

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**DARREN H. SOUTHERLAND
MISTI D. SOUTHERLAND dba
1ST 2 DELIVER EXPRESS TRANSPORT
U.S. DOT No. 2355700**

**Docket No. FMCSA-2013-0437
(Southern Service Center)**

**FINAL ORDER ON PETITION FOR ADMINISTRATIVE REVIEW OF
OPERATIONS OUT-OF-SERVICE AND RECORD CONSOLIDATION ORDER**

1. Background

On October 7, 2013, the Field Administrator for the Southern Service Center (FA), Federal Motor Carrier Safety Administration (FMCSA), hand-delivered an Operations Out-Of-Service and Record Consolidation Order (RCO) to Darren H. Southerland, jointly and severally liable with: (a) Misti D. Southerland dba 1st 2 Deliver Express Transport; (b) Darren Southerland dba 1st 2 Deliver Brokers; (c) Atlas Unlimited Transport, Inc.; (d) Wheels Unlimited, LLC; and (e) Darren H. Southerland dba Wheels Unlimited, alleging that the entities have operated or attempted to operate under several identities and as affiliated entities to avoid complying with FMCSA orders, including orders to cease operations, to avoid statutory and regulatory requirements, to avoid paying civil penalties in excess of \$200,000, and to avoid responding to FMCSA enforcement actions. The RCO further alleged that entities (a) through (c) above “are mere continuations of Darren H. Southerland’s motor carrier operations under the names of Wheels Unlimited, LLC, Wheels Unlimited, Inc. and Darren H. Southerland dba Wheels Unlimited.”

By letter dated October 21, 2013, Darren Southerland, 1st 2 Deliver Express Transport, submitted a petition for administrative review of the RCO (Petition),¹ arguing that 1st 2 Deliver is a different entity than Wheels Unlimited.

On November 27, 2013, the FA requested that the Petition be denied because it was not timely served. The FA submitted the Federal Express receipt demonstrating that the Petition was picked up by Federal Express at 5:27 p.m. on October 23, 2013, one day after the October 22nd deadline for service.² The FA concluded that the Petition was served on the date that Federal Express picked it up.

On December 24, 2013, I issued an Interim Order, stating that there was not enough evidence in the record to determine whether the Petition was one day late, as the FA contended. Although he was correct that the Petition was picked up by Federal Express on October 23rd, Petitioner did not include a certificate of service stating whether he placed the Petition in a Federal Express box or delivered it to a Federal Express office and when he did so. Because it was conceivable that the Petition had been placed in a Federal Express box on October 22nd and not picked up until October 23rd, I asked 1st 2 Deliver Express Transport to submit for the record, within 15 days of the service date of the Interim Order, a signed certificate of service with the following information: (1) Whether Darren Southerland brought the Petition to a Federal Express office or whether he placed it in a Federal Express box; (2) the address of the Federal Express office or

¹ The Petition submitted by Darren Southerland stated that the carrier was 1st 2 Deliver Express Transport, U.S. DOT number 2355700, which is listed on the RCO as Misti D. Southerland dba 1st 2 Deliver Express Transport. The entity known as Darren Southerland dba 1st 2 Deliver Brokers, has a different U.S. DOT number, 2241551.

² See Attachment C to FA's Memorandum in Support.

box; and (3) the approximate time that he brought the Petition to the Federal Express office or placed it in the box.

I notified the parties that after I reviewed the certificate of service, I would determine whether or not the Petition was timely, and I would issue an Order detailing my findings and setting forth any future procedures that would be required of the parties. I further informed the parties that the certificate of service detailing the Federal Express delivery must be served on all those listed in the Certificate of Service of the Interim Order and contain its own certificate of service showing to whom 1st 2 Deliver served the document. The Certificate of Service in the Interim Order contained a listing for the U.S. Department of Transportation Docket Operations.

2. Responses to the Interim Order

According to the FA, 1st 2 Deliver responded to the Interim Order on January 13, 2014. 1st 2 Deliver, however, did not follow the instructions in the Interim Order, because its response was not served upon Docket Operations or contain its own certificate of service. Fortunately, because the FA included it as an exhibit with his response to the Interim Order, 1st 2 Deliver's response was made part of the record. 1st 2 Deliver contended that its Petition was placed in the Fed Express Box at the corner of Elk and Highway 81 in Duncan, Oklahoma in the afternoon of October 22, 2013. It also stated: "my understanding was 15 business days."

