Summary of Electronic Bill of Lading Legal Issues in Trucking

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ABSTRACT

The use of electronic Bills of Lading (“B/L”) is a rapidly evolving area that faces much uncertainty. The intent of this article is to provide a brief review of the history of motor carrier B/L legislation and to summarize some of the legal issues involving the use of electronic B/L such as issues related to contracts, evidence of affreightment, evidence of title, accident and casualty documentation, and regulatory and security compliance. The motor carrier industry, including its customers and regulatory agencies, are the primary stakeholders in the electronic B/L area. But the behavior of these primary stakeholders could affect the safety and welfare of the public at large, especially in issues involving the Department of Homeland Security (“DHS”) and the Customs and Border Patrol (“CBP”). Notwithstanding the unsettled legal issues, the hope is that the use of electronic B/L will lead to improvements in efficiency, safety and security.

SUBJECT HEADINGS

Trucks, Freight transportation, Laws, Contracts, Security, Safety

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INTRODUCTION

The B/L has a long history dating back to the middle ages. The following excerpt from 1248 demonstrates the context of B/L in such times (Blancard 1936).

We … carriers, confess and acknowledge to you … that we have had and received from you twelve full loads of brazil wood … for the purpose of taking them from Toulouse to Provence, to the fairs of Provence … at a price or charge of four pounds and fifteen solidi in Vienne currency for each of the said loads…. And we promise by this agreement to carry and look well after those said loads with our animals, without carts, and to return them to you at the beginning of those fairs.

Even though the use of beasts of burden has significantly diminished, the need for contracting for transportation services has only increased since the inception of B/L. The Uniform Commercial Code (“U.C.C.”) defines a B/L as “a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods”.1 As with other forms of documentation, B/L could serve multiple purposes such as legal, documentary, regulatory, security, and financial. Such purposes could be internal and external to the companies involved and could even affect the public at large as in the examples of customs security and truck safety. These purposes reflect the policy considerations as outlined in the Federal Motor Carrier Commercial Regulations (“FMCCRs”).2 Such considerations include the promotion of: transportation safety, efficiency and economic viability among carriers, fair competitive practices, cooperation with states, sustainability of resources, accessibility to small communities,
and intermodalism. How might all these considerations be affected by the use of electronic B/L?

With the advent of deregulation, the traditional consignor, carrier, and consignee relationship have multiplied to include an entire supply chain that could include multiple intermediaries. These intermediaries are often freight-forwarders and third-party logistics providers (“3PLs”). The term freight forwarder is defined in the FMCCRs as “a person holding itself out to the general public to provide transportation … for compensation in the ordinary course of its business” which includes assembling and consolidating, assuming responsibility for the transportation, and using a carrier.\(^3\) The term 3PL is less precise since definitions employed by various companies and associations differ slightly. In general, 3PLs could encompass companies that provide freight forwarding services or contract with freight forwarders, but might also encompass other functions such as storage, processing of inventory, and managing information. Recently, Congress defined the term 3PL with input from the International Warehouse Logistics Association as “a person who solely receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product”.\(^4\) In the modern context, a shipment can involve a shipper who provides the goods, a 3PL who brokers the transport, a freight forwarder who arranges the carrier, and a motor carrier who provides the actual transportation to the consignee. It is easy to envision how Electronic Data Interchange (“EDI”) systems including electronic B/Ls might increase efficiency and accuracy among the numerous parties in the supply chain given the fact that multiple B/Ls are usually involved in a single shipment.
The land-side 3PL developments somewhat mirror the seaside development of Non-Vessel Operating Common Carriers (“NVOCCs”) (Beecher 2006) and the governing Carriage of Goods at Sea Act. Several law review articles discuss legal issues related to B/L in the maritime and international trade contexts (Beecher 2006; Dubovec 2006; Chan 2006). In contrast, this article will focus on surface transportation and mainly on motor carriers. The motor carrier mode is important because it serves exclusively 72 percent of the communities in the United States and is the largest single freight mode in the world in terms of both tonnage moved and freight revenue (Donath et al. 2005).

