

# NJ N2K Hour: Railroads

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## Conveyances and Underwriting Practices

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Underwriting

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# History of Railroads in NJ

- The origins of railroads in the State of New Jersey goes back to the 1830s.
- The first railroad that was chartered by the New Jersey Legislature was the Camden and Amboy Rail Road and Transportation Company in February of 1830.
- Another railroad company known as the Elizabethtown & Somerville Railroad was incorporated in 1831, and as it expanded over the next decade, it was purchased by the Somerville and Easton Railroad in 1849.
- Once these two railroad companies merged, the Central Railroad of New Jersey (CNJ) was formed in 1849.
- The CNJ served about two-thirds of the state and portions of Pennsylvania as well.
- The CNJ offered both passenger and freight services on several lines, and by 1864, the mainline of the Central Division extended from Newark Bay to Jersey City.

# History of Railroads in NJ (cont.)

- The CNJ also ran passenger ferry service between Elizabethport (Elizabeth, NJ) and New York City.
- In 1864, a passenger terminal was built in the Communipaw section of Jersey City, and by 1889, the Central Railroad of New Jersey Terminal replaced this passenger terminal and stood as the cornerstone of Liberty State Park in Jersey City, until it ceased operations in 1967.
- The CNJ Terminal still stands today in Liberty State Park, but it is now a tourist attraction, and is listed on the State and National Registers of Historic Places for its historical significance and architecture.
- The CNJ was later absorbed by Conrail in April of 1976 along with several other bankrupt railroad companies in the Northeastern U.S.
- At its peak, the CNJ Terminal in Jersey City was part of the largest railroad complex which operated outside of the NY Harbor and transported via ferry tens of thousands of daily commuters to Manhattan from New Jersey; also welcoming many new immigrants from Ellis Island.

# History of Railroads in NJ (cont.)

- In 1872, three of New Jersey's major transportation companies were consolidated into the United New Jersey Railroad and Canal Company (UNJ&CC).
- These existing railroad companies included the Camden and Amboy Railroad, Delaware and Raritan Canal Company, and New Jersey Rail Road and Transportation Company.
- Most of the land that belonged to the United New Jersey Railroad and Canal Company was then leased to the Pennsylvania Railroad Company.
- In 1979, the NJ Public Transportation Act (N.J.S.A. 27:25-1 et seq.) was passed to "acquire, operate, and contract for transportation service in the public interest."
- Hence, NJ Transit was officially created on July 17, 1979.
- By 1983, NJ Transit assumed operation of all commuter rail service in New Jersey from Conrail, which had been formed in 1976 through the merger of several financially troubled railroads.

# Conrail

- In 1976, the federal government formed the Consolidated Rail Corporation (Conrail), which merged the financially troubled Penn Central, Erie Lackawanna, Central Railroad of New Jersey, Lehigh Valley, Lehigh & Hudson River, Reading, and Pennsylvania-Reading Seashore Lines; and operated them under contract for the NJ Department of Transportation (NJDOT).
- Conrail became privatized in 1987, and in 1997, CSX Transportation and the Norfolk Southern Railway (NSR), had agreed to acquire the system and split it into two roughly-equal parts.
- Following approval by the Surface Transportation Board, CSX and NSR took control in August 1998, and on June 1, 1999, began operating their respective portions of Conrail.
- Conrail still exists today, but the scope of its current activities has clearly been limited by the acquisition of NSR and CSX.
- Conrail still maintains an office in Philadelphia.

# NJ Transit

- NJ Transit (NJT) is a state-owned public transportation system that operates bus, light rail, and commuter rail services throughout the State of NJ, and connects to major commercial and employment centers both within the state and from New York City to Philadelphia.
- NJ Transit Rail Operations is the rail division of NJ Transit.
- NJT now operates every passenger and commuter rail line in the state except for Amtrak; the Port Authority Trans-Hudson (PATH), the PATCO Speedline, and two SEPTA Regional Rail lines, the West Trenton Line and the Trenton Line.
- Most of the commercial rail service is centered on transportation to and from New York City, Hoboken, and Newark.
- NJ Transit also operates rail service in Orange and Rockland counties in New York under contract to Metro-North Railroad.
- In total, NJ Transit operates three light rail systems and twelve commuter rail lines.

