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Via Electronic Filing

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Re: Metro-North Railroad Professional Firefighters Association,
Local 5325, IAFF, AFL-CIO
NMB Case No. R-7585 (formerly CR-7226)
Our File No. 27410.0002

Dear Ms. Hennessey:

We represent Metro-North Railroad Professional Firefighters Association, Local 5325, IAFF, AFL-CIO ("Local 5325" or the "Union") in the above-referenced matter. This letter constitutes Local 5325's Reply to the letter of Metro-North Railroad ("Metro-North" or the "Carrier"), dated May 5, 2022 (the "Appeal"), challenging the determination of the National Mediation Board ("NMB" or the "Board") that employees in the Assistant Fire Chief job title are not management officials and are therefore eligible members of the Fire Brigade craft/class, as set forth in the Board's Findings Upon Investigation (the "Findings").

I. Metro-North's Purported "New" Evidence, Submitted for the First Time After the Investigation has been Closed and After the Board Issued the Findings, Should be Rejected

As an initial matter, the Carrier fails to identify the basis for its challenge to the Board's finding that the Assistant Fire Chief title is not managerial, and it is unclear as to whether it is intended to serve as an appeal pursuant to Section 10.0 of the Representation Manual. To the extent that the Carrier's challenge is deemed to be an appeal arising under Section 10.0, the Carrier submission of purportedly "new" evidence must be rejected, as Section 10.2 makes clear that "new evidence submitted on appeal which was not submitted to the Investigator during the investigation will not be considered" absent extraordinary circumstances.

Even if the Carrier's Appeal is considered something other than a formal appeal, the Carrier's belated attempt to present new evidence now for the first time, over a year after the Board's investigation in this case began and after the Board already issued its decision, should be rejected. The Carrier offers no explanation as to why it failed to submit an Affidavit from former Fire Brigade Chief Jonathan F. Lee (the "Lee Aff.") during the now-closed representation investigation. Nor does the Carrier explain why this purported new evidence is only first being submitted now *after* the Board issued its decision with respect to the Carrier's claim that the Assistant Fire Chief ("AFC") title is managerial.

There is simply no conceivable justification for the Carrier's delay. The representation investigation in this case was first opened by NMB on March 31, 2021, notice of which was given to both parties at that time. On May 5, 2021, the Carrier filed its initial position statement arguing that the AFC title is managerial, and submitted documentary evidence in support of its claims. The Union filed its reply to the Carrier's position statement on June 11, 2021, which included the Affidavit of Local 5325 President James T. Tipa, Jr. (the "Tipa Aff.") – the same document that the Carrier now attempts to discredit almost a full year after it was filed. The investigation remained open thereafter until the Board issued the Findings specifically addressing and rejecting the Carrier's claim that the AFC title is managerial. These facts make clear that the Carrier had over a year to present its purported new evidence – but simply failed to do so without explanation.

By waiting until after the investigation has been closed and after NMB issued the Findings, the Carrier's delay in presenting its purported new evidence prejudices both the Union and the Board. Had the Carrier presented this purported new evidence in a timely fashion during the investigation, the Board and the Union both would have had an adequate opportunity to investigate the claims in the Lee Aff. and, from the Union's perspective, adequate time to formulate a thorough and complete response. As such, the Lee Aff. annexed to the Carrier's Appeal, as well as any reference thereto in the Appeal, should be rejected.

II. The Carrier's Appeal and Purported New Evidence Have No Bearing on the Board's Determination that AFCs are not Management Officials

The Carrier's Appeal is based on an erroneous characterization of the basis for the Board's determination that the AFC title is not managerial. The sole ground for the Carrier's Appeal is its baseless argument "that the content of the Tipa Aff[.] is factually inaccurate in many respects." Carrier Appeal at 1. However, the Board reached its conclusion that AFCs are not management officials on the basis of the position description alone:

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 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, 49 NMB 21, 105 (2022) (citing *Metro-North*, 39 NMB 460, 467 (2012)) (emphasis added).¹

The Carrier completely ignores the fact that the Board's analysis and ultimate finding that AFCs are not management officials is based on the job duties set forth in the AFC position description. Instead, Metro-North confusingly claims that a small number of factual assertions in the Tipa Aff. are inaccurate, and argues that those alleged inconsistencies somehow warrant a finding that AFCs are management officials. Neither the Carrier's Appeal nor the Lee Aff.

¹ After reaching this conclusion solely on the position description, the Board merely considered the Tipa Aff. as further support for its finding that the AFC title is not managerial. *Metro-North Railroad*, 49 NMB 21, 106.

identify any new/additional job duties of the AFC title which are not reflected in the position description that the Board based its decision on. As such, the Carrier has failed to present any new material evidence that would impact the Board's ultimate finding with respect to the AFC title.

