



Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: Mayor Sam Liccardo
Councilmember Sergio Jimenez
Councilmember Raul Perez
Councilmember Dev Davis
Councilmember Maya Esparza

SUBJECT: UNION PACIFIC PROPERTY

DATE: May 30, 2019

Approved

Date

5-30-2019

RECOMMENDATION

- A. Direct the City Attorney to explore the following legal avenues for action against Union Pacific Railroad (UPRR), and report back to Council in closed session. The Council should be presented with options relating to potential lawsuits or claims—filed in a court of appropriate jurisdiction, or before the federal Surface Transportation Board—alleging:
1. Nuisance, or other state-law claims relating to laws of general applicability, against UPRR, for:
 - a. its failure to prevent trespass on the UPRR property, which would obviate the need to use train horns when utilizing the tracks at nighttime; and
 - b. its failure to properly maintain the UP property free from blight, trash, and graffiti
 2. Violations of NEPA or other federal environmental laws relating to night-time operations or lack of basic maintenance, or failure to maintain the UPRR property free from blight, trash, and graffiti;
 3. Unfair business practices, nuisance, and other state law claims against every customer of UPRR that benefits from operations along the corridor (*cf. Hi-Tech Transportation v. NJ*, 382 F.3d 295 (3rd Cir. 1994); *SEA3, Inc. Petition for Declaratory Order*, FD 35853 STB, served March 17, 2015 (both finding that federal preemption does not apply to lawsuits against customers of a federally regulated rail company)).
 4. Determination of whether UPRR has a franchise or easement to use every public street that intersects with its line for crossing, utilizing searches of historic title records. In particular, there may be historic basis for the belief that some City streets located near Diridon station do not have any recorded easement or franchise for UPRR's use;
 5. UPRR's failure to abide by federal Constitutional and state law requiring prior notification of homeless residents & offers of relocation to housing prior to encampment abatement on Bassett Street on May 9, 2019, among other occasions; and

6. Any other viable legal theories or actions that the City Attorney's Office might unearth in its legal research.

B. Direct the City Manager to bring to Council for the next available hearing of General Plan amendments a proposal to change the land use designation of the UPRR corridor to public open space for purposes of future rail-to-trail conversion. Such a change could facilitate a recreational trail connecting the Guadalupe River Park with Downtown neighborhoods.

DISCUSSION

1. Nighttime Operations

In the past year, UPRR has made a business decision to conduct rail operations during nighttime hours, something the company had not done in several years. On each trip, the loud and repeated blaring of train horns disturbs thousands of families attempting to sleep in their Downtown neighborhoods, stretching from Vendome and Hensley through Japantown, all the way to the South Bay Mobile Home Park.

Under Federal Railroad Administration regulations, trains operating at night must blow their horn at a volume between 96 and 110 decibels. Ample national studies demonstrate that level of noise to pose health risks to those exposed, from increased chance of heart attacks in adults to developmental delays and diminished learning in children.

It appears that that the nighttime culprits consist of one UPRR "job" (a locomotive and crew) hauling freight and empty cars to Watsonville and Salinas (the "Salinas job"), and at least two nighttime jobs that run freight through Downtown San Jose from Mission Bay (the "Mission Bay jobs"). Previously, UPRR customers such as Graniterock have routinely depended upon daytime delivery of loads to transport concrete, asphalt, and recycled aggregate from its quarry on Berryessa Road to Watsonville.

On May 11, 2019, Congresswoman Zoe Lofgren and the Mayor had a phone call with UPRR CEO Lance Fritz, to describe the plight of thousands of our residents. Mr. Fritz explained that UPRR switched to nighttime operations "to create a service product that is more appealing to our customers." The Mayor told Mr. Fritz that UPRR's longest-served customer on the line, Graniterock, routinely depended on daytime operations, and had expressed no specific desire for nighttime transport. (Specifically, in an April 19, 2019 letter, Graniterock CEO Tom Squeri insists that the change to nighttime operations "was not done at our suggestion or request. There is no advantage to Graniterock to the time—daytime vs. nighttime—deliveries."). When pressed to identify which customers requested nighttime service, Mr. Fritz demurred.