# Eminent Domain

- Aside from the State of NJ, the power of eminent domain also extends to its agencies, departments, counties and municipalities, as well as any public utilities and railroads within the state.
- N.J.S.A. 48:3-17.6 provides that railroads and other public utilities may take or acquire property by condemnation, so they can acquire any lands that are necessary for its operation.
- N.J.S.A. 48:3-17.7 further states that a public utility may not exercise this condemnation power unless the property is reasonably necessary for the service, accommodation, convenience or safety of the public, and the taking of such land or other property or interest is not incompatible with the public interest and would not unduly injure the owners of private property.
- N.J.S.A. 48:12-35.1 establishes additional conditions for the condemnation of property by railroads, and states that a railroad may take land by condemnation “as exigencies of business may demand.”

# Eminent Domain (cont.)

- In the case of *Norfolk Southern Railway Company v. Intermodal Properties, LLC*, **215 N.J. 142 (2013)**, the New Jersey Supreme Court rejected the challenge of property owner Intermodal to the taking of its property by Norfolk Southern, thereby affirming the authority of Norfolk Southern to acquire by condemnation the private property to expand railroad facilities.
- The plaintiff Norfolk Southern Railway Company owned and operated Croxton Yard, a large Intermodal freight facility.
- In 2004, Norfolk Southern wanted to expand the yard by acquiring three adjacent properties, including one that was owned by the defendant Intermodal Properties, LLC.
- Intermodal rejected Norfolk Southern's offers, and Norfolk initiated condemnation proceedings through a petition filed with the New Jersey Department of Transportation, which then referred the case to an Administrative Law Judge (ALJ).



# Eminent Domain (cont.)

- Intermodal wanted to use the property as a parking facility for the Secaucus Junction passenger rail station, claiming that the use of a parking facility was more compatible with the public interest.
- However, the ALJ precluded Intermodal from invoking the prior public use doctrine because the property was not being used for a public purpose and was not zoned to permit a parking facility.
- Also, the ALJ disagreed with Intermodal's contention that the statutory provision permitting a taking only "as exigencies of business may demand" required the railroad to demonstrate an urgent need.
- The NJ Supreme Court found that Norfolk Southern's proposed use met the requirement of N.J.S.A. 48:3-17.7 that the taking be "not incompatible with the public interest."

# Bankruptcy

- Railroad bankruptcies are exclusively governed by the railroad reorganization provisions under the U. S. Bankruptcy Code, Subchapter IV, 11 U.S.C. Sections 1164 – 1174.
- The railroad reorganization provisions reflect the general flexibility of chapter 11 bankruptcy to promote a wide variety of restructuring options for railroad companies, including liquidation.
- In railroad bankruptcies, a trustee is always appointed and the “public interest” is factored into the court’s decisions.
- In the case of railroad bankruptcies that occurred with many railway companies in NJ, the railroad properties were conveyed by the bankruptcy trustees of these various railroads to Conrail.
- The issue with these conveyances is that they are considered to be broad conveyance deeds because they generally lack a metes and bounds legal description, and also have exception and reservation clauses within the Deed.

# Bankruptcy (cont.)

- If a railroad company went bankrupt, new corporations were created to hold the remainder of the railroad's property which was not conveyed to Conrail.
- The conveyance would be made with the recording of a broad conveyance deed and a copy of the Consummation Order from the bankruptcy court in each county where the railroad company had still retained property.
- These broad conveyances were typically done free and clear of all liens and encumbrances.
- Per N.J.S.A. 46:16-3, if railroad property is located in more than one county, then any leases or deeds of conveyance of any railroad made or to be made, shall and may, when acknowledged or proved and certified as provided by this title, be recorded in the office of the secretary of state, in a book by him to be provided for that purpose.
- The deed must be filed with the Secretary of State's office in Trenton.

