



News and information for members of the Association of United States Postal Lessors

When the USPS Holds Over After Lease Expiration

By: Mark Karolczyk, Director of Operations

For post office lessors, the issue of “holdover” is vexing. A holdover occurs when a lease expires but the USPS continues to occupy the property after the lease expiration. Normally, the reason for a holdover will be that the USPS and the lessor have not been able to negotiate and agree upon an extension before the expiration of the lease.

Because the USPS is an agency of the United States government, courts do not normally allow lessors to evict the USPS when the USPS holds over in leased buildings. Instead, the general rule courts follow in holdover disputes is that the USPS is required to pay a lessor a fair market value rental amount during a holdover, and, except for the new fair market rent, the terms of the expired lease continue to govern the USPS’s occupancy.

Obviously, a lessor that ends up with the USPS holding over in a building faces uncertainty. Although the USPS would be required to pay a new fair market value rental amount during the holdover, the lessor would still have to do the necessary research to determine the fair market rental amount. And the USPS would need to agree with the lessor’s determination. If the USPS did not agree with the lessor’s determination of the fair market rent amount, a Board of Contract Appeals claim could be required to litigate the matter.

With regard to the fair market rental to be paid by the USPS during a holdover tenancy, a recent determination of the USPS Board of Contract Appeals (the “BCA”) provides some leverage to postal lessors. In *Nationwide Postal Management v. United States Postal Service*, the USPS Board of Contract Appeals (the “BCA”) provided some clarity regarding the issue of fair market value rent during a USPS holdover. The *Nationwide* case was originally brought by an AUSPL member and was decided in May of 2019. **In *Nationwide*, the BCA decided that USPS holdovers create special risks for postal lessors, and the fair market value rent the USPS pays during a holdover should therefore include a premium to compensate the lessor for the extra risk.**

The basis of the BCA’s ruling in *Nationwide* is that, when the USPS holds over in a building, the lessor suffers uncertainty regarding his or her property. The uncertainty arises because the lessor cannot evict the USPS but the USPS can choose at any time to terminate the holdover and vacate the building. Because of the extra risk to the lessor from such uncertainty, the BCA held in *Nationwide* that a true fair market value rent under those circumstances must include a risk premium over and above the fair market value rent that would be paid under a binding lease contract. In *Nationwide*, the amount of the risk premium was an additional thirty percent.

The extra leverage the *Nationwide* case gives lessors is that the USPS now knows that holding over will not only involve paying a fair market value rent during the holdover. It will also mean paying a premium to compensate for the lessor’s extra risk. That gives the USPS a strong incentive to agree upon a lease renewal instead of holding over after lease expiration.

Some lessors have ended up in holdover situations because they did not want to renew using the new



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Continued from page 1

USPS lease forms. They sought to negotiate the lease forms with the USPS and ended up in holdover when negotiations broke down and a lease expired. Such a lessor would accept fair market value rent (which now includes the risk premium described above) during the holdover, and the other terms of the lease would remain as they were before the lease expiration.

However, such a strategy creates risk for the lessor and should only be considered by a lessor that is sophisticated and able to evaluate the risks. For example, a lessor with a mortgage would not want

to allow a lease to expire and rely upon a holdover. Doing so might give the lessor's lender justification to require immediate repayment of the full amount of the lessor's loan.

In addition, in a holdover situation, the USPS is not bound to stay in a building for any particular length of time. Therefore, a lessor in a holdover situation accepts a very real risk that the USPS might find another location, terminate the holdover tenancy and leave the lessor's building. Most postal lessors will no doubt prefer the certainty of leases that bind the USPS to lease their buildings for definite terms.

As illustrated above, the holding in the *Nationwide* case provides postal lessors with a basis to request extra compensation if the USPS holds over in their buildings. However, holdovers involve extra risk for lessors and should generally be avoided. For lessors, the best use of the *Nationwide* holding is as leverage in negotiations for acceptable lease renewals. Because the USPS will want to avoid paying the extra rent premium called for in *Nationwide*, it will have an incentive to negotiate a mutually acceptable lease renewal for a building it wants to continue to occupy.