**BRIEF MODERN HISTORY OF B/L LEGISLATION**

As a product of a long common law history, B/L is now governed by federal statutes. In 1935, the Motor Carrier Act was enacted with the purpose of preventing the destructive competition among motor carriers and the protection of motor and rail carriers from each other through regulations. Then the Motor Carrier Act of 1980 was passed to liberalize entry and rates of trucking companies thus accomplishing partial deregulation. The Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) replaced the Interstate Commerce Commission, a regulatory agency established in 1887, with a newly created Surface Transportation Board (“STB”). ICCTA defines transportation very broadly to mean not only the actual physical movement of property, but all carrier services related to the movement. Some of these services include receipt, delivery, elevation, transfer in transit, refrigeration, storage, handling, packing, unpacking and
interchange of property. ICCTA also emphasizes federal authority over intrastate transportation of property and limits states from enacting or enforcing any law, rule, regulation, standard, or other provision related to interstate or intrastate price, route, or service. The Motor Carrier Safety Improvement Act established the Federal Motor Carrier Safety Administration (“FMCSA”) within the U.S. Department of Transportation. FMCSA’s primary mission is to reduce crashes, injuries and fatalities involving large trucks and buses. FMCSA develops and enforce regulations concerning motor carriers including regulations of B/L. In addition, there are several other relevant statutes that will be mentioned in the discussions on specific legal issues.

The Federal Motor Carrier Commercial Regulations (“FMCCRs”) consist of statutes and regulations of persons providing or arranging transportation for compensation. Generally, the jurisdiction related to FMCCRs include both intra and inter-state transportation of passengers or property by motor carrier and the procurement of that transportation in the United States. The FMCCRs say, “[a] carrier providing transportation or service subject to jurisdiction … shall issue a receipt or bill of lading for property it receives for transportation under this part”. Thus the FMCCRs impose B/L requirements on all motor carriers. The FMCCRs list five pieces of information that a motor carrier B/L should contain. They are the names of the consignor and consignee, the origin and destination points, the number of packages, the description of freight; and weight, volume, or measurement of freight. Recently, the FMCSA finalized the amended rule that requires surface freight forwarders to issue a receipt or bill of lading on each shipment for which they arrange transportation of freight by commercial motor vehicle in interstate commerce for both non-household and household goods.
A B/L is negotiable if it meets certain conditions including the language that the goods are to be delivered to the order of a consignee. Conversely, a B/L is non-negotiable if “the bill states that goods are to be delivered to a consignee”. A negotiable B/L means that “the common carrier issuing the bill becomes obligated directly to the person to whom the bill is negotiated to hold possession of the goods under the terms of the bill the same as if the carrier had issued the bill to that person.” A non-negotiable B/L means that “[t]he holder of a B/L may transfer the bill without negotiating it by delivery and agreement to transfer title to the bill or to the goods represented by it…. the person to whom the bill is transferred has title to the goods against the transferor”. Negotiability is an attractive feature of B/L since it means that the B/L has intrinsic value and entitles holders to sell the goods while in transit by transfer of the document. Negotiability also means that a transferee who acquires title for full value, in good faith, and without notice of irregularities is protected from the B/L’s validity from being affected. The negotiable B/L stands in contrast to waybills which are non-negotiable and cannot be pledged to banks as collateral for loans or credit (Dubovec 2006).

LEGAL ISSUES OF ELECTRONIC B/L

One reason why the B/L is such a complicated legal area is because it involves a combination of the law of contract, bailment, assignment, negotiability, and tort. Another reason is that though it has a primary commercial purpose, it serves many other documentary purposes. Some of the legal issues of electronic B/L are: 1) a contract
document, 2) an evidence of affreightment, 3) an evidence of title, 4) a support document in accident and casualty investigations and 5) a record for regulatory compliance and security purposes.

