

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

LAMB WESTON, INC.

and

Case No. 15-CA-207924¹

**AMANDA DEXTER,
An Individual**

Andrew Miragliotta, Esq. for the General Counsel
Steven R. Cupp and Knox MacMillian, Esqs., (Fisher & Phillips, LLP)
Gulfport, Mississippi, for the Respondent

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. With the consent of all parties, this case was tried by video conferencing in New Orleans, Louisiana and Washington, D.C., on September 14, 2018. Amanda Dexter filed the charge giving rise to this matter on October 13, 2017. The General Counsel issued the complaint on February 28, 2018.

This case only involves employer policies, work rules and employee handbook provisions. None of these rules explicitly restrict activity protected by Section 7; none were adopted in response to protected activity and none, so far as this record shows, have been applied to restrict such activity. Thus this case is governed by the Board's recent decision in *The Boeing Company*, 365 NLRB No. 154 (2017). In *Boeing*, the Board delineated 3 categories of "rules." Category 1 rules are those which are lawful because they either (1) do not prohibit or interfere with employee Section 7 rights when reasonably interpreted, or (2) the employer's justification for the rule outweighs the potential adverse impact on protected rights. Category 2 rules are

¹ This case was originally captioned Lamb Weston Holdings, Inc. At the hearing it was amended to reflect the correct legal identity of Ms. Dexter's employer. Also, Ms. Dexter's unfair labor practice charge was consolidated with charges and objections filed by the United Food and Commercial Workers Local Union 455. The lead docket of the consolidated complaint was 15-CA-195894, which related to a charge filed by the UFCW. All docketed matters between the Union and Respondent were settled prior to hearing. Only the charge filed by Amanda Dexter, 15-CA-207924, was litigated. On October 10, 2018, the General Counsel withdrew portions of the complaint in 15-CA-207924.

those which warrant individualized scrutiny as to whether they prohibit or interfere with section 7 rights and whether legitimate justifications outweigh any adverse impact on these employee rights. Category 3 rules are those which are unlawful because the justification for their maintenance does not outweigh their adverse impact on employee Section 7 rights. A rule which is not unlawful to maintain, may be unlawful as applied. However, application of Respondent's rules is generally not an issue in this case.

On the entire record, including my observation of the demeanor of the witness, and after considering the briefs and reply briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, produces sweet potato fries at a facility in Delhi, Louisiana, where it annually sells and ships goods valued in excess of \$50,000 directly to points outside of Louisiana.² Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the United Food and Commercial Workers Union, Local 455, which represents or represented some of Respondent's employees, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The rules, Respondent's justification and their legality or illegality under the Boeing standard.

The General Counsel alleges that Respondent is violating Section 8(a)(1) of the Act by maintaining the rules set forth below. Respondent has proffered a justification for these rules through the testimony of Senior Human Resources Director Dan Downard.

General Conduct Rules in Section 8.4 of the Employee Handbook, list examples of behavior that will not be tolerated: (Jt. Exh. 2):

Rule 11: Fighting, horseplay, words or conduct, which are likely to provoke or cause bodily injury or property damage or otherwise interfere with Company operations.

I do not think Rule 11 would reasonably be read to prohibit an appeal to other employees, for example, to engage in a strike. Thus, I find this rule to be lawful as a category 1 rule in that when reasonably interpreted in context it does not prohibit or interfere with employee's Section 7 rights. I conclude that a reasonable interpretation of the rule is that it is directed only to violence or words reasonably likely to incite violence.

² Until November 2016, Respondent was a wholly-owned subsidiary of Con-Agra. That month it became an independent stand-alone company. Many of the rules herein were promulgated while the company was a Con-Agra subsidiary. At most of its facilities, Respondent produces french fries from white potatoes; the Delhi plant specializes in producing sweet potato fries.

Rule 35: Refusing to courteously cooperate in any Company investigation, including discussing the investigation or interview with other employees unless specifically authorized to do so.

5 Dan Downard testified that Respondent maintains this rule to prevent its investigations from being tainted by employees talking to each other while the investigation is ongoing.