# Railroad Regulation

- In NJ, railroads are regulated by the Board of Public Utilities and the NJ Department of Transportation (NJDOT) at the state level, and the Surface Transportation Board (STB) at the federal level.
- A rail line is abandoned only when the railroad has applied to the STB for abandonment authorization; the STB has issued an order authorizing abandonment of the line; and the railroad has notified the STB that it has consummated the abandonment authorization.
- Per N.J.S.A. 48:12-125.1, when STB approval is required for the abandonment of a rail line, a 90 day right of first refusal exists in favor of the State of New Jersey, and the county and municipalities in which the land is located.
- The STB always posts information about railroad abandonments on its website and has a searchable database containing full text records of filings for purchases of abandoned railroad properties, and decisions that have been administered by the STB.

# Rails to Trails Program

- Abandonment is made official when (1) the STB has issued an order authorizing abandonment of the line and (2) the railroad has notified the STB that it has consummated the abandonment authorization.
- The passage of the Trails Act of 1983 helped create the STB's Rails to Trails program, which seeks to "preserve shrinking rail trackage by converting unused rights-of-way to recreational trails."
- Railbanking is also defined in the Act as a voluntary agreement between a railroad company and a trail agency, which enables the agency to use an out-of-service rail corridor as a trail until a railroad might need the corridor again for rail service.
- Railbanking has been responsible for preserving thousands of miles of rail corridors across the country, and since the railbanked corridor is not considered abandoned, it can be sold, leased or donated to a trail manager without reverting to adjacent landowners.

# Board of Public Utilities

- The New Jersey Board of Public Utilities (NJBPU) is a state regulatory authority with a statutory mandate to ensure safe, adequate, and proper utility services at reasonable rates for customers within the state.
- In 1907, the New Jersey Board of Railroad Commissioners was created and empowered to have general supervision of all railroads operating in New Jersey.
- In 1910, the Board of Railroad Commissioners' name was then changed to the Board of Public Utility Commissioners, and its duties were expanded by extending its regulatory jurisdiction over all public utilities.
- The following year, Governor Woodrow Wilson signed an act into law creating the Department of Public Utilities, which later became known as the NJBPU.
- The Board's purpose was to provide essential services to New Jersey, which at the time included railroads and interstate commerce, as well as utility services, and has now further expanded in regulating critical services such as natural gas, electricity, water, and telecommunications and cable television.

# NJ Department of Transportation

- The New Jersey Department of Transportation (NJDOT) is a state agency which is responsible for transportation issues and policy in New Jersey.
- These responsibilities include the maintenance and operation of the state's highway and public road system, planning and developing transportation policy, and assisting with rail, freight, and intermodal transportation issues.
- NJDOT primarily focuses on freight rail transportation and coordinates with the Class 1 railroads, Regional and Short Line railroads.
- The Department also coordinates with NJ TRANSIT for the provision of statewide transportation and passenger rail service.
- The NJDOT is also a member of the Northeast Corridor Commission, which was established by the U.S. Congress in 2010 to promote mutual cooperation and planning among owners and operators on the Northeast Corridor (NEC) rail line and to further advise Congress on Corridor policy and any investment needs.

# Surface Transportation Board

- The Surface Transportation Board (STB) is an independent federal agency that serves as an adjudicatory board.
- The STB was created in 1996 after the Interstate Commerce Commission (ICC) was abolished.
- It absorbed the regulatory powers relevant to the railroad industry which was previously regulated by the ICC.
- The STB has broad economic regulatory oversight of railroads in the United States, and primarily regulates and decides disputes involving railroad rates, railroad mergers or line sales, and certain other transportation matters.
- The Board consists of five members, appointed by the U.S. President with the advice and consent of the Senate for 5-year terms.
- While most of the Board's work involves freight railroads, the Board also has certain responsibilities with respect to passenger rail matters as well.



# Railroad Classes

- Railroad classes are the system by which freight railroads are designated in the United States.
- These railroads are assigned to Class I, II or III according to annual revenue criteria originally set by the Surface Transportation Board in 1992.
- The thresholds have been adjusted for inflation since 1992.
- Class I railroads are railway carriers designated by the STB that earn more than \$250 million in revenue per year.
- This number has been adjusted for inflation and now stands at \$943,898,958 as of 2021.
- Class II railroads are railway carriers designated by the STB that earn between \$20 million and \$250 million in revenue per year, with an adjusted inflation rate between \$42,370,575 and \$943,898,958 as of 2021.