DID YOU KNOW?

1. When a lessor inherits a postal facility, the facility normally comes with a lease in place. The terms of the lease must be complied with until the next renewal of that lease, or until a new lease is written.
2. New Owners of postal facilities, whether through purchase or inheritance, need to inform the USPS of the change in ownership. Change of Ownership forms can be found on the AUSPL website under the Members Only section.
3. According to most USPS leases, Renewal Options must be exercised more than 30 days prior to lease expiration. After that, a Renewal Option that has not been exercised is no longer valid.



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Association of United States Postal Lessors

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Gutters, Downspouts, Scuppers and Roof Drains

By: Sandra Lindsay

Maintaining the drainage components of the roof system is critical to the longevity of those components and to the profitability of a lessor's investment. Regular maintenance of gutters, downspouts, scuppers and roof drains will help lessors avoid future costly repairs.

Gutters channel water from a peaked roof to a downspout, which then directs the water away from the structure. To be fully effective, gutters must be free of debris. Failure to remove debris may have expensive consequences, including rotting fascia boards, roof damage, insect and pest infestation, damage to interior walls and ceilings, landscape erosion and foundation issues. Flat roofs have scuppers or roof drains to empty water from roofs. Clogged scuppers or roof drains can lead to ponding water, roof leaks, ceiling damage, and even structural damage.

Common maintenance includes removing debris and sealing broken joints. Gutters that have pulled away from the eaves or have rust holes need to be reattached or patched. Gutter replacement is indicated when there are a large number of repairs to be made, when gutters are sagging or when there are dirt channels or pooling water in the gutters. Prior to replacement, consider local regulations as well as USPS requirements regarding the size and type of gutters.



Sieves over drains collect debris and should be cleaned often.

Gutters by the numbers:

- 2 - Minimum number of times annually to clean and inspect gutters. Local conditions may require more.
- 3", 4", 5" and 6" - Available widths of gutters.
- 10 years - Average lifespan for heat tape.
- 20 years - Average lifespan for gutters – dependent on climate and nearby landscaping.
- \$.50 to \$1.50 - Average gutter cleaning cost per linear foot.
- \$3 - \$5 - Approximate replacement cost for vinyl gutters per linear foot.
- \$4 - \$9 - Approximate replacement cost for galvanized gutters per linear foot.
- \$15 to \$25 - Average fascia replacement cost per linear foot.
- \$20 to \$30 - Average soffit replacement cost per linear foot.

Heat tape can prevent damage caused by snow and ice build-up. Many post offices are designed with electrical circuits to power heat tape. Make sure the postmaster knows about the heat tape and where to power it on and off.

Scuppers on buildings with flat roofs need to be clear of debris and firmly attached to downspouts that direct water away from the foundation. Some flat roof designs include roof drains that guide water into the internal plumbing of the building, or into a downspout concealed inside the wall. Sieves over these drains collect debris and should be cleaned often to prevent clogging and ponding of water that has nowhere to go.

A wide variety of gutter cleaning tools are available to help with the messy task of cleaning gutters. Common examples are vacuum attachments, leaf blowers, power sprayers, a rotary system with brushes and a digital camera showing the inside of the gutter, and even a gutter cleaning robot that travels down the gutter on its own. All these tools can improve the cleaning experience.

Gutter guards keep large debris out while allowing water to pass into the gutter. The many types of guards to choose from include screens, mesh, foam fillers, hoods, and micro mesh.

Unique to postal facility owners is the issue of gutter damage caused when delivery trucks hit gutters. Responsibility for these repairs belongs to the truck owner. However, when damage happens outside of business hours and the driver leaves unseen and with the damage unreported, responsibility will normally fall to the owner of the building. Insurance proceeds (less the applicable deductible amount) should cover this type of repair.

Regular maintenance of roof drainage systems will lead to fewer notices from EMCOR and a more profitable investment.



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While we at AUSPL continue to plan for a conference in 2021, we are aware that large gatherings may continue to be ill-advised. We will keep the membership informed of changes in plans. In the meantime, keep the date open, as we look forward to resuming the annual conferences.

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