Fire Brigade employees do not have authority over the employment terms of volunteer members of the Fire Brigade with respect to volunteers' primary positions with Metro-North, nor do Fire Brigade employees have any authority to discipline, transfer, assign, or grant overtime for volunteers when they are engaged in volunteer work for the Fire Brigade. Fire Brigade employees provide instruction and direction to volunteers in the course of responding to emergencies. The Fire Chief and the supervisor of the Metro-North Department in which the volunteer primarily works have the authority to assign, transfer, discipline, or grant overtime to volunteers.

The Fire Brigade is within the Emergency Management Division which is one of six divisions that fall under Metro-North's Office of System Safety. The Fire Chief manages the overall activities of the Fire Brigade, and directly reports to the Emergency Management Director, who is the highest ranking official in Emergency Management Division. The Emergency Management Director answers directly to the Vice President of the Office of System Safety.

The Fire Chief and Emergency Management Director make all hiring decisions for Fire Brigade personnel. Assistant Chiefs and EMS Supervisors are involved in the hiring process, and may provide input to the Fire Chief or Emergency Management Director as to questions or concerns that the Chief and Director may have with respect to certain applicants.

The Carrier's Fire Life Safety Policy was developed by the officials of the Division of Emergency Management and Fire Life Safety. Final approval for Standard Operating Guidelines applicable to the Fire Brigade are established at the Fire Chief level or higher.

The Fire Chief is ultimately responsible for granting or denying any requested transfers, assignments, or overtime for Fire Brigade personnel. Occasionally, Assistant Chiefs and EMS Supervisors will document performance issues in accordance with Metro-North policies. There is no evidence that these documented performance issues have any effect on

employees' employment. According to the declaration provided by a Metro-North EMS Supervisor, these write-ups are not discipline, and are performance based, rather than being disciplinary in nature. Neither Assistant Chiefs nor EMS Supervisors are authorized to take any disciplinary action against other employees. All disciplinary matters and decisions with respect to Fire Brigade employees are made by the Fire Chief, the Emergency Management Director, and the Carrier's Human Resources Department.

For emergency response work, operational command is conducted in accordance with the provisions of the National Incident Management Systems (NIMS), which is issued by the Federal Emergency Management Agency. In accordance with the chain of command set forth in NIMS, when an emergency situation arises, the Fire Chief assumes the role of incident commander, and gives overall direction and orders to all responding employees. Assistant Chiefs go to the scene and assess what resources and equipment are needed to adequately respond to the emergency, and give directions and instructions to the EMS Supervisors as to what steps are to be taken to properly respond to the emergency. The EMS Supervisors give specific assignments and tasks to any responding lower-ranking Fire Brigade employee.

All Fire Brigade employees below the rank of Fire Chief are assigned to twelve-hour shifts designed to provide twenty-four-seven coverage at GCT. The staffing structure of Fire Brigade employees consists of four groups or tours that work three twelve-hour shifts per week, with a fourth twelve-hour shift every third week. There are two different day tour shifts, with regular working hours of 10:00 a.m. to 10:00 p.m. There are also two different night tours, with regular working hours of 10:00 p.m. to 10:00 a.m. The only Fire Brigade title that does not work these shifts is the Fire Chief, whose hours of work are Monday through Friday, 9:00 a.m. to 5:00 p.m. All Fire Brigade employees are required to report to work in full Fire Brigade uniform.

Fire Brigade employees can temporarily stop construction work at GCT due to safety hazards and concerns, but the Fire Chief and the supervisor of the Department responsible for the construction work have the authority and final say as to whether the work can continue or if changes must be made before work can be resumed.

Fire Brigade employees are not authorized to halt train operations. In order to halt train operations due to the observance of dangerous conditions, a Fire Brigade employee is required to submit a request to the Metro-North Operational Control Center, the Metro-North Department responsible for approving any shut down requests.

