United States Court of Appeals
For the First Circuit

No. 19-1161

MONTREAL MAINE & ATLANTIC RAILWAY, LTD.,

Debtor.

ROBERT JAMES KEACH, Estate Representative of Post-Effective Date Estate of Montreal, Maine, and Atlantic Railway, Ltd.,

Appellant,

v.

NEW BRUNSWICK SOUTHERN RAILWAY COMPANY LIMITED; MAINE NORTHERN RAILWAY COMPANY,

Appellees.

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

[Hon. Peter G. Cary, U.S. Bankruptcy Judge]

Before

Torruella, Thompson, and Barron,
Circuit Judges.

Robert J. Keach, with whom Lindsay Z. Milne and Bernstein, Shur, Sawyer, & Nelson, P.A. were on brief, for appellant.
Alan R. Lepene, with whom Thompson Hine LLP was on brief, for appellees.

March 10, 2020

BARRON, **Circuit Judge**. This case arises out of the 2013 petition for bankruptcy that the Montreal Maine & Atlantic Railway, Ltd. ("MMA") filed in the United States Bankruptcy Court for the District of Maine. The dispute concerns whether priority status should be given to certain claims that creditor railroads filed with the Bankruptcy Court. The creditor railroads in these claims sought to recover their share of the payments that the MMA was to collect for charges that had been billed to customers that had shipped freight on routes that spanned rail systems that were owned at the time by, respectively, the MMA and the creditor railroads.

The creditor railroads argued that, because the MMA incurred the debt for their share of these payments so close in time to the MMA's bankruptcy, their claims qualified as what are known as "Six Months Rule" claims under 11 U.S.C. § 1171(b) of the Bankruptcy Code and so must be paid in full before other claims. See generally Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 979 (2017) (explaining bankruptcy priority rules). The Bankruptcy Court and the Bankruptcy Appellate Panel ("BAP") agreed. We now affirm.

I.

The debtor in bankruptcy is the MMA. For more than a decade, the MMA owned and operated a rail system that stretched throughout northern New England and into the Canadian provinces of Québec and New Brunswick.

The creditor railroads are the New Brunswick Southern Railway Company Limited and the Maine Northern Railway Company (collectively, "the Irving Railroads"). While the MMA's rail system was operating in New England and Canada, the Irving Railroads owned and operated their own rail systems, which operated in Maine and New Brunswick and were able to connect with the MMA's.

The Irving Railroads and the MMA each used their own locomotives and tracks to haul freight along routes that spanned these interconnected rail systems. As a result, the MMA and the Irving Railroads needed a means to coordinate the payments that they each would be owed for the charges that customers would be billed for shipping freight via these rail systems.

The MMA is a participant in the Interline Settlement System ("ISS"). The ISS is a centralized clearinghouse that many railroads across the country use to process payments for the charges that are made to customers that ship freight between interconnected rail systems. These payments are often referred to as interline payments.

Under the ISS, the railroad that owns the rail system on which the freight traffic originates bills the entire freight charge to the customer that ships the freight. The billing railroad does so even though that charge is based in part on the fact that the freight has traversed for some part of its journey a rail system that the billing railroad does not own. To account

for this fact, the ISS provides that the billing railroad will, within a certain period of time, pay the appropriate share of the payment for that freight charge to each railroad that owns one of the interconnected rail systems through which the freight traveled.

The problem that the Irving Railroads and the MMA encountered was that, unlike the MMA, the Irving Railroads did not participate in the ISS. That was so in large part because of the resources and expertise that the Irving Railroads would have needed to participate in the ISS and in part because the Irving Railroads did not want to duplicate the efforts of the MMA and other connecting railroads that were ISS participants. Thus, the MMA and the Irving Railroads needed to devise a payment processing system of their own.

The parties' solution to this problem took the form of an agreement that they entered into with each other in 2003. The parties refer to this agreement, which took advantage of the MMA's role as an ISS participant, as a "swap" arrangement.

The agreement accounted for different scenarios. The first scenario concerned the situation in which a customer's freight originated on the rail system of the MMA or of the Irving Railroads and then interchanged with the other rail system. In that situation, the agreement provided that the MMA would bill the customer directly for the full charge for shipping that freight,

even though the charge to that customer was based, in part, on the freight traveling via rail systems that the MMA did not own and operate but that were interconnected with the MMA's rail system. The second scenario concerned the situation in which the freight originated with the rail system of another ISS-participating railroad -- and thus originated on neither the MMA's nor the Irving Railroads' rail systems -- but subsequently passed through the MMA's and the Irving Railroads' rail systems. In that event, under the agreement, the MMA would collect from the billing railroad its share of the payment for the charge that the customer had been billed by the railroad that owned the originating rail system. In addition, per the agreement, the MMA would collect from the billing railroad the share of the payment for the charge to the customer shipping the freight that represented the share of that payment due to the Irving Railroads for the freight having been shipped, in part, via their rail systems.

As to each of these scenarios, the agreement specified how the Irving Railroads would receive from the MMA their share of the payment for the charge to the customer for shipping the freight that the MMA would collect. The agreement provided that, within a discrete number of days of the Irving Railroads' handling of freight traffic for which the MMA was responsible for collecting payments either directly from the customer that had shipped the freight or from the billing railroad, the MMA would transfer to

the Irving Railroads their share of those payments. Specifically, the agreement stated that the Irving Railroads would submit an invoice every Wednesday "for the seven days ending with the second preceding Friday," and that the MMA should pay the Irving Railroads "within 21 days from receipt of the invoice." The railroads referred to this as a 33-day deadline for the MMA making the payment, apparently because that was how long the MMA would have, under these terms, to pay the Irving Railroads their share of the payment charged to a customer who shipped freight with the Irving Railroads' rail systems from the time that such customer made such a shipment.

The agreement addressed one other circumstance that bears on the issues that we confront here. This circumstance arose from the fact that the Irving Railroads' affiliates were among the customers that would ship freight through the MMA's rail system. These affiliates are several paper companies in the region: Irving Pulp and Paper, Limited; Irving Paper Limited; and J.D. Irving, Limited; or, collectively, "the Irving Paper Companies."