In fact, UPRR has engaged in this shift to nighttime hauling as part of a nationwide cost-cutting plan to increase the efficient utilization of its rolling stock and labor. Last year, UPRR's Executive Vice President of Marketing, Kenny Rocker, publicly reported that since the strategy was implemented, "overall operating inventory has been reduced by 10 percent, car velocity is up 7 percent, and dwell [time] is down 10 percent, all of which indicate we're moving your freight faster." As part of that plan, the company reported to its employees in February it would cut its workforce by about 250 people, and "furlough" (a euphemism for "temporary layoffs") 450 mechanics, while idling 1,000 locomotives nationally. UPRR said the cuts were necessary to improve "efficiency and productivity."

Our discussion with Mr. Fritz and other UPRR executives revealed no inclination to accommodate the reasonable concerns of Downtown residents to quiet enjoyment of their homes, and to their undisturbed sleep. He merely suggested that the City implement a “quiet zone” at local taxpayer expense, requiring the buildout of several millions in infrastructure to (improbably) prevent trespass on their own UPRR property.

While San José has several “quiet zones” of their own, their implementation appears far from cheap—likely costing several millions of dollars, borne by local taxpayers. We have seen mixed evidence about the actual safety of quiet zones; January 2000 study by the Federal Railroad Administration found a 62-percent increase in accidents at crossings where train horns were halted, while FRA statistical studies in 2011 and 2013 demonstrated no such additional risk. We have to know more before deciding that local taxpayers should pick up the tab for UPRR’s exploitative business decisions.

2. Neglect of Obligations to Address Blight, Graffiti, Trash, and Trespass

For many years, UPRR’s neglect of its obligations to abate nuisances and to prevent trespass on its rail lines has earned it the deep enmity of residents living in neighborhoods surrounding its infrastructure.

Over the course of three years, residents near Bassett Street and Japantown complained on more than 60 occasions about noise, trash, and other impacts from encampments on the UPRR line, to which the company failed to respond. UPRR’s failure to maintain the UPRR line along Monterey Road continues to bring many complaints each week to the offices of Councilmembers Maya Esparza and Sergio Jimenez. Numerous business along that line—including SIMs Metal, Off-Sites Records Management, and Dan Caputo Company—have spent hundreds of thousands of dollars on fencing and blight abatement. UPRR has an inactive line near Alma Ave that invites encampments and an astonishing amount of garbage. The UPRR line on Monterey Rd south of Capitol Expressway to Morgan Hill is riddled with illegal dumping ranging from furniture to construction debris. Residents submit requests for service to UPRR that are often unanswered while the trash sits next to the railway for months at a time. Encampments along UPRR property pose a health and safety hazard for our residents—housed and unhoused. The conditions of UPRR property deteriorates the quality of life for our residents and is unacceptable.

In the rare moments when UPRR has made even a modest assurance to assist with the maintenance of its property, it has ultimately backed down on its commitment. Two years ago, for example, the UPRR promised to clean the ever-graffitied train trellis over Highway 101 near Old Bayshore Highway, and Caltrans accommodated the work by closing the freeway. Two hours before the work was scheduled to begin, UPRR inexplicably declined to participate. The City of San José spent \$30,000 to abate the graffiti in UPRR’s absence. Last year, when UPRR committed to engage in a Memorandum of Understanding with the City on its maintenance responsibilities, City staff endeavored repeatedly to engage the company to craft the agreement. According to UPRR officials in March, the company had not even assigned an attorney to perform any work on the MOU, which continues to languish without progress.

UPRR demonstrates neglect not seen among other rail corridor owners. A palpable example of the distinction between UPRR’s conduct and that of others can be seen along the Caltrain corridor. The Caltrain JPA owns and maintains their corridor from Diridon to Tamien Station in good condition,

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while UPRR owns the heavily blighted line south of Tamien, providing a stark contrast between the two operators.

Without a meaningful change in UPRR's neglect of local communities and our laws, we have few options but to seek legal recourse.

Brown Act Disclaimer

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