III. Even if the Carrier's Purported New Evidence is Considered, the Lee Aff. Fails to Demonstrate that the AFC Title is Managerial

Even if consideration of the Carrier's purported new evidence is appropriate – which it is not – the Lee Aff. fails to show that employees in the AFC title possess supervisory authority sufficient to be deemed management officials. The Carrier's Appeal simply cherry-picks certain factual assertions in the Tipa Aff. and attempts to discredit them with information set forth in the Lee Aff. However, the majority of the factual assertions contained in the Lee Aff. and cited in the Carrier's Appeal are consistent with the facts set forth in the Tipa Aff. – the Carrier simply mischaracterizes/distorts those facts in an obvious attempt create the false impression of managerial authority. While the Carrier attempts to conflate the statements in the Lee Aff., upon close inspection, the Lee Aff. does not raise any new material facts that were not before the Board when it issued the Findings. Further, the Lee Aff. merely contains generalized, bare-assertions of managerial authority without any supporting documentation or other evidentiary support, and it therefore cannot support a finding that AFCs are management officials.

A. The Lee Aff. Fails to Establish that Employees in the AFC Title Possess Actual Hiring Authority

Foremost, the Lee Aff., as well as the Carrier's Appeal, concede that AFCs do not have the authority to actually hire employees. *See* Carrier's Appeal at 2 (“the Fire Chief and Emergency Management Director do have the authority to reject candidate selections”); Lee Aff. ¶4 (“The [AFCs] . . . determined which candidates they would *recommend* to be hired and later presented their *recommendations* to the Fire Chief and Director of Emergency Management . . . [and] the Fire Chief and Director retain the authority to reject a recommendation.”). At most – AFCs merely make recommendations to the Fire Chief and Emergency Management Director, who are the management officials with the ultimate authority to actually hire an applicant. Notably, the Lee Aff. and the Appeal do not claim that AFCs actually make any decision to hire an applicant. As such, Metro-North's Appeal and the Lee Aff. fail as a matter of law to establish that AFCs possess sufficient hiring authority to warrant a finding of managerial status. *See Independent Ry. Supervisors Assn.*, 37 NMB 237, 250 (2010) (holding that employees' involvement in hiring process did not support a finding of managerial status where the employees' “authority is only to recommend, as part of a panel, based upon Carrier-determined criteria.”); *Port Authority Trans-Hudson Corp.*, 34 NMB 81, 90 (2007) (same); *Intl. Brotherhood of Electrical Workers*, 37 NMB 3, 15-16 (2009) (same); *see also United Airlines, Inc.* 32 NMB 75, 118 (2004) (holding that evidence of employees' involvement with “interviewing and recommending potential employees” does not support of finding of managerial status where “no example or evidence was provided showing that these employees can actually hire”).

In addition, the Carrier's exaggerated and unsupported claim that AFCs “independently canvass applicant resumes [and] decide which candidates to interview” is inaccurate. Carrier Appeal at 2. As set forth in the Tipa Aff., AFCs have only been involved in reviewing applicants' resumes when they have been instructed to do so by the Fire Chief and/or Emergency

Management Director – which is not always the case. *See* Tipa Aff. ¶17. When that occurs, the AFCs merely make initial determinations as to whether applicants meet the certification and training requirements set by Metro-North policy. *Id.* Nothing in the Lee Aff. demonstrates that this information is inaccurate.²

Moreover, Metro-North admits that any independent discretion that AFCs may actually possess in the application review process (beyond ensuring that applicants meet the Carrier’s policy requirements) is based on their technical “subject matter expertise”³ – not based on the type of discretionary authority traditionally exercised by management officials. Thus, any such discretion that AFCs have in reviewing applications does not support a finding of managerial status. *See Metro-North*, 39 NMB 460, 468 (2012) (“the evidence demonstrates that these employees’ exercise of judgment is based on their technical expertise, and is limited by Metro-North’s procedures and policies.”) (citing *US Airways, Inc.*, 28 NMB 91, 100 (2000); *see also US Airways*, 26 NMB 359, 372 (1999) (supervisors’ exercise of judgment was based upon technical expertise and not “the same type of judgment which the Board finds is typically exercised by management officials.”).

Accordingly, the Carrier has failed to demonstrate that AFCs possess and exercise sufficient hiring authority to support a finding of managerial status.