The agreement provided that the Irving Paper Companies would transfer the payments that they owed to the MMA for their use of its rail system at the same time as the MMA transferred to the Irving Railroads their share of the payments that the MMA was to receive directly from other customers, or from the billing railroad through the ISS, for customers having shipped freight

through the Irving Railroads' rail systems. In this way, the agreement permitted the Irving Paper Companies to withhold payment to the MMA if the MMA failed to transfer to the Irving Railroads their share of the payments charged to customers for having shipped freight via their rail systems.

In practice, the payments that the Irving Paper Companies owed the MMA usually dwarfed the share of the payments that the MMA owed to the Irving Railroads for customers' use of their rail systems. The arrangement thus provided some assurance to the Irving Railroads that they would be paid their share of the payment for the charge to the shipping customer that the MMA was responsible for collecting, given what the MMA stood to lose from not transferring to the Irving Railroads what they were owed for freight having traveled by means of their rail systems.

The agreement that the parties hammered out appeared to serve them well until sometime in 2012. At that point, however, the MMA and the Irving Railroads began hauling a significant volume of crude oil to refineries in St. John, New Brunswick, across their interconnected rail systems.

Importantly, the jump in the volume of crude meant that, in the course of the parties' regular swap of payments, the amount of funds that the MMA owed to the Irving Railroads typically would exceed the amount of funds that the Irving Paper Companies owed to

the MMA. But, this new development also created the following practical problem.

Payments for the charges to customers for making these oil shipments were processed through the ISS. It would typically take 45 to 60 days after the MMA handled the railcars for a given shipment of freight for the MMA to receive the ISS payments that it was owed for charges to customers that were billed, pursuant to the ISS, by the railroad on which the oil shipment originated. That period of time exceeded the amount of time that it would typically take for the MMA to receive, pursuant to the agreement, payment for charges for which it directly billed customers.

Thus, in practice, the MMA usually received payments that included the Irving Railroads' share of the payment for the charge to a customer for an oil shipment about 45 to 60 days after the Irving Railroads handled the shipment. The result was that the MMA had trouble ensuring that the Irving Railroads received their share of the payment for the charge to the customer for that oil shipment within the 33-day period that the swap arrangement had specified.

To account for this new difficulty occasioned by the oil shipments to St. John, the parties, in July of 2012, modified the swap arrangement. The new agreement carved out from the old one any payments that were attributable to freight traffic originating on a railroad other than the MMA or the Irving Railroads -- in

other words, payments contemplated by the second scenario addressed in the swap arrangement. Thus, the new agreement necessarily carved out from the old one those payments that were owed to the Irving Railroads in consequence of charges to customers for oil shipments going to St. John, as none of those shipments originated on the rail systems of either the MMA or the Irving Railroads.

Under the new agreement, moreover, the Irving Railroads authorized the MMA to pay them their share of any carved-out payments that the MMA collected up to five days after the MMA had done so. The new agreement otherwise left the old one in place, save for one additional modification that the parties made to it. Under the new agreement, payments for charges to customers for freight shipments that originated on the rail systems of the Irving Railroads or the MMA, which were contemplated in the first scenario addressed by the swap arrangement, would be paid in accord with the terms of the original swap arrangement, except that the MMA would be required to pay the Irving Railroads their share of the charge to a customer for any such freight shipment that the MMA was to collect within 30 days of handling the freight.

The modified version of the agreement remained in place through July of 2013. At that time, though, there was yet another new development, and it is that new development that most directly led to the dispute that is now before us.

In that month, an MMA train hauling 72 cars filled with crude oil derailed in Lac-Mégantic, Québec. The derailment led to several explosions, killed 47 people, caused severe property damage, and required a major environmental response effort.

In consequence, the MMA became insolvent and petitioned the United States Bankruptcy Court for the District of Maine for Chapter 11 bankruptcy on August 7, 2013. Soon thereafter, the Irving Railroads filed the claims with the Bankruptcy Court that are now before us.

The claims seek to recover payments that the Irving Railroads contend are owed to them by the MMA for "[f]reight services provided to the Debtor in connection with interline rail shipments." The claims, in other words, seek payments that represent what the Irving Railroads assert is their share of the payments for the freight charges to customers that the MMA was responsible for collecting but that the MMA had yet to pass on to the Irving Railroads. In this respect, the claims seek recovery not only of the Irving Railroads' share of payments that the MMA was responsible for collecting that were tied to charges to customers for their oil shipments to St. John but also the Irving Railroads' share of payments that the MMA was responsible for collecting that were tied to charges to other customers for having shipped other types of freight via, in part, the Irving Railroads' rail systems.

The Irving Railroads asserted that the claims for the payments at issue were entitled to priority under 11 U.S.C. § 1171(b) as "Six Months Rule" claims. The trustee of the bankruptcy estate, Robert J. Keach,[1] objected. He argued that the claims should be treated as general, unsecured claims and thus should not be given priority under § 1171(b) as Six Months Rule claims.

The Bankruptcy Court agreed with the Irving Railroads and held that the claims were entitled to priority pursuant to § 1171(b) because they were Six Months Rule claims. Keach appealed to the BAP, which affirmed. He then moved for reconsideration of the issue in front of the Bankruptcy Court, which denied the motion and again held that the claims at issue here were priority claims under § 1171(b).

At that juncture, the parties jointly requested permission from this Court to appeal both orders of the Bankruptcy Court directly. See 28 U.S.C. § 158(d)(2)(A). We allowed the appeal, which is now before us.

II.

We ordinarily do not defer to the district court or to the BAP in reviewing a bankruptcy court's decision. See In re

[1] Per the liquidation plan approved by the U.S. District Court for the District of Maine, Keach is no longer the trustee, and is instead the "estate representative of the post-effective date estate."

Vázquez Laboy, 647 F.3d 367, 373 (1st Cir. 2011). Thus, "[o]ur review of the bankruptcy court's decision is de novo, though we will only upset the court's factual determinations in the case of clear error." Id.

III.

This appeal turns, at least initially, on the proper interpretation of a nearly 40-year-old precedent from this Circuit. It thus presents a pure question of law, which we review de novo.