10 Nevertheless, I find that Respondent violated the Act in mandating employee cooperation in all company investigations and at any stage of the investigation and in requiring employees to maintain confidentiality. The fact that Respondent can “waive” confidentiality does not save the rule. I conclude Respondent’s justification for the rule does not outweigh its effect on employee section 7 rights due to its overbreadth. Thus, in *Boeing* parlance, it is a category 3 rule.

15 In *Beverly Health & Rehab Services*, 332 NLRB 347, 348-49, 356 (2000) the Board found a similar rule illegal in that it was inconsistent with the long-standing Board precedent in *Johnny’s Poultry*, 146 NLRB 770, 774-76 (1965). Rule 35 would reasonably be read to apply to a company investigation of unfair labor charges. An employer may only question employees about the circumstances regarding a NLRB charge if the questioning is done on a voluntarily basis and the employee has been assured that his cooperation is voluntary.

20 Additionally, in *Cook Paint Varnish Co.*, 246 NLRB 646 (1979) the Board found that an employer cannot require an employee to cooperate in a disciplinary investigation when the investigatory process has been completed and discipline has been imposed. An employee cannot, for example, be compelled to help the employer to build a case against another employee in preparation for an arbitration proceeding.

25 Rule 35 is a category 3 rule under *Boeing* and thus illegal.

30 This rule also is a category 3 rule and violates the Act in mandating confidentiality as to what was discussed in an investigation.

35 In *Caesar’s Palace*, 336 NLRB 271, 272 (2001) the Board held that the employer did not violate Section 8(a)(1) by instructing employees not to discuss an ongoing drug investigation. It observed that employees have a Section 7 right to discuss discipline or disciplinary investigations. However, it found that Caesar’s established a substantial and legitimate business justification which outweighed its infringement on employees’ rights. The Board in footnote 5 made it clear that it is the Respondent’s burden to establish a legitimate and substantial business justification.

40 In *Hyundai America Shipping Agency, Inc.* 357 NLRB 860 (2011), enfd. in pertinent part, 805 F.3d 309, 314 (D.C. Cir. 2015), the Board found the employer violated Section 8(a)(1) by promulgating, maintaining and enforcing an oral rule prohibiting employees from discussing with other persons any matters under investigation by its human resources department. This rule was a blanket prohibition, applying to all matters regardless of the circumstances. The employer’s rule in *Boeing Co.*, 362 NLRB No. 195 (2015), was similarly broad.³

³ Also see, *Banner Estrella Medical Center*, 362 NLRB No. 137 (2015).

In *Caesar's Palace*, an employer witness testified that the company never explained the purpose of the confidentiality instruction to the employees during the investigation, 336 NLRB at 273. The Board appears to have inferred from the circumstances of the investigation that the employer had a legitimate and substantial justification for its confidentiality instructions. I believe this could be inferred in many investigations in which the dangers of evidence being destroyed or fabricated, and witness intimidation, are obvious. In this vein I would note the Rule 615 of the Federal Rules of Evidence, in requiring a judge to order the sequestration of witnesses upon the request of any party, is a tacit recognition of this danger.

However, Respondent's rule is overly broad and thus illegal. I do not believe the *Boeing* decision (365 NLRB No. 154) overrules *Hyundai America Shipping Agency*. While Respondent probably could demand confidentiality in some investigations, *Hyundai* makes a blanket confidentiality rule illegal. While Respondent can "waive" confidentiality, confidentiality is the default option and the rule provides no guidance as to terms under which Respondent will authorize discussion of a company investigation. The rule infringes on employee section 7 rights and Respondent has not put forth a justification for a blanket rule that outweighs these rights. The rule would prohibit an employee from talking to other employees after he or she has been disciplined to prepare a defense (e.g. for an arbitration or a ULP hearing in which discipline is alleged to be discriminatory) and thus violates the criteria set forth in the Board's decision in *Cook Paint Varnish*.

Rule 36: Engaging in any activity or performing any act that reflects adversely upon the Company or is detrimental to its reputation or interests.