B. The Carrier has Failed to Show that AFCs Actually Possess and Exercise the Authority to Fire Employees

Like the Carrier’s unfounded claims regarding hiring authority, the Appeal and the Lee Aff. are devoid of any claims that AFCs have the ultimate authority to fire employees. At most, the Carrier claims only that AFCs can “recommend termination to the Fire Chief.” Carrier Appeal at 2; *see* Lee Aff. ¶7 (conceding that AFCs have never done more than recommend termination, and that the ultimate decision to terminate an employee is always made by the Fire Chief, Emergency Management Director, and the Carrier’s Human Resources Department). Board precedent is well-established that the authority to recommend employee discipline is not sufficient for purposes of establishing managerial status. *See United Air Lines*, 40 NMB at 218 (“Although they can recommend discipline, they do not have the authority to discipline or fire employees themselves, key indicia of managerial authority.”); *American Train Dispatchers Assn.*, 37 NMB 270, 277 (2010) (“involvement in discipline hearings is not sufficient to establish managerial authority if the final decision is made by management officials.”). Therefore, the Carrier has failed to prove that AFCs possess and exercise sufficient disciplinary authority to render them management officials.

Beyond the Carrier’s failure to show that AFCs possess and exercise the authority to terminate employees, Metro-North falsely claims that AFCs are entitled to otherwise discipline employees. Carrier Appeal at 2; Lee Aff. ¶6. The Lee Aff. alleges that AFCs have the authority to issue “verbal [and] written reinstructions, and formal written warnings or reprimands placed in the employee’s permanent personnel file.” Lee Aff. ¶7. The Carrier provides no evidence or examples of these types of disciplinary actions taken by AFCs in the past. Instead, the Lee Aff.

² The Lee Aff. simply states that AFCs have had involvement in the last three rounds of hiring – but fails to address other instances of hiring rounds where AFCs were not instructed to review applicants’ resumes by the Fire Chief.

³ Lee Aff. ¶3.

misleadingly includes an Exhibit that the Carrier claims to be an example of a “written reprimand” issued by an AFC in 2018. Lee Aff., Ex. A. However, that document is **NOT** a “written reprimand,” nor is it otherwise disciplinary in nature – it simply documented that an employee did not properly secure Metro-North property, and notes that future instances of the same conduct “may require additional retraining, a performance improvement plan or other actions.” *Id.*⁴ There is no mention of discipline or reprimand. Clearly, the Carrier’s Exhibit is nothing more than an example of the type of written documentation prepared by AFCs that was described in the Tipa Aff. and already considered by the Board. *See* Tipa Aff. ¶12 (“Occasionally, Assistant Chiefs . . . will document when employees in lower titles have not fully completed tasks in accordance with Metro-North policies. However, these write-ups are not discipline, nor can they alone form the basis for disciplinary action, and their purpose is to remind employees of their duties/responsibilities under Metro-North’s policies in furtherance of quality assurance/operational control, rather than being disciplinary in nature.”).

Moreover, the Carrier also falsely claims that AFCs have previously “participated as the management/supervisory leads in meetings with MNR Legal, Employee Relations and Human Resources Departments to jointly determine sufficiency of evidence, and whether and how to terminate employees.” Carrier Appeal at 2; Lee Aff. ¶7. The Carrier provides no evidence to support this claim, other than a generalized, self-serving statement in the Lee Aff. that, on two occasions in the past, Fire Brigade employees were terminated “based on recommendations and **documentation** provided by [AFCs].”⁵ *Id.* Yet, the Carrier has failed to produce any such “documentation” referenced in the Lee Aff., and offers no other details (*i.e.*, dates that they occurred, which AFC allegedly recommended termination, etc.) or evidentiary support for such claims. Therefore, the Lee Aff.’s conclusory and self-serving assertion regarding AFCs’ disciplinary authority cannot support a finding that AFCs are management officials. *See Allegiant Air, LLC*, 45 NMB 43, 45 (2018) (holding that “bare assertions and job descriptions” are insufficient to prove managerial status).

C. Metro-North has Failed to Present any Evidence Showing that AFCs are Involved with Employee Evaluations

Metro-North also offers no evidentiary support for its claim that AFCs “lead the performance management and evaluation process” for other Fire Brigade employees. Carrier Appeal at 2. The Carrier attempts to prove this baseless claim through a single self-serving statement in the Lee Aff. that AFCs “set[] annual performance goals . . . prepar[e] mid-year evaluations, goal revisions, and year-end evaluations with written and numerical performance ratings.” Lee Aff. ¶5. Again, the Carrier fails to present any documentary examples of these “written” evaluations allegedly performed by AFCs. Accordingly, the Carrier has failed to demonstrate that AFCs actually exercise any authority with respect to employee evaluations. *See e.g., USAIR, Inc.*, 19 NMB 423, 433 (1992) (holding that a carrier’s statement that a job title possesses the authority to perform employee evaluations, without more, is insufficient to prove the actual exercise of such authority).

⁴ It is notable that the only example that the Carrier can offer showing AFCs’ purported disciplinary authority is a four-year old letter that imposes no disciplinary penalties whatsoever.