The precedent in question holds, the parties agree, that the Bankruptcy Code at the time of that decision impliedly incorporated what is known as the Six Months Rule via one of its provisions. The parties further agree that, by virtue of that precedent, claims by creditors that qualify as Six Months Rule claims were entitled to priority status under the Bankruptcy Code at that time even if those claims otherwise would not have been entitled to such status.

The precedent in question is In re Boston & Maine Corp. (Boston & Maine II), 634 F.2d 1359 (1st Cir. 1980). It addressed when certain claims by creditors against a debtor railroad were entitled to priority status under a provision of the Bankruptcy Code, 11 U.S.C. § 205(b) (1976), that is no longer operative. Id. at 1366.

That provision of the Bankruptcy Code, however, was a precursor to the one that is our concern in this appeal: § 1171(b). By the time that Boston & Maine II was decided, moreover, § 1171(b) had been enacted. And, notably, Boston & Maine II expressly recognized that § 1171(b) was "the same in substance" as § 205(b). 634 F.2d at 1366 n.15; see also id. at 1379 n.35 ("The provision enacted as 11 U.S.C. [§] 1171(b) . . . substantially continues the language of [§ 205(b)].").

Thus, the parties proceed in this case on the understanding that Boston & Maine II's analysis of § 205(b) applies equally to § 1171(b), such that, if Boston & Maine II's analysis of § 205(b) would be controlling if § 205(b) were still operative, then that same analysis applies to § 1171(b). We proceed on that same understanding in analyzing Boston & Maine II and its significance to this appeal.

In construing § 205(b), Boston & Maine II explained that the Six Months Rule was the name for the more-than-century-old practice of courts in reorganization proceedings granting priority status to certain kinds of claims that creditors brought against railroads in receivership but that otherwise would not have been entitled to such privileged status. See 634 F.2d at 1366. Boston & Maine II then held that § 205(b) was best construed to have, albeit impliedly, incorporated the Six Months Rule. Id. Boston & Maine II thus held that a creditor's claim against a railroad in

bankruptcy that otherwise would not qualify for priority status under the Bankruptcy Code would so qualify, per § 205(b), if the Six Months Rule encompassed it. See id.

Boston & Maine II explained that, just as the name for the Six Months Rule suggests, and in accord with the past practice on which the rule is based, there was a temporal limitation on how old a debt could be in order for a claim to recover payment for it to be given priority pursuant to § 205(b) as a Six Months Rule claim. See id. at 1379. This temporal limitation ensured that priority status for claims encompassed by the Six Months Rule would "extend[] backward to the period preceding reorganization" only "to the extent necessary to assure that there is continuity in the payment of indispensable operating expenses . . . so long as the current expenses of the pre-reorganization period . . . are not so dated as to forbid the conclusion that they are in fact current." Id. Boston & Maine II explained, however, that, despite the Six Months Rule's name, "six months is not an inflexible time limit" for a claim to qualify as a Six Months Rule claim. Id. Thus, some claims to recover payments for debts of an older vintage might qualify, too. Id.

For present purposes, there is no dispute between the parties that the claims for which the Irving Railroads seek priority status as Six Months Rule claims under § 1171(b) fall within the temporal scope of the Six Months Rule. There is a

threshold dispute, though, over whether Boston & Maine II properly defined the substantive scope of the Six Months Rule that, in light of longstanding practice, it had held that § 205(b) impliedly incorporated. Thus, our analysis begins with that dispute.

The dispute arises because Keach contends that Boston & Maine II misconstrued the Six Months Rule in a manner that makes it far broader than it is. He then contends that we must depart from Boston & Maine II's holding on that score and that, once we do, we must reverse the Bankruptcy Court's ruling, because the claims at issue here cannot in that event qualify as Six Months Rule claims.

As we will explain, we reject Keach's contention that, because Boston & Maine II (in his view) erroneously defined the substantive scope of the Six Months Rule, we are not bound by Boston & Maine II's construction of it. We also reject Keach's argument that, even pursuant to the test set forth in Boston & Maine II, the type of claims that the Irving Railroads seek to recover are categorically ineligible for Six Months Rule priority. However, even though we reject Keach's more wide-reaching challenges to the Bankruptcy Court's priority finding, our work is by no means done. Instead, we also must address Keach's various case-specific fallback challenges, in which he argues, respectively, (1) that the Bankruptcy Court erred in describing the test that Boston & Maine II set forth for determining whether

a claim qualifies as a Six Months Rule claim and (2) that, even if the Bankruptcy Court did not so err, it nonetheless erred because the record fails to support its findings that the claims at issue qualified as Six Months Rule claims under that same test. But, before we explain why those case-specific fallback arguments fail to persuade, first things first.

A.

Keach's threshold challenge to Boston & Maine II's construction of the substantive scope of the Six Months Rule zeroes in on the fact that Boston & Maine II held that the Six Months Rule reflects "two essentially different principles, neither of which limits the operation of the other." 634 F.2d at 1377. Keach argues that, properly understood, the Six Months Rule in fact reflects only the first of the two principles that Boston & Maine II described that rule as reflecting. Thus, Keach contends, even if § 1171(b) does encompass the Six Months Rule, that provision may not be properly construed to encompass the expansive version of it that Boston & Maine II describes.

This contention is critical to Keach's argument. The parties agree that the claims at issue here qualify as Six Months Rule claims -- insofar as they do -- only under the second of the two independent principles that Boston & Maine II described the Six Months Rule as reflecting. Thus, if Keach is right that Boston & Maine II was wrong to construe the Six Months Rule to reflect

that second principle, then he is right that the claims at issue here cannot qualify as Six Months Rule claims.[2]

As we will explain, however, we reject Keach's contention that we are not bound by Boston & Maine II's holding that the Six Months Rule reflects that second principle, given our duty to adhere to our prior precedent under the law-of-the-circuit doctrine. See United States v. Holloway, 630 F.3d 252, 258 (1st Cir. 2011). To explain why we reach that conclusion, we begin by describing what Boston & Maine II held with respect to each of the two principles. We then consider Keach's arguments for why we should not follow Boston & Maine's II's holding that the Six Months Rule reflects the second of those two principles.

1.