**Contract**

As the Interstate Commerce Act (“ICA”) explains, the B/L is a basic transportation contract between shipper-consignor and carrier, and its terms and conditions bind shipper and all connecting carriers. Thus as a contract, the B/L defines contractual liabilities, rights, and remedies. In general, the carrier gives up possession at the destination only when payment for the transportation is made at the contract rate. “Battle of the forms” is a legal term used to describe situations where there are conflicting contract terms in the same transaction. Battle of the forms is especially complex in the carrier setting, since in addition to contractual agreements, motor carriers have a duty under its common carrier obligation to provide service on a reasonable request. One example of battle of the forms is when the shipper has its own standard terms and conditions in its master transportation contract and the motor carrier has different terms and conditions in its B/L. As an illustration, consider Tyco International’s request to the STB for a declaratory order that a carrier’s issuance of a B/L would necessarily equate to acceptance of Tyco’s terms and not the carrier’s B/L terms. In denying Tyco’s request, the STB decided that “the existence of a … negotiated agreement sufficient to meet the definition of contract carriage can only be determined by considering the ‘totality of the circumstances’ surrounding a particular movement”. Thus the resolution of the battle of the forms remains complicated and highly fact-specific.
One author has claimed that the growth of electronic contracting will eliminate the battle of the forms in the context of commercial click-wrap contracts or contracts where the buyer is required to “accept” the terms actively by clicking an “I agree” icon (Mootz 2008). Despite some differences between traditional click-wrap contracts and B/L, there is potential for electronic B/L and electronic contracts to help facilitate consistency checking among forms and at the very least alert parties of potential conflicting terms. The use of electronic B/L could very well go hand in hand with other efforts in standardization such as the replacement of outdated U.C.C. terms by incoterms for domestic commerce (U.S.C.I.B. 2004). Incoterms are rules developed by the International Chamber of Commerce and accepted worldwide by governments, legal authorities and practitioners for the interpretation of the most commonly used terms in international trade (I.C.C. 2000). Some examples of incoterms in road freight include EXW or ex works (title and risk pass to buyer), FCA or free carrier (obligation fulfilled when goods are delivered), and CPT or freight carriage paid (seller pays the freight for the carriage of goods to the named destination) (I.C.C. 2000). Electronic B/L could enable the automated flagging of inconsistent incoterms among different forms.

Another example of the battle of the forms is when there are conflicts in the B/Ls among different stages of a shipment. Under the 1906 Carmack amendment to ICA (“Carmack”), a receipt or bill of lading provides evidence that goods were delivered to the carrier or freight forwarder. If goods were damaged, the B/L can specify the monetary value of the cargo thus quantifying the loss or damages. Carmack ended the inconsistent results from applying a patchwork of differing state laws. Carmack states that a motor carrier, freight forwarder, or railroad is liable for the full invoice value of
lost or damaged goods unless the shipper agreed in writing to a lower limitation in return for a lower rate. As a long line of federal appellate and trial court decisions held, Carmack has dominion over the bill of lading liability and preempts local regulations (Wright 2003). The case of *KPX, L.L.C. v. Transgroup Worldwide Logistics, Inc.* (“KPX”) will be used to illustrate a potential advantage of using electronic B/L. In KPX, there was a conflict between the liability limit of $25 per pound stated on a bill of lading and of $.050 per pound on an airbill. The shipper, KPX, contracted a 3PL, Road-e-o, who contracted a freight forwarder, Transgroup, who contracted a motor carrier, Value Truck. The motor carrier driver signed the 3PL’s straight B/L, and the shipper, at the behest of the driver who did not explain the airbill’s content or its effect of reducing the limit on liability, signed the freight forwarder’s airbill. For the purposes of this article, this case illustrates conflicting B/Ls and the potential for the use of electronic B/L to avoid such pitfalls via a standardized form, master B/L, or centralized database. An example of a standard B/L is the Voluntary Interindustry Commerce Solutions Association’s Standard B/L which can be used as input to carrier EDI transactions (V.I.C.S. 2005).