This rule is certainly is broad enough to include such section 7 activities as picketing, leafleting and organizing any concerted protest of employee working conditions. It **could** be read by unsophisticated employees to apply to any appeal to the public that is critical of conditions at Respondent's facility. For example, Respondent, in another context, mentions that it uses anhydrous ammonia. If employees were to raise concerns as to how this toxic chemical is handled in the plant that would be detrimental to Respondent's reputation in the community.⁴

However, under the pre-*Boeing* standard, the Board found that very similar rules **would** not be reasonably read as encompassing Section 7 activity. In *Albertson's* 351 NLRB 254, 258-59, the Board held that a rule prohibiting off-the-job conduct which has a negative effect on the company's reputation... did not violate the Act. In *Lafayette Park Hotel*, 326 NLRB 824, 826-27 (1998) the employer maintained a rule prohibiting improper conduct off the hotel's premises or during non-working hours...which affect the hotel's reputation or good will in the community. The Board also found that this rule did not violate the Act. I find these cases dispositive and therefore find that Respondent's rule 36 is a category 1 rule and does not violate the Act.

⁴ <https://www.nytimes.com/2013/04/19/us/huge-blast-at-texas-fertilizer-plant.html>. Anhydrous Ammonia was used at a facility that exploded in West, Texas in 2013, killing 15 and injuring many more.

Employee handbook Section 9, 9.1 Problem Resolution Procedure

Respondent's problem resolution procedure provides as follows: An employee having a question or issue concerning any matter relating to wages, hours or working conditions (including termination of employment or any other discipline, any aspect of the job, an employee's relationship with the Company or a coworker, etc.) or the interpretation of any of the provisions of this Handbook or any of the Company's policies or rules, **should** follow these procedures:

STEP 1: Since your Team Leader is often in the best position to help, your first step generally is to discuss the problem with your immediate supervisor. You must discuss the problem with your Teams Leader within seven (7) calendar days of the occurrence of the complaint or problem (or when you should have known of its occurrence). The Team Leader will answer the question or complaint within seven (7) calendar days.

STEP 2: If you are not satisfied with the response at Step 1, the next step is to take the matter to our Human Resources Manager. All we ask is that you do so in writing, on appropriate form, within seven (7) calendar days of receiving you Team Leader's answer because we strongly believe that it is best to get questions, concerns and problems resolved as quickly as possible. The Human Resources Manager will give you a written response within seven (7) calendar days.

Respondent submits that nothing in this provision requires an employee to go to management with a problem before discussing it with other employees or persons outside the company. Indeed, the preamble to the procedure states "we strongly **encourage** employees with questions and issues to use this procedure." Thus, a reasonable reading of this procedure would be that one who chooses to take a problem to management start with their immediate supervisor, rather than, for example, immediately escalating the situation to higher-level management or human resources.

Respondent's procedure is distinguishable from that in *Kinder-Care, Learning Center*, 299 NLRB 1171, 1172 (1990) relied upon by the General Counsel. In *Kinder-Care*, while the rule did not prohibit appeals to persons other than management on its face, the verbiage suggested that appeals outside of the company would be subject to disciplinary action. That is not the case here. I find that Respondent's Problem Resolution Policy is a category 1 rule and does not violate the Act.

Section 13: General Information

Section 13.2 Off-Duty Employees

The company's rules provide as follows: Off-duty employees are welcome to return to our property for bona fide business reasons or in other unusual or emergency situations. Off-duty employees are also only allowed in operating areas of the plant with the permission of the Plant Manager or delegate.

Respondent justifies this rule by arguing that off-duty employees do in fact come onto their property regularly, for example, to wait for a spouse who also works at the Delhi plant. Secondly, it submits that in non-work areas inside the plant, for example, in break rooms, an off-duty employee could be exposed to hazardous chemicals without Respondent even being aware of their presence. Respondent's rule does not distinguish between company property and operating areas. It also is vague as to what it considers a bona fide business reason.

Respondent rule violates the Act. It is inconsistent with long-standing Board precedent, *Tri-County Medical Center*, 222 NLRB 1089 (1976) in that it is not limited to the interior of the plant and other working areas. A rule denying off-duty employees access to parking lots, gates and other outside nonworking areas is invalid unless justified by specific business reasons. Respondent's justification for the scope of this rule does not outweigh the impact of the rule on Section 7 rights. Parking lots are often the most convenient place to engage in section 7 activity, for example at shift changes. In *Eastex v. NLRB*, 437 U.S. 556 at 574 (1978), the Supreme Court quoted the following passage from *Gale Products*, 142 NLRB 1249 (1963):

[the plant] is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.