Boston & Maine II traced the first principle that it held that the Six Months Rule reflected to the late nineteenth century United States Supreme Court precedent of Fosdick v. Schall, 99 U.S. 235, 253 (1878). Boston & Maine II read that precedent to

[2] The Irving Railroads contend that this argument has been waived. But, while Keach did repeatedly concede to the Bankruptcy Court and the BAP that there was no diversion requirement under the Six Months Rule, any argument to the contrary would have been hopeless given the precedent we describe. Thus, because there would have been no reason for Keach to argue this point in front of the lower courts, we decline to treat his argument as waived. See Bennett v. City of Holyoke, 362 F.3d 1, 7 (1st Cir. 2004) ("[W]e will excuse a party for failing to raise a defense . . . when the defense, if timely asserted, would have been futile under binding precedent.").

support the conclusion that, in general, a debtor railroad in bankruptcy "must restore to operating creditors revenues [that were] diverted" from a current expense fund to pay off the railroad's mortgagees before the railroad entered into bankruptcy. 634 F.2d at 1377 (citing Fosdick, 99 U.S. at 253).

Boston & Maine II did not describe the precise scope of this Fosdick-based diversion requirement. But, Boston & Maine II did clearly hold that claims by creditors that satisfy the requirement that the debtor railroad had engaged in a diversion of revenues from a current expense fund to mortgagees may qualify for priority status in some circumstances, per the long-recognized Six Months Rule. Specifically, Boston & Maine II made clear that such claims could so qualify so long as those claims were also for the recovery of debts that the debtor railroad incurred within the relevant six-months window prior to its entering bankruptcy and so long as the debtor railroad had been expected to pay those debts out of current operating expenses. See id. at 1368-69, 1380, 1382.

Because the parties agree that no such diversion of funds occurred here, Keach understandably has little to say about what Boston & Maine II held with regard to this first principle. Instead, he trains his focus on what Boston & Maine II had to say about the second principle that it held that the Six Months Rule reflected. After all, it is because Boston & Maine II held that the Six Months Rule also reflected that second principle, and thus

not only the Fosdick-based principle, that the Bankruptcy Court held that the claims at issue here qualified as Six Months Rule claims under Boston & Maine II even though they cannot satisfy the Fosdick-based diversion requirement.

Boston & Maine II traced this second principle to a different late nineteenth century United States Supreme Court case from Fosdick. That case was Miltenberger v. Logansport, C. & S.W.R. Co., 106 U.S. 286 (1882).

Boston & Maine II read Miltenberger, along with other precedents that aligned with its reasoning, to elaborate on the Six Months Rule in a manner that accounted for the fact "that a 'railroad is authorized to be constructed more for the public good to be subserved, than for private gain.'" Boston & Maine II, 634 F.2d at 1377 (quoting Barton v. Barbour, 104 U.S. 126, 135 (1881)). Boston & Maine II further construed the Six Months Rule, based on its reading of the Miltenberger-based line of precedent, to encompass claims for payment of debts incurred by the debtor railroad if, when those debts were incurred, "a stoppage of the continuance of such business relations would be a probable result . . . of nonpayment." Id. (quoting Miltenberger, 106 U.S. at 312).

Thus, based on this reading of the import of the Miltenberger-based line of authority, Boston & Maine II held that creditors need not show a diversion by the debtor railroad of operating revenues from operating expenses to pay a mortgagee to

show, as the Fosdick principle otherwise would require, that their claims merited Six Months Rule priority under the Bankruptcy Code. See id. at 1380. Rather, Boston & Maine II explained that, per its understanding of the logic of the Miltenberger line of precedent, claims to recover payments from debtor railroads for services that resulted in the debtor railroad incurring certain critical expenses also could qualify as Six Months Rule claims, despite the absence of any showing by a creditor that would satisfy the Fosdick-based diversion requirement. Id. at 1382.

To be sure, consistent with Keach's contention about the proper construction of the Six Months Rule, other courts had at the time of Boston & Maine II read Miltenberger differently from how Boston & Maine II read it. These courts treated Miltenberger as addressing a different rule applicable to railroad receiverships than the Six Months Rule, the "Necessity of Payment Rule," and thus not to be addressing the Six Months Rule at all. See, e.g., In re N.Y., New Haven & Hartford R.R. Co., 278 F. Supp. 592, 602 n.15 (D. Conn. 1967), aff'd, 405 F.2d 50 (2d Cir. 1968) (critiquing courts that read Miltenberger as a Six Months Rule case for having "inexplicably merged the two rules by making necessity of payment a requirement of the six months rule and eliminating diversion as a requirement for" the Six Months Rule).

Boston & Maine II itself recognized the difference between the Six Months Rule and the Necessity of Payment Rule. It

explained that the Necessity of Payment Rule "does not confer rights on claimants" like the Six Months Rule. 634 F.2d at 1382. Instead, the Necessity of Payment Rule "reflects the existence of a judicial power to authorize trustees in reorganization to pay claims where such payment is exacted as the price of providing goods or services indispensably necessary to continuing the rail service" even though these trustees did not receive court approval to pay such expenses ex ante. Id.

But, Boston & Maine II observed that Miltenberger used "ambigu[ous] . . . language" in characterizing the nature of the rule that Miltenberger was setting forth with respect to whether it concerned the Six Months Rule or only the Necessity of Payment Rule. Id. at 1378. And, further, Boston & Maine II rejected an interpretation of Miltenberger that read it, or the subsequent Supreme Court precedent applying it, to be solely addressing the scope of the Necessity of Payment Rule. Id. Instead, Boston & Maine II held both that the Necessity of Payment Rule was a "distinct . . . principle" from either the Fosdick-based diversion principle or the Miltenberger-based principle concerning nonpayment of debts arising from a debtor railroad's necessarily incurred expenses and that the Six Months Rule reflected, in part, this latter, Miltenberger-based principle. Id. at 1382. Accordingly, Boston & Maine II held that the principle emerging from Miltenberger was not merely one that would allow a court to

sanction certain expenditures made by a railroad receiver after the fact pursuant to the Necessity of Payment Rule, but also a priority rule "provid[ing] for payment of claims on the same basis and from the same operating income as administration expenses" pursuant to the strictures of the Six Months Rule. Id. at 1382.