**Evidence of Affreightment**

A B/L under Carmack provides evidence that goods were delivered to the carrier or freight forwarder. So another legal issue of B/L is to allow claimants (shippers) to make a prima facie case against motor carriers and freight forwarders. In other words, the B/L is conclusive evidence that the goods have been transferred to a third party acting in good faith.
Evidence of Title

Even though U.C.C. Article 7, which deals with documents of title, is pre-empted by federal legislation, it is still worthwhile to discuss it since it is largely consistent with federal legislation. The U.C.C. defines a document of title as “a record (i) that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers and (ii) that purports to be issued by or addressed to a bailee and to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.”

The aspect of B/L as a document of title only applies to negotiable B/L. As a document of title, it directs the carrier to deliver the goods to the appropriate party be it the holder, consignee, or transferee. The most recent U.C.C. revision explicitly incorporates electronic document of title. It says, “[a]n electronic document of title means a document of title evidenced by a record consisting of information stored in an electronic medium. A tangible document of title means a document of title evidenced by a record consisting of information that is inscribed on a tangible medium.”

The draft notes to the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) committee, explain the twofold impetus behind the revision as “to provide a framework for the further development of electronic documents of title and to update the article for modern times in light of state, federal and international developments” (Rusch 2002). The notes explain that “[c]ontrol of an electronic document of title is the conceptual equivalent to possession and indorsement of a tangible
document of title…. that parties may desire to substitute an electronic document of title for an already issued paper document and vice versa.” Of primary importance is the concept of control of electronic document of title. First, the concept requires that the document reliably establishes the person as “the person to which the electronic document was issued or transferred.” Second, there is only a single authoritative copy that is unique, identifiable, and outside of some exceptions, unalterable. This authoritative copy needs to be communicated to and maintained by the person asserting control. Thus the U.C.C. presents an ideal in how parties should treat the electronic B/L, but its actual reception could vary since there are divergent documentary practices among carriers, shippers, and financial institutions. The concern over the preservation of the marketability aspect of paper documents could diminish the confidence in the electronic version. Because of the greater challenge in reproducing the document of title aspect of B/L in electronic form, some have even questioned the need for negotiability for electronic B/L (Richardson 2000).

As a document of title, the B/L is also a critical component in a letter of credit (“L/C”). A L/C substitutes the credit of a bank for that of a customer, and a B/L becomes security for payment under a L/C to a bank (Xiang and Buckley 2009). A commercial L/C is a primary security mechanism that provides for the payment and financing mainly in the context of international shipping. While a standby L/C is a secondary security mechanism that is triggered only upon default and is used mainly in the context of domestic shipping. The laws concerning L/Cs include the U.C.C., the Uniform Customs and Practice for Documentary Credits and supplement (I.C.C. 2007; I.C.C. 2002), the International Standby Practices (I.S.P. 1998), and applicable case law (Weil
Two fundamental principles of L/C are independence and strict compliance. Independence means that the L/C is viewed distinctly from other related transactions (Xiang and Buckley 2009). Strict compliance means that the tender of the document must be made strictly in the manner and within the time prescribed in the credit. Some common discrepancies that can arise between a L/C and a B/L include inconsistent dates (e.g. B/L’s delivery is outside L/C’s date range), inconsistent description of goods (e.g. volume, quality), inconsistent origination and/or destination, and inconsistent party names. Such inconsistencies could be fatal since the strict compliance principle has been applied rigidly by the courts (Xiang and Buckley 2009). The strict compliance principle is also expressed in the U.C.C. which provides that “an issuer shall honor a presentation that . . . appears on its face strictly to comply with the terms and conditions of the letter of credit.” Consider the case *Beyene v. Irving Trust Co.* in which a buyer, Mohammed “Sofan”, financed the purchase of two prefabricated houses using a L/C. The B/L listed erroneously the name Mohammed “Soran” as the party to be notified by the shipping company. After the bank refused to honor the L/C based on the discrepancy between the B/L and L/C, the seller sued and lost. The appeals court held that “that misspelling of name of person to whom notice was to be given of arrival of goods was a material discrepancy that relieved confirming bank of its duty to honor letter of credit.” As in the case of conflicting terms and conditions, there is also potential for electronic documents to provide some consistency checking in the context of B/Ls and L/Cs. Since checking electronic documents, as compared to paper documents, can be automated to a great extent, there could potentially be significant savings in document checking labor and cost not to mention the avoidance of costly litigation.
Support Document