DISCUSSION

Craft or Class Determination

In determining the proper craft or class for employees, the Board is guided by the Representation Manual (Manual) Section 9.1 which states:

In craft or class determinations, the NMB considers many factors, including the composition and relative permanency of employee groupings along craft or class lines; the functions, duties, and responsibilities of the employees; the general nature of their work; and the extent of community of interest existing between job classifications. Previous decisions of the NMB are also taken into account

See, e.g., Southwest Airlines, 42 NMB 110 (2015), *Louisville & Indiana R.R.*, 41 NMB 82 (2014); *Indiana Southern R.R.*, 37 NMB 226 (2010); *Florida Northern R.R.*, 34 NMB 142 (2007). The Board makes craft or class determinations case by case, based upon Board policy and precedent. *USAir*, 15 NMB 369 (1988); *Simmons Airlines*, 15 NMB 124 (1988). While the Board has modified traditional craft or classes, as needed, to take into consideration facts unique to a given carrier's operation, the vast majority of the Board's craft or class determinations fall along traditional craft or class lines.

One of the arguments the Carrier makes in opposing this application is that all positions at issue in this application oversee and direct emergency response and life-saving measures and therefore, must remain unrepresented "based on their responsibility to perform critical life/safety emergency management functions on a 24/7 basis." However, there is no provision of the RLA which excludes safety or emergency management positions from the Act's coverage. In fact, safety responsibilities are an integral part of position descriptions of many of the positions that fall under the Act's coverage. In addition, an analogous position with significant safety and emergency response duties is police officer and "Police Officer Below the Rank of Captain" is a recognized craft or class under the Act. *See e.g. Consolidated Rail Corp.*, 16 NMB 377 (1989); *National R.R. Passenger Corp.*, 8 NMB 401 (1981); *Long Island R.R.*, 7 NMB 130 (1979). Therefore, the Board finds that "Fire Brigade Employees Below the Rank of Fire Chief" is an appropriate craft or class on this Carrier.

Additionally, based upon the evidence submitted, the Board finds that the Fire Brigade Employees below the rank of Chief share a work related community of interest. They share similar, and in some cases, identical functions, duties and responsibilities. They work in the same physical location within the system -- GCT. They work in the same division which is managed by the Fire Chief. They wear similar uniforms. They all work a similar shift schedule. Therefore, the Board finds that the following positions belong within the craft or class of "Fire Brigade Employees Below the Rank of Fire Chief": Assistant Fire Chief; Fire EMS Supervisor; Fire EMS Specialist; Fire EMS Officer; and Control Center Coordinator.

Management Officials

The second argument that the Carrier advances in opposition to the Organization's application is that the employees in question have significant managerial duties and are therefore, management officials and fall outside of the RLA's coverage. Even if the Board finds that these positions are not management officials, the Carrier argues that the positions should be excluded from RLA coverage because they function as the "alter ego of management."

The "alter ego" doctrine generally applies to clerical or administrative personnel who work closely with management officials. These are positions with duties "so substantially intertwined with the significant managerial responsibilities of those officials that they are effectively the managers "alter ego for purposes of representation under the Railway Labor Act." See *China Airlines, Ltd.*, 6 NMB 434, 440 (1978) (Board found secretaries of the General Manager and Deputy General Manager to be alter ego of management officials and ineligible to participate in the election). As the Board stated in *Metro-North R.R.*, 39 NMB 423, 439 (2012), "the Board has never excluded an entire group of employees through application of the alter ego doctrine." In this case, the Carrier did not provide any evidence that Fire Brigade personnel have duties are "so substantially intertwined with the significant managerial responsibilities" of their managers to find them to be management officials. In the absence of any evidentiary support its alter ego argument is not persuasive.

Management Officials are ineligible to vote. Manual Section 9.211 states that the term includes individuals who have:

- (1) the authority to dismiss and/or discipline employees or to effectively recommend the same;
- (2) the authority to supervise;

- (3) the ability to authorize and grant overtime;
- (4) the authority to transfer and/or establish assignments;
- (5) the authority to create carrier policy; and,
- (6) the authority to commit carrier funds.