Of course, under Boston & Maine II, claims based on this Miltenberger principle -- no less than claims based on the principle drawn from Fosdick -- qualify as Six Months Rule claims only if they seek the recovery of a payment for a debt that the debtor railroad incurred within, roughly, six months of the debtor railroad petitioning for bankruptcy. See id. at 1378-79. And, further, under Boston & Maine II, such claims qualify as Six Months Rule claims on the basis of this second principle only if the creditor expected that it would be paid for this debt from the debtor railroad's operating revenues and not in reliance on the railroad's general credit. Id.

But, the key point for purposes of assessing Keach's threshold challenge is that Boston & Maine II construed the Six Months Rule, as codified in § 205(b), to be rooted in more than a concern about diversion of funds, per the Fosdick principle. Instead, based on the Miltenberger line of authority, Boston & Maine II construed the Six Months Rule also to reflect a concern about ensuring equal treatment of claims that sought the recovery of payments for expenses that were of sufficient importance to the

debtor railroad to make them distinct from claims that sought recovery for payment for the debtor railroad's less critical expenses.

Boston & Maine II explained in this regard that claims of this Miltenberger-derived sort are "inevitably . . . indistinguishable from and essentially contemporaneous with expenses paid by the railroad before reorganization, and will be indistinguishable from currently paid administration expenses" during the reorganization period.[3] Id. (emphasis added). In this way, Boston & Maine II construed the Six Months Rule as one that aims, by expanding the types of claims entitled to priority, to "eliminate[]" "[t]he inequity in treatment arising out of the accidental circumstance of non-payment before the filing of the petition" of creditors' claims. Id. at 1379. For, Boston & Maine II indicates, claims that qualify as Six Months Rule claims seek recovery for debts arising from expenses that are at least as necessarily incurred by the debtor railroad as are the debtor railroad's administrative expenses, and claims by creditors to recover debts arising from those expenses of the debtor railroad do receive priority under the Bankruptcy Code. Id.

[3] Certain expenses incurred by the bankruptcy estate are deemed to be "administrative expenses," 11 U.S.C. § 503(b), and entitled to priority, see id. § 507(a)(2).

In addition to tracing the Six Months Rule back to the Miltenberger line of authority, Boston & Maine II also set forth a three-prong test for determining whether a creditor's claim qualifies for priority status under the Bankruptcy Code as a Six Months Rule claim. Notably, that three-prong test does not include any requirement that the creditor satisfy the diversion requirement that a creditor would have to meet if Boston & Maine II reflected only the Fosdick-based principle. See id. at 1378. The test instead sounds in the necessity-based, equal-treatment-aiming principle that Boston & Maine II derived from the Miltenberger line of authority. Specifically, under the test that Boston & Maine II announced, a claim falls within the scope of the Six Months Rule so long as:

> (1) it represents a current operating expense necessarily incurred, (2) was incurred within six months before the reorganization petition was filed, and (3) the goods or services were delivered in the expectation that they would be paid for out of current operating revenues of the railroad, and not in reliance on the road's general credit.

Id.

Before we circle back to Keach's challenge to the way that Boston & Maine II construed the Six Months Rule, two further points about Boston & Maine II's construction of the Six Months Rule warrant further elaboration, as each of these points figures

prominently in some of Keach's fallback challenges. We thus briefly address each of those points here.

The first of these points concerns the fact that the Boston & Maine II test emphasizes the critical nature of the expense of the debtor railroad that gives rise to the creditor's claim, as that expense must be an expense that is "necessarily incurred." Id. Or, as Boston & Maine II also phrased it, the claim must be one to recover a debt arising from an expense "for a service or supply indispensable to the maintenance and operation of the railroad." Id.

Significantly, however, the test does not turn on whether "the claimant has the naked power to exert economic duress" over the debtor. Id. Instead, Boston & Maine II clarifies that the test focuses on whether the claim at issue "represent[s] indebtedness for ordinary and necessary current operating expenses indispensable to continued rail service of the kinds being paid currently as expenses of administration." Id. at 1380 (emphasis added). For, Boston & Maine II makes clear, creditors that failed to receive payment for such debts only due to the relatively temporally proximate "intervention of the reorganization petition before expiration of the ordinary billing and payment period," id., possess a "superior equity" as compared to other unsecured creditors of the debtor railroad, S. Ry. Co. v. Carnegie Steel Co., 176 U.S. 257, 285 (1900), no less than do those creditors

that are owed administrative expenses. In that respect, Boston & Maine II's rejection of a "naked duress" test of necessity accords with its equal-treatment aims.

Second, the third prong of the Boston & Maine II test contains an important limitation apart from that imposed by the "necessarily incurred" prong on the capacity of claims by creditors of debtor railroads to qualify as Six Months Rule claims. Per the third prong of its test, Boston & Maine II makes clear that creditors who "intention[ally] exten[ded] . . . credit to the railroad," and thus whose contracts with the railroad presumably reflect the risk of the railroad's default, are taken to have assumed the risk of non-payment in their extension of credit. Boston & Maine II, 634 F.2d at 1380. Thus, under the Boston & Maine II test, that class of creditors is not entitled to priority in bankruptcy under the Six Months Rule, no matter that the rule would otherwise encompass claims brought by that class of creditors. Id. at 1378.

2.

With this background in place, we are now well positioned to see the problem with Keach's threshold contention that Boston & Maine II confused the Six Months Rule with the Necessity of Payment Rule and that Boston & Maine II therefore erred in holding that the Six Months Rule encompassed a class of claims that could not satisfy a Fosdick-based diversion requirement. See id. at

1382. The problem is that, as the foregoing review makes clear, Boston & Maine II clearly did recognize that the Six Months Rule could encompass claims that could not satisfy that diversion requirement, and we are bound as a three-judge panel to follow the law-of-the-circuit doctrine, which dictates that "newly constituted panels ordinarily are constrained by prior panel decisions directly (or even closely) on point." Holloway, 630 F.3d at 258 (quoting United States v. Guzmán, 419 F.3d 27, 31 (1st Cir. 2005)).