# Railroad Classes (cont.)

- Class III carriers are railways with less than \$42,370,575 in revenue as of 2021.
- Class I railroads are the largest rail carriers in the United States, and there are a total of six Class I Railroads operating in North America that focus primarily on transporting freight and cargo.
- BNSF Railway is the largest Class I railroad by revenue, miles of track coverage, and count of employees.
- A Class II railroad in the United States hauls freight and is mid-sized in terms of operating revenue.
- Class III railroads are typically local shortline railroads which serve a small number of towns and industries or typically haul cars for one or more railroads.
- These Class III railroads had once been part of branch lines of larger railroads or even abandoned portions of main lines.

# Railroad Taxes

- Railroads are taxed in accordance with the Railroad Tax Law of 1948.
- This law imposes both property and franchise taxes.
- Pursuant to 54:29A-7, Class I and Class III railroad property is tax exempt, but Class II railroad property is subject to state taxes.
- However, Class II railroad property is exempt from municipal taxes and local assessments.
- Railroad properties that are subject to state taxes are taxed at the rate of \$4.75 for each \$100.00 of the true value of such property for the year 1967 and each year thereafter.
- NJ Transit is also tax exempt since they are a state government agency.

# Railroad Taxes (cont.)

- Pursuant to N.J.S.A. 54:29A-13, all railroads are subject to a franchise tax.
- The tax shall be assessed at the rate of 10% upon the net railway operating income of the preceding year, computed and allocated in the manner hereinafter provided, of each system and of each railroad not part of a system, provided, however, that the minimum franchise tax payable by any taxpayer shall be \$100 as to taxpayers having total railway operating revenues of the preceding year allocated under section 14 not in excess of \$1 million and \$4,000 as to all other taxpayers.
- Also, all railroad properties that are not used for railroad purposes are subject to local municipal taxes and assessments.
- Pursuant to N.J.S.A. 54:29A-4, all property of a railroad company that is not used for railroad purposes shall be assessed and taxed by the same assessors, in the same manner and at the same rate as the taxable property of other owners in the same taxing district.



# Underwriting Practices

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# Railroad Property Conveyances

- Typically, a conveyance of real estate to a railroad company is often intended to vest title or interest as an easement rather than fee simple title, depending on the language used in the Deed instrument.
- Also, railroad companies which have received their right-of-way by land grants from the federal government by congressional act are subject to reversionary interests.
- If the railroad abandons, sells, or ceases to use the right-of-way for a railroad, the property may revert back to the federal government.
- If we come across a Deed in the chain of title which lacks any actual consideration or contains a reversionary clause, it is likely that the conveyance may have been intended as an easement as opposed to fee simple title.
- Also, when insuring a railroad property, any reversionary interest found in the chain of title must be raised as an exception to title.

# Underwriting Requirements

- In order to insure railroad property, a certified copy of the deed must be recorded with the County Clerk or Register, with the original Deed to be filed in the Secretary of State's Office in Trenton.
- The deed also must reference the land to be insured.
- Most deeds for railroad properties will not include a metes and bounds legal description, so we may need to rely on a railroad property map before insuring title.
- Also, please note that most deeds for railroad properties may include exceptions and reversionary rights, so exceptions to title must be raised for any reversionary clauses within the Deed.
- Pursuant to N.J.S.A. 48:2-1 et seq. and N.J.S.A. 48:3-7, approval is typically required by the NJDOT or NJBPU for railroad conveyances.

# Underwriting Requirements (cont.)

- If approval for the conveyance is not required by the NJDOT or NJBPU, then proof must be provided to the insurer confirming same.
- Per N.J.S.A. 48:3-7, approval of the board shall not be required to validate the title of the United States, State, or any county or municipality or any agency, authority, or subdivision thereof, to any lands or interest therein heretofore condemned or hereafter to be condemned by the United States, State, or any county or municipality or any agency, authority, or subdivision thereof, for public use.
- However, please exercise caution when insuring railroad property that does not require government approval, and follow up directly with the NJDOT or NJBPU to confirm that no additional requirements are necessary.
- N.J.S.A. 48:3-7 specifically provides that a sale, lease, or mortgage made without BPU approval “shall be void.”