The Investigator also considers:

- (1) whether the authority exercised is circumscribed by operating and policy manuals;
- (2) the placement of the individual in the organizational hierarchy of the carrier; and,
- (3) any other relevant factors regarding the individual's duties and responsibilities.

When evaluating managerial authority, the Board evaluates the above factors cumulatively. See *United Air Lines, Inc.*, 32 NMB 75, 110 (2004); *USAir*, 24 NMB 38, 40 (1996) (citing *Pan American World Airways*, 5 NMB 112, 115 (1973)).

The Carrier argues that in the event the NMB does not dismiss the Organization's application in its entirety, it should find that the Assistant Fire Chiefs and the Fire EMS Supervisors are management officials and should be excluded from the craft or class. Metro-North relies on the job descriptions to support this proposition, citing provisions within each that it says prove that these positions have managerial authority with regard to hiring, discipline, discharge, supervision, task assignments, creation of budget and policy and authorization of overtime.

In evaluating position descriptions to determine the level of managerial authority of the position, the Board is cognizant that often the level or authority outlined in the position description exceeds the level of authority actually exercised by the incumbent. In evaluating the level of authority in the written position descriptions in this case, the Board finds that these positions do not reach a sufficient level of authority to render them management officials. As the Board stated previously in a similar case also involving Metro-North, "[i]n many cases, the Board finds that while there are certain factors indicating some level of authority, when all the factors are viewed cumulatively the individuals at issue generally are first-line supervisors, not management officials." *Metro-North*, 39 NMB 460, 467 (2012) (quoting *USAir, above*, at 41).

In addition, Metro-North provided only the position descriptions and the organization chart and did not provide evidence that these positions actually exercised managerial authority. In contrast, the Organization provided a declaration from a current Fire EMS Supervisor who has worked within the Fire Brigade for approximately five years. The Board gives great weight to this statement and finds that it further substantiates the Organization's claim that the authority exercised by Assistant Fire Chiefs and Fire EMS Supervisors is not at the level of a management official and therefore these positions are eligible members of the craft or class of "Fire Brigade Employees Below the Rank of Fire Chief."

CONCLUSION

The Board finds that the MNRPFA's application for "Fire Brigade Employees Below the Rank of Fire Chief" is a proper craft or class. The Board authorizes an election for the "Fire Brigade Employees Below the Rank of Fire Chief." Accordingly, NMB File No. CR-7226 is converted to NMB Case No. R-7585.

Based on the authorization cards submitted by the Organization, the Board further finds that a dispute exists regarding the representation in the Fire Brigade Employees Below the Rank of Fire Chief craft or class, and the Board authorizes an election among the craft or class of Fire Brigade Employees Below the Rank of Fire Chief, employees of Metro-North Railroad, using a cut-off date of March 23, 2021. Pursuant to Manual Section 12.1, the Carrier is hereby required to furnish within five calendar days, 1 X 2 5/8", peel-off labels bearing the alphabetized names and current addresses of those employees on the List of Potential Eligible Voters. The Carrier must print the same sequence number from the List of Potential Eligible Voters beside each voter's name on the address label. The Carrier must also provide to the Board the name and sequence number of those potential eligible voters on military leave who are serving in foreign countries or who reside outside of the United States.

The Carrier must use the most expeditious method possible, such as overnight mail, to ensure that the Board receives the labels within five calendar days.

By direction of the NATIONAL MEDIATION BOARD

Maria-Kate Dowling
Acting General Counsel

Chairman Fauth, dissenting in part.

I write separately because I disagree with my colleagues' decision to include Assistant Fire Chiefs and Fire EMS Supervisors within the craft or class of Fire Brigade Employees Below the Rank of Chief. In my view, these two positions meet the criteria for management officials set forth in Manual Section 9.211 and therefore should be excluded from the craft or class.