⁵ Even if AFCs have actually been involved in two prior disciplinary matters, as alleged by the Carrier, such limited, isolated, and sporadic involvement by AFCs is not sufficient to establish managerial status. *See American Train Dispatchers*, 37 NMB at 278 (“the exercise of authority must be more than sporadic or intermittent.”).

Further, even Metro-North's inaccurate description of AFCs' evaluation authority fails to support a finding of managerial status.⁶ Metro-North does not argue that the evaluations allegedly prepared by AFCs have any impact on employee pay, or that the evaluations may form the basis of disciplinary action against employees. Thus, notwithstanding the Carrier's utter failure to prove that AFCs actually perform evaluations, any purported evaluation authority possessed and exercised by AFCs does not support a finding that they are management officials. *See Independent Ry. Supervisors Assn.*, 37 NMB at 251 (holding that employees' authority to perform evaluations was insufficient to show managerial status where there "is no actual evidence that performance evaluations affect pay or discipline"); *see also Port Authority Trans-Hudson Corp.*, 34 NMB 81, 90 (2007) ("[F]or over four decades Board precedent has been that training and *evaluating personnel does not render a position outside of the RLA's coverage.*") (citing *United Air Lines, Inc.*, 4 NMB 30 (1965)) (emphasis added).

D. Metro-North's Remaining Arguments Are Meritless

Metro-North appears to claim that AFCs should be deemed management officials because they assume the role of incident commander during emergencies when the Fire Chief is absent, but it utterly fails to state how this fact supports a finding of managerial status. Nonetheless, the operational command process for emergency response work is governed by the National Incident Management Systems issued by the Federal Emergency Management Agency. *Metro-North*, 49 NMB at 102; Tipa Aff. ¶11. This factual information was already considered by the Board when it issued the Findings, and the Carrier has failed to offer any new information with respect to emergency response work performed by AFCs. *Id.*

The Carrier's conclusory statements in an attempt to mischaracterize the AFCs' authority to "manage staff scheduling and assignments" must also be rejected. While the Appeal and the Lee Aff. claim to provide purported "new" evidence of AFCs' role in staff and shift assignments, the Carrier offers no information beyond that which was already presented to the Board by the Union during the investigation. *See* Tipa Aff. ¶9. As such, the Carrier has failed to demonstrate that the authority of AFCs with respect to work/shift assignments supports a finding that they are management officials.

Finally, the Carrier falsely claims that the Fire Chief is the only management official overseeing the Fire Brigade. Carrier Appeal at 4. In making this argument, Metro-North completely ignores the information in the Tipa Aff. (which is also described in the Findings) that the Fire Chief answers directly to the Emergency Management Director, who answers directly to the Vice President of Office System Safety. Tipa Aff. ¶18; *Metro-North*, 49 NMB at 101. Thus, the Carrier's claim that the Fire Chief is the only management official overseeing the Fire Brigade is patently false. Ironically, in his Affidavit, Mr. Lee states that after he left the Fire Chief position, he was recently hired to the position of Deputy Director of Emergency Management – an apparent new Metro-North title underneath the Emergency Management

⁶ Metro-North's employee evaluation process is not something unique to the Fire Brigade – it is an agency-wide process mandated by MTA/Metro-North policy. The performance of evaluations of craft employees is merely a ministerial exercise for purposes of complying with MTA/Metro-North policy requirements. Indeed, the Fire Chief drafts/prepares craft employees' performance evaluations and sends them to the AFCs, who then simply copy and paste the language provided by the Chief into a written evaluation.

Director. Lee Aff. ¶1. Therefore, it appears that Mr. Lee's new position is yet another level of management/supervision above the Fire Chief.

* * * * *

The Board's finding that the AFC is not managerial, "when all factors are viewed cumulatively," is fully supported by the facts and law. The Carrier's improper attempts to reopen the record and reargue this case should be denied entirely. The Carrier's Appeal is yet another naked attempt at delaying/frustrating the proceedings in this matter, designed specifically to interfere with craft employees' representation rights under the Act.

For the reasons stated herein, the Union respectfully requests that the Appeal be expeditiously considered and dismissed.

Very truly yours,



Matthew Hromadka

cc: Mr. James T. Tipa, Jr.
Richard S. Corenthel, Esq.
Andrew J. Paul, Esq.
Mr. James Slevin, Vice President, International Association of Fire Fighters

CERTIFICATE OF SIMULTANEOUS SERVICE

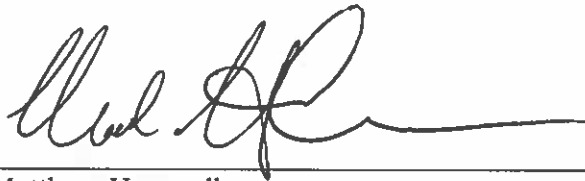
I hereby certify that I have, on this 20th day of May, 2022, simultaneously served a copy of the foregoing Letter upon the following individuals via electronic mail:

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