A B/L can be used in an accident investigation to verify the information recorded on the driver’s record of duty status.\textsuperscript{34} The National Transportation Safety Board reports that heavy truck accidents are significantly related to fatigue. Since the B/L lists the date, time, and location that load was picked up and dropped off, one could calculate if it is possible for a driver to stay within the hours-of-service regulations for the trip (N.T.S.B. 1995). Thus motor carriers are required to retain supporting documents such as B/L at their principal place of business for a period of 6 months from the date of receipt.\textsuperscript{35} A B/L can also be used to obtain the names, addresses, and roles of the various parties in casualty investigations (Brownlee and Magarick 2008). Since electronic documents are relatively inexpensive to store, there is potential to keep such documents longer than the regulatory time frame thus providing more sources of information for accident and casualty investigations.

The Electronic Signatures in Global and National Commerce Act (“ESIGN”) applies to any transaction in or affecting interstate or foreign commerce and preserves the rights and obligations of a signature, contract, or related record and the use of electronic signature or record in the formation of a contract.\textsuperscript{36} ESIGN allows retention requirements to be met by electronic records thus it implies that regulatory agency requirements for B/L could be met electronically.\textsuperscript{37} But if the electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties, then the electronic record could be deemed invalid.\textsuperscript{38} However in practice, different regulatory agencies have particular regulations regarding the use of electronic documents
for specific types of documents. Specifically, the FMCSA has expressed a position that “the use of electronic-based record keeping methods in a supporting documents system is preferred over traditional paper records.”\textsuperscript{39} The FMCSA proposes to allow motor carriers to use … electronic bills of lading used by customs officials in the United States and other countries … in conjunction with paper supporting documents as long as the electronic supporting documents are retained for the same period as applies to paper supporting documents, are equally accessible and reviewable by special agents as are their paper counterparts, and can be produced, within 48 hours of demand, in hard copy.” FMCSA explains that one rationale for taking this position is to keep “the requirements of the Paperwork Reduction Act of 1995” or to eliminate duplication in record keeping and reduce the information collection burden on motor carriers.” In fact, electronic documents are appearing more in regulations. For example, the FMCSA promulgated the supporting documents rule in 2004 which required any written or electronic trip document to include the driver's name or the vehicle number in order for the document to be connected with the individual driver (Spain 2008).

\textbf{Regulatory Compliance and Security}

The Department of Homeland Security ("DHS") and Customs and Border Protection ("CBP") seek to minimize safety and security risks flowing through the borders and throughout the transportation network. The main areas of concern are hazardous materials handling, biometric identification (e.g. fingerprints, palm prints, facial and iris recognition), container security, and border security (Armstrong 2006). An example of both container and border security relates to the North American Free Trade
Agreement (“NAFTA”) and the eventuality that significant number of Mexican trucks may be traveling beyond the commercial zone in the U.S. The trucking industry possesses some attributes that are attractive to terrorists such as “access, sizeable volumes, adequate kinetic energy and an open operational environment” (Donath et al. 2005). One example of the use of electronic documents in improving safety and security is the mandatory use of the Automated Commercial Environment (“ACE”) for cargo as presented in the Trade Act of 2002. Under this act and outside certain exemptions, any inbound truck must notify CBP electronically via an e-Manifest a number of pieces of information including the numbers and quantities for cargo laden board the truck and the complete name and address of the consignee as contained in the B/L. In addition to civil penalties that may arise from violations, the liability to the motor carrier and their insurer offer strong incentives for compliance with new EDI requirements. For an example of liability incentives, see In re World Trade Center Bombing Litigation. Thus motor carriers have other incentives besides increased efficiency to invest in electronic data infrastructure. A trade association also has a stake in ACE, such as the National Motor Freight Traffic Association who developed the Standard Carrier Alpha Code to identify transportation companies.