Moreover, the rule is invalid because in practice it does not prohibit access to non-work exterior areas of its property for all purposes. By allowing, for example, off-duty employees to wait for their spouse in the parking lot, Respondent belies the neutrality and justification of the rule, *St. John's Health Center*, 357 NLRB 2078, 2080-83 (2011).

This is a category 3 rule and violates the Act.

Section 13.3 Solicitations

Respondent's rules provides: Employees who are working should not be disturbed, interrupted or disrupted by solicitations or the distribution of literature. For that reason these rules apply:

*Non-employees may not solicit employees or distribute literature on our property at any time.

*An employee who wishes to solicit or distribute literature to other employee by or on behalf of any individual, organization, club or society may do so only during times when he or she is not supposed to be working (e.g. break periods and meal times) and may not solicit or distribute literature to employees who are or should be working.

*The distribution of literature in work areas is prohibited at all times, but such materials may be distributed elsewhere, such as in established break rooms of lunchrooms.

*Certain types of material – including obscene, profane or inflammatory items and political advertisements or solicitations – will not be permitted.

Respondent justifies the last bullet point as necessary to prohibit the creation of a hostile work environment. Downard specifically cited the need to prohibit sexually themed material so as not to offend Respondent's female employees. He stated that Respondent prohibits political material to avoid divisiveness in the workplace. Respondent, some of whose employees were represented by the UFCW, has allowed the distribution of union literature in non-work areas.

The General Counsel submits this rule is illegal because it may apply to union materials. I find the rule illegal, however, for another reason. "Political" issues often have a direct impact on the wages, hours and working conditions of employees. An obvious example is the recent ballot referendum in Missouri about whether it would become a "right to work" state. Since the electorate voted that Missouri would not become a "right-to-work" state,⁵ employees who might not otherwise have to pay the collective bargaining expenses of a union, continued to be obligated to do so. Had Missouri become a "right-to-work" state, other employees may have had to increase the dues payments to their union.

In fact the United States Supreme Court found an employer's unwillingness to allow the distribution of political materials to violate Section 8(a)(1) of the Act in *Eastex v. NLRB*, 437 U.S. 556 (1978). In *Eastex*, Paperworkers Local 801 was prohibited from distributing a newsletter to production employees. The newsletter contained four sections. The first and fourth sections urged support of the Union. The second section urged employees to write their state representative to oppose the incorporation of the State of Texas' "right-to-work" law into the State Constitution. The third section criticized the President's veto of minimum wage legislation and urged employees to vote, elect the Union's friends and defeat its enemies. The Court held that both the second and third sections of the newsletter were protected as activities for "mutual aid or protection" pursuant to Section 7.⁶

This is a category 3 rule and violates the Act. Respondent's interest in avoiding divisiveness does not outweigh employees' Section 7 right to discuss political issues at work (depending on whether or not they are allowed to discuss other non-work issues) and distribute political material (on non-work time, in non-work areas) that may have a direct impact on their wages, hours and working conditions.

⁵ https://www.washingtonpost.com/business/2018/08/08/missouri-voters-defeat-gop-backed-right-work-law-victory-unions-associated-press-projects/?utm_term=.d3d1d47282bc

⁶ The Court stated that some concerted activity may be so attenuated in relation to employees' interests that it may not fall within Section 7.

Employee Agreement, Jt. Exh. 3

5 On November 18, 2013, Charging Party Amanda Dexter signed an Employee Agreement that contained the following provisions:

Information Regarding the Employee Agreement
The Need to Safeguard Confidential and Propriety Information.

10 In addition, various laws make it important for employees to safeguard the confidentiality of other Company employees. Such employee information includes, payroll, benefits, retirement plans, pension plans, employee salaries, terminations, disciplinary actions, appraisals and health and medical information.