Keach is right that there are two exceptions to this rule of fidelity to our prior precedent. We may deviate from a prior panel's treatment of an issue where the "existing panel decision may be undermined by controlling authority, subsequently announced," Guzmán, 419 F.3d at 31 (quoting Williams v. Ashland Eng'g Co., 45 F.3d 588, 592 (1st Cir. 1995)), and, under "hen's-teeth rare" circumstances, we may do so where "authority that postdates the original decision, although not directly controlling, may nevertheless offer a compelling reason for believing that the former panel, in light of new developments, would change its collective mind," id. But, Keach points to no authority post-dating Boston & Maine II, and, given the authority he does cite, we do not see how this is the exceptionally rare

circumstance that would trigger the law of the circuit's second exception.[4]

Keach points first to subsequent statutory developments -- particularly, the codification of "paradigmatic" Six Months Rule-like claims elsewhere in the Bankruptcy Code, see, e.g., 11 U.S.C. § 503(b)(9) (granting priority to claims for the value of goods received by the debtor up to 20 days before filing). He contends that these developments should cause us to revisit Boston & Maine II's holding that the Six Months Rule that it found incorporated into § 205(b) reflects more than the Fosdick-based principle and thus that claims need not meet the diversion requirement set forth in Fosdick to qualify as Six Months Rule claims.

But, these enactments tell us nothing about what Congress meant in 1978 when it enacted § 1171(b). See Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history . . . is not a legitimate tool of statutory interpretation."). In fact, § 1171(b) remains on the books without Congress having made any relevant modifications to it in the interim. But cf. Bankruptcy Amendments and Federal Judgeship Act

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[4] For the purposes of this case, we set aside any additional limitations that might apply due to principles of statutory stare decisis. See Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015) ("[S]tare decisis carries enhanced force when a decision . . . interprets a statute.").

of 1984, Pub. L. No. 98-353, § 522, 98 Stat. 333, 388 (1984) (modifying § 1171(b) to change "such priority" to "the same priority").

Keach also points to a variety of out-of-circuit cases that he argues read the Supreme Court's precedent to impose a Fosdick-based diversion requirement for claims to qualify as Six Months Rule claims. See, e.g., Alco Prods., Inc. v. Trs. of Prop. of N.Y., New Haven and Hartford R.R. Co. (In re N.Y., New Haven & Hartford R.R. Co.), 405 F.2d 50, 52 (2d Cir. 1968). But, not one of these precedents postdates Boston & Maine II. Thus, for that reason alone, none supplies a basis, under the law-of-the-circuit doctrine, for us to decline to adhere to what Boston & Maine II held in the relevant respect.

The result is that Keach cannot succeed in overturning the finding below that the claims at issue here qualify for priority status under § 1171(b) as Six Months Rule claims through his frontal assault on Boston & Maine II. Instead, if he is to succeed, he must show that those claims fail to satisfy the test for identifying such claims that Boston & Maine II derived from the Miltenberger line of precedent, rather than because Boston & Maine II was wrong to derive a test from that line of authority that allows claims to qualify as Six Months Rule claims even when they do not seek to recoup funds diverted in the way that Fosdick

contemplates. Accordingly, we now turn to his arguments on that score.

B.

The first of the arguments of this kind that Keach presses is quite sweeping in its own right, even though it purports to take Boston & Maine II at its word. He contends that the type of claims for which the Irving Railroads seek priority status under § 1171(b) are by their very nature -- and without regard to the facts found below -- not encompassed by the Six Months Rule, even under the three-prong Boston & Maine II test.

To understand this contention, we need first to say a bit more about the particular type of claim that we understand Keach -- at least for purposes of this aspect of his argument -- to agree is at issue here. That type of claim is what is known as an interline claim, and it arises in the following way.

As this Court described in Matter of Boston & Maine Corp. (Boston & Maine I), 600 F.2d 307, 308 (1st Cir. 1979), interlining is the practice of interconnected railroads "loaning cars to one another rather than loading and unloading freight every time a shipment passes onto rails belonging to a different road." This practice, by its nature, contemplates that there will be a system in place by which the interlining railroads will coordinate payments between them. It is through that system that the interlining railroads account for the fact that the customers who

ship freight on these interconnected lines ship it across rail systems that are separately owned. Interline claims, then, are the claims that creditor railroads bring against debtor railroads to recover the interline payments that they are owed for the services that they provided in connection with the practice of interlining. See Boston & Maine II, 634 F.2d at 1361, 1369.

We understand Keach to agree, at least for the purpose of contending that the claims at issue here can never qualify as Six Months Rule claims even under the Boston & Maine II test, that the claims asserted by the Irving Railroads are properly treated as a species of interline claim. Keach's agreement to that proposition is fundamental to this aspect of his challenge. He contends that the creditor railroads' claims cannot satisfy the test that Boston & Maine II set forth for qualifying as Six Months Rule claims precisely because interline claims, by their nature, never can.

To support that categorical contention, Keach argues that Boston & Maine II did not itself hold that interline claims could qualify as Six Months Rule claims under its three-prong, Miltenberger-derived test, as he contends that Boston & Maine II had no occasion to do so, given the issues that arose on appeal in that case. He then points to a variety of precedents from outside this Circuit that he argues demonstrate that interline claims are "per se general unsecured claims" that cannot receive priority in

bankruptcy. Thus, he asks us to follow these other precedents -- out-of-circuit though they are -- and decide what he contends Boston & Maine II did not have occasion to decide: that, even under the three-prong test for defining Six Months Rule claims that Boston & Maine II sets forth, interline claims can never qualify as Six Months Rule claims.

We, however, read Boston & Maine II's treatment of interline claims differently from Keach. In consequence, we conclude that, once again, the law-of-the-circuit doctrine stands in the way of his argument.

1.

It is true that, as Keach argues, Boston & Maine II did not expressly hold that the interline claims at issue in that appeal were entitled to priority; it instead remanded for the District Court to identify a class of creditors entitled to priority under the Miltenberger-derived three-prong test for determining whether a claim qualifies as a Six Months Rule claim that Boston & Maine II set forth. See Boston & Maine II, 634 F.2d at 1382. However, Boston & Maine II read Miltenberger to support its conclusion that there is a separate, non-Fosdick basis for Six Months Rule status, and Keach concedes that this aspect of Boston & Maine II was a holding. See id. Thus, we do not see how we can square Boston & Maine II's clear holding that the Six Months Rule reflects the principle it attributed to Miltenberger with Keach's

contention that the specific class of claims that Miltenberger identified as pertaining to "indispensable business relations," 106 U.S. at 312 -- interline claims -- are categorically ineligible for priority under the Six Months Rule under the "necessarily incurred" prong of the Boston & Maine II test.