On January 27, 2014, the FA responded to the Interim Order, requesting leave to submit evidence to complete the record to demonstrate that 1st 2 Deliver could not have placed the envelope containing the Petition into the Duncan, Oklahoma Federal Express

box on the afternoon of October 22, 2013.³ The FA submitted the Declaration of Oklahoma Federal Program Specialist Bob Neal, who stated that because he did not believe 1st 2 Deliver's allegation that it had placed its Petition in the Federal Express box at the corner of Elk and Highway 81 in Duncan, Oklahoma on the afternoon of October 22, 2013, he interviewed Lavonda Whitaker, the Federal Express service agent for the Federal Express drop location in question.

Mr. Neal provided the following account from Ms. Whitaker: Petitioner's allegation regarding the date of delivery could not be correct. At the end of each day, Federal Express boxes, including the package at issue in this case, are picked up by a Federal Express driver, and pickup times and locations are scanned into the company's computer tracking system. This system will not allow a driver to close out until the driver picks up the packages from, and scans into the tracking system, each location. Thus, if the driver failed to pick up packages from one of the locations at the end of the day on October 22, 2013, Federal Express's system would not permit the driver to close out for that day.

According to Ms. Whitaker, Federal Express's system will not allow any of its box locations to be missed on any given day. As a result, had 1st 2 Deliver dropped the envelope containing the Petition in the Federal Express box on the afternoon of October 22, 2013, it would have been picked up on the 22nd, and the Federal Express tracking receipt would have indicated the time that it was picked up on that date, which would have been approximately 5:30 p.m. Because the receipt shows that the envelope containing the Petition was not picked up until 5:27 p.m. on October 23rd, 2013, 1st 2

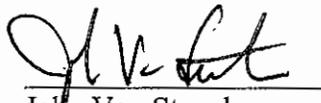
³ Claimant's request is granted.

Deliver could not have placed the envelope in the Federal Express box on the afternoon of the 22nd,⁴ as it alleged.⁵ The FA, therefore, requested that because the Petition was submitted one day late, it be denied.

3. Decision

The FA's evidence demonstrates that 1st 2 Deliver did not submit its Petition until October 23, 2013. Accordingly, it was served one day late⁶ and will not be considered.⁷ The FA's request that the Petition be denied is hereby granted.⁸ The entities listed in the first paragraph of this Final Order are out of service and their records are consolidated, effective immediately.

It Is So Ordered.



John Van Steenburg
Assistant Administrator
Federal Motor Carrier Safety Administration

2/24/14
Date

⁴ Only if 1st 2 Deliver had certified that it had placed the envelope containing the Petition into the Federal Express box on October 22nd, but after the end-of-the-day pickup, would it have had a plausible argument that it had timely served the Petition. But 1st 2 Deliver did not provide the time that it placed the envelope into the Federal Express box, even though it was requested to do so by the Interim Order, stating only that it placed the Petition in the Federal Express box "in the afternoon."

⁵ See Declaration of Oklahoma Federal Program Specialist Bob Neal, January 23, 2014, paragraphs 7 – 9.

⁶ 1st 2 Deliver is mistaken in its "understanding" that it had 15 business days in which to serve its Petition. In accordance with 49 CFR 386.73(j), subpart A of 49 CFR part 386 applies to RCO proceedings. Section 386.8(a), which is contained within subpart A, provides that all Saturdays, Sundays, and legal Federal holidays, except those falling on the last day of the period, will be computed. October 22, 2013 fell on a Tuesday.

⁷ See 49 CFR 386.73(g)(2).

⁸ Accordingly, it is not necessary to consider the FA's evidence in support of the RCO or his request that the automatic stay of the provisions of the RCO be vacated.

CERTIFICATE OF SERVICE

This is to certify that on this 25 day of February 2014, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Darren H. Southerland
Misti D. Southerland dba 1st 2 Deliver Express Transport
PO Box 2212
Duncan, OK 73534

One Copy
U.S. Mail

Matthew Hardy, Esq.
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Office of Chief Counsel (MC-CCE)
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Original
Personal Delivery