In addition to physical security concerns, another concern involves the availability of information of the destination and means of transit for shipments for third parties in the B/L. The immense amount of duplicate paperwork and the availability of such paperwork compromises security. Thus DHS and CBP are considering security improvements to control information access using EDI. Such a system could use hardware chips installed in the cargo and container (Glick 2002).
Commercial vehicle stops can sometimes involve multiple concerns such as the vehicle’s safety condition, driver compliance of rules, and conformity with cargo regulations. Such stops are much more complicated than a typical traffic stop. The use of Intelligent Transportation Systems has already been in use in several aspects of commercial vehicle operations including the Commercial Vehicle Information Systems and Networks which can perform e-credentialing, e-screening, and safety information exchange. The use of electronic B/L fits within existing schemes and could potentially further assist inspections and commercial vehicle stops. Even though some have questioned the constitutionality of random stops/searches of commercial vehicles to ensure compliance with safety regulations, the courts have held that an administrative inspection of a pervasively regulated industry may be conducted without a warrant, e.g. United States v. Delgado; United States v. Fort; United States v. Mitchell.

CONCLUSION

The electronic B/L has many potential benefits. It allows the electronic transmission of the B/L which eliminates the delay of arrival or the loss of the B/L as a bottleneck in the supply chain. It simplifies the paperwork process thus saving considerable labor costs. It takes advantage of the advances of technology for the purpose of storage, retrieval and reproduction. It improves document security by using electronic authentication. It provides standardization of B/Ls and other contracts from multiple parties that are involved with the transport of a single shipment. It improves and
simplifies regulatory compliance for records. It allows regulatory agencies to make
greater use of B/Ls for safety and security.

The issue of adopting electronic B/L in the motor carrier industry involves many
different parties on both the public and the private side. On the public side, there is the
FMCSA, CBP, DHS and a host of other related regulatory and support agencies that are
both federal and state. This does not even include the international arena where it
involves a multiplicity of nations and laws notwithstanding international conventions.
On the private side, there are manufacturers, buyers, household good consumers,
shippers, motor carriers, freight forwarders, 3PLs, trucking associations, lenders and
insurers. Many parties have similar motivations such as improving safety, security and
efficiency and to decrease liability, but many times there is the major trade off in the cost
of implementing electronic B/L. And the cost does not only involve capital and recurrent
costs associated with electronic equipment, it also involves changing company
procedures, re-training the entire staff to use electronic documents, adapting to new
insurance company policies, and adjusting to different legal liabilities.

The manager for the Customs and Facilitation Institute of the International
Federation of Freight Forwarders Associations (“FIATA”) believes that the predominant
movement should come from the private side. He says, “The issue is whether customers
(shippers) will accept electronic documents. If the customer wants a piece of paper, I
will do that, because otherwise I will lose my customer” (Freudmann 1998). Thus he
believes that the predominant factor is to gain the trust and security of customers and not
a matter of changing transportation law. However, others believe that there is an equally
important movement needed from the legal and regulatory sides. Dubovec (2006)
commented that “clear legal rules” and “established legal structure” are needed to facilitate the movement from the private side. As with any adoption of new technology in an industry, changes often occur in a piecemeal fashion until eventual uniformity is achieved.
CITATIONS AND REFERENCES

(1) List of Cases


United States v. Delgado, 545 F.3d 1195 (9th Cir. 2008).

United States v. Fort, 248 F.3d 475 (5th Cir. 2001).

United States v. Mitchell, 518 F.3d 740 (10th Cir. 2008).

(2) List of Statutes


(3) Endnotes


7. 113 Stat. 1750.


10. Scattered sections of 49 C.F.R. issued by FMCSA or its predecessors under authority provided in 49 U.S.C. 13301 or a predecessor statute.


(4) References

Armstrong, S.R. Homeland Security: Program Regulations that Affect Trucking