Boston & Maine II makes clear that it read Miltenberger to establish, at the very least, that "interline claims" can in some circumstances fall within "the class of claims entitled to priority of payment" because the "disastrous consequences of failing to pay" such claims could include the possibility of "a stoppage of traffic interchange." 634 F.2d at 1377-78. Moreover, Boston & Maine II described Miltenberger as "defining the classes of claims payment of which was indispensable to the business of the road." Id. at 1377.

It is thus significant that Miltenberger expressly affirmed a railroad receiver's authority to "pay indebtedness . . . to other connecting lines of road, in settlement of . . . freight accounts and balances." 106 U.S. at 308. In fact, the Court there stated that "[i]t is easy to see that . . . the payment of limited amounts due to . . . connecting lines of road . . . for unpaid ticket and freight balances . . . may well place such payments in the category of payments . . . entitle[d] . . . to be made a first lien." Id. at 311-12. What is more, in the critical passage of Miltenberger that Boston & Maine II quoted, Miltenberger

stated that "non-payment" of the expenses there at issue -- interline payments -- would produce the "probable result" of a "stoppage" of "indispensable business relations." Boston & Maine II, 634 F.2d at 1370, 1377 (emphasis added) (quoting Miltenberger, 106 U.S. at 312).

Moreover, even if we were to treat as dicta Boston & Maine II's discussion of whether the nonpayment of interline claims could interfere with indispensable business relations, that dicta is of the carefully considered variety. Accordingly, it "must carry great weight, and may even . . . be regarded as conclusive." McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) (alteration in original) (quoting Charles A. Wright, The Law of Federal Courts § 58, at 374 (4th ed. 1983)).

2.

Against this background, Keach's invocation of a number of out-of-circuit precedents that he asserts support his argument that the Six Months Rule necessarily excludes interline claims as a categorical matter does little to aid his cause. The simple point is that, even if they do support Keach's contention about the nature of interline claims, Boston & Maine II cannot be squared with them. But, it is also worth observing, none of the non-controlling precedents on which he relies in fact raise meaningful questions about the correctness of Boston & Maine II's treatment

of interline claims as the type of claims that could, in their nature, qualify as Six Months Rule claims.

Keach is right that some out-of-circuit precedents decided after Boston & Maine II include broad language that deems interline claims to be "general, unsecured" claims. See, e.g., Union Pac. R.R. Co. v. Moritz (Matter of Iowa R.R. Co.), 840 F.2d 535, 545 (7th Cir. 1988). But, two of the ones that he cites deem interline claims to be general unsecured claims only in the course of rejecting other, distinct arguments that these claims should receive special treatment in bankruptcy without thereby purporting to address whether they might qualify nonetheless as Six Months Rule claims. See id. (rejecting an argument that interline claims should be treated as being held in trust); In re Bangor & Aroostook R.R. Co., 320 B.R. 226, 236, 240 (Bankr. D. Me. 2005), aff'd, No. 01-11565, 2007 WL 607867 (D. Me. Feb. 23, 2007) (similar).

In fact, while Iowa Railroad Co. does refer to interline claims as claims for "general, unsecured debts," 840 F.2d at 545, the opinion also specifically recognizes that "[c]ourts [have] applied the[] principles [of the Six Months Rule] . . . to interline balances," id. at 537. And, further, rather than disputing that conclusion of those other courts, the Seventh Circuit accepts it and considers it to be evidence for its conclusion that "interline balances are general, unsecured debts." Id. Thus, Iowa Railroad Co., in characterizing interline claims

as ones that seek recovery for general, unsecured debts, is not at odds with Boston & Maine II's characterizing the subset of interline claims that seeks recovery of payments for debts incurred temporally close to the debtor railroad's bankruptcy as being capable of qualifying as Six Months Rule claims.

Keach does point out that Iowa Railroad Co. reasoned that, because affording priority to interline-claim creditors will necessarily penalize other creditors, those other creditors will respond to the preference for interline-claim creditors by simply demanding more from railroads in exchange for the services they provide. Id. at 542. In other words, the court concluded, no matter the priority rules, "in the end, someone bears the whole risk, and shippers pay the full cost." Id. And, on that basis, Iowa Railroad Co. rejected the interline creditors' argument in that case that prioritizing their claims, based on the federal common law, was "essential to the preservation of a national transportation system." Id.

But, Boston & Maine II is not necessarily at odds with Iowa Railroad Co. in that respect either. Boston & Maine II expressly rejects a "naked power to exert economic duress" test for determining whether a creditor's claim that seeks to recover a debt that arises from an expense that the debtor railroad necessarily incurred qualifies as a Six Months Rule claim. 634 F.2d at 1378. Boston & Maine II explains that the Six Months Rule

reflects in significant part an equal treatment principle. The idea is to ensure that, because creditors with claims for administrative expenses are entitled to priority on their claims, the sudden advent of bankruptcy does not disadvantage certain pre-petition creditors who seek to recover payments for debts arising from the expenses necessarily incurred by the debtor railroad that are similar to administrative expenses. See id. at 1379; see also 11 U.S.C. § 503(b), 507(a)(2).

That leaves Keach with but one post-Boston & Maine II case that accords with his view: In re McLean Industries, Inc., 103 B.R. 424 (Bankr. S.D.N.Y. 1989). That out-of-circuit bankruptcy court case based its conclusion on the fact that "Congress, in enacting the Bankruptcy Code, expressly rejected a proposal that debtor railroads be required to pay interline balances." Id. at 426. The rejected statutory provision on which that bankruptcy court relied, however, would have immediately required a debtor railroad to pay all pre-bankruptcy interline debts without any need for court approval. See S. 2266, 95th Cong. § 1169 (1978); see also Boston & Maine I, 600 F.2d at 313 ("The legislative history of this provision indicates that . . . . Congress chose . . . to place the timing of payment of [interline] claims exclusively in the discretion of the reorganization court."). Thus, Congress's choice not to enact a special provision for interline claims reveals little about whether Congress meant

for creditors to receive the weaker protection of the Six Months Rule via § 1171(b) for the subset of interline claims that seek payment for debts incurred by the debtor railroad sufficiently near to the time of its bankruptcy to fall within the temporal scope of the Six Months Rule. See Zucker v. Rodríguez, 919 F.3d 649, 660 (1st Cir. 2019) ("The fact that Congress rejected a provision about one thing tells us little about what Congress intended in enacting a provision about something else.").