# STB Approval

- Pursuant to 49 U.S.C. §§1 et seq., federal approval is also required from the STB for railroad conveyances, unless the railroad line has been abandoned in accordance with 49 U.S.C. § 10903.
- If STB approval is not obtained for the abandonment of a rail line, then this may raise a question about the ability of the State, county, or municipality to exercise their respective rights of first refusal.
- If STB approval for abandonment is required, then proof of compliance must be provided regarding the 90 day notice provisions of N.J.S.A. 48:12-125.1 et seq. with respect to the State of NJ, the county, and the municipality, and further proof will be required that neither the State, nor the county or municipality has exercised its statutory right of first refusal.

# STB Approval (cont.)

- If a railroad makes a self-serving determination that STB abandonment approval is not required, then the title insurer must take steps and confirm that the railroad's position is correct.
- Please do not assume that STB approval is not required based on the railroad company's assertion.
- There have been multiple instances with specifically Conrail failing to obtain STB approval prior to the abandonment of a rail line.
- Extensive litigation occurred particularly from Conrail's abandonment of the Harsimus Cove line in Jersey City, which led to several lawsuits between Conrail and Jersey City.

# STB Approval (cont.)

- Conrail had abandoned the rail service and removed the tracks without seeking STB approval, and later sold the embankment over which the tracks were originally laid to a developer.
- However, the developer subsequently had issues securing land use approvals from the municipality and other community groups that wanted to transform the embankment into a state or county park.
- The lawsuits concluded that even though STB is not empowered to determine whether a railroad track is a “line” or a “spur” for abandonment purposes, a railroad company cannot unilaterally transform a main line into a spur by discontinuing service and then removing the tracks, which had occurred with Conrail.

# Conveyances from State Authorities and Other Entities

- If we are insuring a conveyance from a state authority such as the NJDOT or NJ Transit, then proof of statutory compliance is required.
- Per N.J.S.A. 27:25-5.k, NJ Transit is specifically permitted to sell or convey real property, so from an underwriting standpoint, proof is required that the Deed to be insured is executed in accordance with the statutory provisions.
- Conveyances from railroad entities outside of Conrail and state authorities must be handled on a case by case basis, and caution must be exercised when insuring a conveyance from a still-existing bankrupt entity.
- When handling these conveyances, proof of statutory compliance is still required and federal and state approvals from NJDOT, NJBPU, and STB still apply.

# Liens and Encumbrances

- Per N.J.S.A. 27:25-18, property owned by NJ Transit is exempt from all claims of creditors and from levy, execution or attachment.
- As for mortgages, conveyances which were made pursuant to the Consummation Orders of the Bankruptcy Court should have been made free and clear of liens, so typically any pre-bankruptcy mortgages that are found of record can be omitted pursuant to the Consummation Order in the chain of title.
- Judgment liens against railroad companies are typically disposed of via an indemnity agreement from the railroad company or entity.
- However, please consult your underwriter for further guidance before omitting any mortgages or judgment liens.