15 The Agreement section: number 2: For the purposes of this Agreement, the term “Confidential Information” means information disclosed to me or known by me as a consequence of my employment and which relates to Company’s or any of its affiliates trade secrets, customer lists, product information, financial information and other
20 proprietary information that may or may not be patentable. The term Confidential Information shall also refer to Company’s or any of its Affiliates’ human resource information, including but not limited to information concerning payroll, health and welfare benefit plans, defined benefit plans, defined contribution plans, company stock purchase plans, incentive plans, deferred compensation plans, employee salaries and other compensation, employee hirings and terminations, employee disciplinary actions,
25 employee appraisals, employee health and medical information, including claims information, and all other information pertaining to Company’s or its Affiliate’s employees. The term Confidential Information does not include information generally known to the public or which, through no fault of my own, becomes available to the public at the time of such disclosure.

30 Respondent states this Agreement was intended only for employees with access to the personal information of other employees, not rank and file production or maintenance workers who do not have such access. Dan Downard stated that the Charging Party, Amanda Dexter and other rank and file employees were mistakenly given the Agreement
35 to sign during a mass hiring in 2010 and are not subject to the provisions of the Agreement set forth above. Downard stated the Agreement does not prohibit employees from sharing their wage information and that employee wage scales are posted at Respondent’s facility.

40 There is nothing illegal about the agreement on its face and as applied to the employees who have access to the personal information of other employees. The rule on its face is a *Boeing* category 1 rule as applied to employees with access to the personal information of other employees. However, employees who did not have access to such
45 information were required to sign the agreement. For those employees, it is a category 3 rule.

5 An employee being required to sign this agreement would reasonably conclude that there is a reason that he or she is being required to do so. Since such an employee would have no access to many of the types of information covered by the agreement, they would reasonably conclude that there are certain types of information to which they have access that they may not divulge. Such an employee would reasonably infer that when the agreement speaks of “payroll,” it means their wages, since there is no other category of information mentioned in the agreement to which they would have access.

10 Since Respondent submits that the agreement was presented to certain employees, including Ms. Dexter, in error, it obviously has no justifiable business reason to apply the agreement to her and similarly situated employees. The remedy here, however, is not for Respondent to rescind the agreement, but instead to remove it from the personnel files of these employees and inform them in writing that the agreement does not apply to them and has been removed from their personnel files, *Customer Creation Center, LLC*, 360 NLRB No. 91 (2014).

REMEDY

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

25 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

30 The Respondent, Lamb Weston, Inc., Delhi, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining overly broad rules as follows:

- 35 1. Prohibiting employees from refusing to courteously cooperate in any Company investigation, including discussing the investigation or interview with other employees unless specifically authorized to do so.
- 40 2. Prohibiting off-duty employees from returning to its property for other than bona fide reasons or in other unusual or emergency situations.

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

3. Prohibiting solicitations or the distribution of literature that include political advertisements or solicitations.
- 5 4. Maintaining its employee agreement in the files of employees other than in the files of employees who have access to the personal information of other employees.
- 10 5. In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Rescind the overly broad rules set forth above and notify employees in writing that this has been done and that these rules are no longer in force.
- 15 (b) Remove its employee agreement from the files of employees who do not have access to the personal information of other employees and notify them in writing that it has done so and the agreement is no longer in force with respect to them.
- 20 (c) Within 14 days after service by the Region, post at its Delhi, Louisiana facility copies of the attached notice marked “Appendix.”⁸ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to
- 25 employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any
- 30 other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 13, 2017.

⁸ If this 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 read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C. November 28, 2018

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Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT prohibit employees from refusing to courteously cooperate in any Company investigation, including discussing the investigation or interview with other employees unless specifically authorized to do so.

WE WILL NOT prohibit off-duty employees from returning to our property for other than bona fide reasons or in other unusual or emergency situations.

WE WILL NOT prohibit solicitations or the distribution of literature that includes political advertisements or solicitations.

WE WILL NOT maintain our employee agreement in the files of employees other than employees who have access to the personal information of other employees.

WE WILL NOT In any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the overly broad rules set forth above and notify employees in writing that this has been done and that these rules are no longer in force.

WE WILL remove our employee agreement from the files of employees who do not have access to the personal information of other employees and we will notify these employees in writing that we have done so and that the agreement is no longer in force with respect to them.

LAMB WESTON, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

600 South Maestri Place, 7th Floor, New Orleans, LA 70130-3413
(504) 589-6361, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/15-CA-207924 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389.