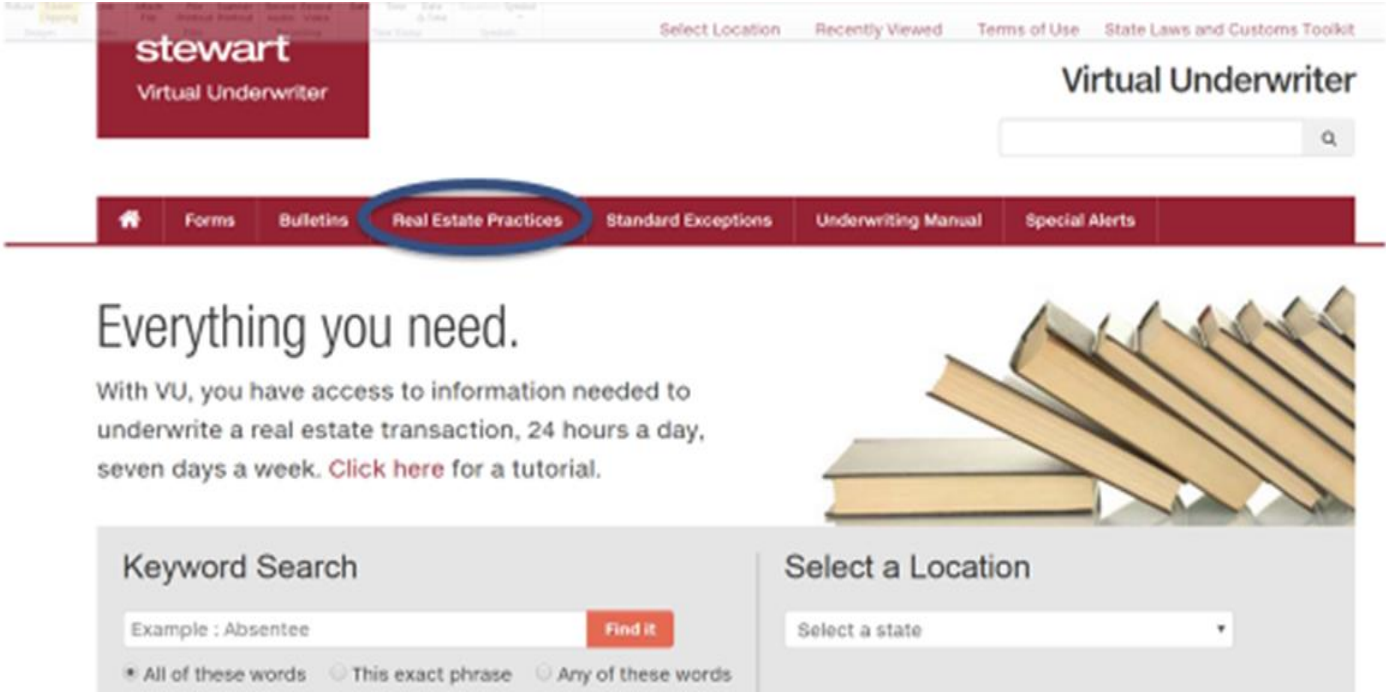
# Rights of Adjoining Owners

- Railroad companies often enter into easements or license agreements with adjoining landowners, which may be unrecorded.
- These easements or license agreements may take the form of sidetrack or grade crossing agreements and may also grant rights to either the railroad or to the adjoining landowner or to both.
- When insuring a railroad property or conveyance, please be sure to add an exception for rights of adjoining owners under any easement or license agreements.
- Also, if our property is located adjacent to a railroad line or tracks, an exception must be added for any rights of way for railroad, switch tracks, spur tracks, railway facilities, and other related easements or licenses, if any, on and across the Land.

# Conclusion and Wrap-Up

- In NJ, railroads are regulated by the Board of Public Utilities and the NJ Department of Transportation (NJDOT) at the state level, and the Surface Transportation Board (STB) at the federal level.
- Governmental approval and statutory compliance is required for all railroad conveyances, unless proof is provided to the insurer that approval is not specifically required from the NJDOT, NJBPU or STB.
- Please exercise caution when reviewing deeds in the chain of title involving railroads, as any exceptions or reversionary interests within the Deed must be raised as exceptions to title.
- Lastly, please consult your underwriter for guidance before omitting any mortgages or judgment liens and include exceptions for rights of adjoining owners and any rights of way for railroads located adjacent to our property.

# www.VUwriter.com



The screenshot shows the Stewart Virtual Underwriter website. At the top left is the Stewart logo with the text "Virtual Underwriter". To the right are navigation links: "Select Location", "Recently Viewed", "Terms of Use", and "State Laws and Customs Toolkit". Below this is a search bar with a magnifying glass icon. A dark red navigation bar contains several menu items: a home icon, "Forms", "Bulletins", "Real Estate Practices" (circled in blue), "Standard Exceptions", "Underwriting Manual", and "Special Alerts". The main content area features the heading "Everything you need." followed by the text: "With VU, you have access to information needed to underwrite a real estate transaction, 24 hours a day, seven days a week. [Click here](#) for a tutorial." To the right of this text is an image of several books stacked. Below the text are two search sections: "Keyword Search" with an input field containing "Example : Absentee", a "Find it" button, and radio button options for "All of these words", "This exact phrase", and "Any of these words"; and "Select a Location" with a dropdown menu labeled "Select a state".



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Please mark your calendars for our:

**July N2K HOUR**

**Creditor's Rights/Fraud Transfers**

Tuesday

July 9th

11:00AM