We note, moreover, that the only other Court of Appeals that Keach identifies as having read the Six Months Rule to include a Miltenberger-based principle, and not merely a Fosdick-based one, is the Fourth Circuit. See S. Ry. Co. v. Flournoy, 301 F.2d 847, 851 (4th Cir. 1962). But, that Circuit has held that interline claims may be entitled to priority status under the Six Months Rule. Id. at 853-54. Thus, in addition to the fact that Boston & Maine II itself cannot be squared with the notion that interline claims are categorially barred from qualifying as Six Months Rule claims, the precedents that Keach relies on fail to indicate that it was wrong in that regard.

3.

Keach does briefly suggest another reason to conclude that interline claims -- as a class -- cannot qualify as Six Months Rule claims under Boston & Maine II's three-prong test. He contends, in this regard, that federal law required the Irving

Railroads to allow the MMA to interchange with their railroads and thus that the payments that the MMA owed to them in consequence of their being interconnected are, inherently, expenses that are not "necessarily" incurred.

As authority for this proposition, Keach cites to an out-of-circuit district court case, Matter of Penn Central Transportation Co., 458 F. Supp. 1234 (E.D. Pa. 1978). There, the court stated in dicta that a similar mandate "renders the necessity of payment rule" -- which, as we have explained, is an entirely different rule from the Six Months Rule -- "totally inapplicable." Id. at 1332 n.93. Keach then alleges that we conflated the Necessity of Payment Rule with the Six Months Rule in Boston & Maine II and that we therefore should read Penn Central's dicta on the former rule to apply to our caselaw concerning the latter one.

But, to the extent that this argument by Keach is not waived for lack of development, see United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990), it necessarily fails under the law-of-the-circuit doctrine if for no other reason than that Penn Central was decided before Boston & Maine II. But, we should add, Boston & Maine II itself recognized that "the interlining of freight cars is mandatory under the Interstate Commerce Act." 634 F.2d at 1362.

C.

Keach still is not done, however. Even accepting that Boston & Maine II's test is sound and that interline claims are not categorically barred from qualifying as Six Months Rule claims under that test, he asserts that the ruling below as to these particular interline claims cannot stand for three case-specific reasons. We thus close out our consideration of this appeal by considering each one of these more narrowly drawn challenges.

1.

Keach first contends that the Bankruptcy Court erred because, at one point in its oral opinion, it stated with regard to the Boston & Maine II test that "it is sufficient [that] claims are for a current expense, goods and services and bringing ordinary operation of the rail." Based on this language, Keach contends that the Bankruptcy Court mistakenly required that the claims at issue need only represent current expenses of the debtor railroad to qualify as Six Months Rule claims. He thus argues that the Bankruptcy Court effectively dispensed with the necessity requirement that Boston & Maine II set forth for discerning a claim as one that the Six Months Rule encompasses. As a result, he argues that, at the very least, the ruling below must be vacated and remanded.

The Bankruptcy Court's oral opinion, however, cited to Boston & Maine II and correctly described the test that it set

forth as requiring a showing that a claim is for the recovery of a debt arising from "a current operating expense necessarily incurred." (emphasis added). Moreover, the Bankruptcy Court's written order overruling Keach's objections on this point confirmed that the claims at issue concern debts arising from "current operating expenses that were necessarily incurred by MMA in connection with its on-going operations." (emphasis added). Thus, we see no reason to attribute to the Bankruptcy Court the mistake that Keach contends that it made.

2.

Keach next takes aim at the evidentiary basis for the Bankruptcy Court's ruling that, per the Miltenberger-derived test set forth in Boston & Maine II, the claims are for debts arising from "current operating expense[s] necessarily incurred." Boston & Maine II, 634 F.2d at 1378 (emphasis added). Once again, we are not persuaded.

Keach is right that Boston & Maine II held that Six Months Rule claims must be "for a service or supply indispensable to the maintenance and operation of the railroad," id. at 1378 (emphasis added), and he points us to a variety of out-of-circuit cases that limit Six Months Rule claims to those based on expenditures of that ilk, see, e.g., Chicago & A.R. Co. v. U.S. & Mexican Tr. Co., 225 F. 940, 945-46 (8th Cir. 1915). But, we do not agree with Keach's further contention that, because the

evidence clearly showed that the MMA could have continued operating without interchanging with the Irving Railroads, the Irving Railroads' claims are not for the recovery of payments for debts arising from "expense[s] necessarily incurred." Boston & Maine II, 634 F.2d at 1378.

We have already noted that Boston & Maine II made clear that "[t]he test is not whether the claimant has the naked power to exert economic duress," id. at 1378, and, to an extent, Keach recognizes this point. For example, the Irving Railroads point out, Keach acknowledged to the Bankruptcy Court that a creditor's claim to recover about $7,000 based on repair costs incurred by a debtor railroad would merit priority status under the Six Months Rule. He did so, moreover, even though he recognizes that there may be no argument that this one repair expense to this one service provider, standing on its own, was necessary to keep the railroad going. That is because, as Keach admits in his reply brief, the test is not "whether the specific [claim] at issue," if withheld, "would have forced a total shutdown of operations." Rather, he contends, "it is the genre of the claim that is relevant to the analysis."

Indeed, a focus on whether the claimant seeks payment for a debt arising from an expense -- the particular repair -- that is independently essential to the ongoing operation of the railroad would likely render few if any claims indispensable. It

would be the rare repair that, in and of itself, would be so essential that the railroad could not go without it.

Nevertheless, Keach contends that the interline claims that are at issue here are not like those that seek recovery of payments for debts arising from expenses incurred by a debtor railroad to make repairs, because the very route on which the freight traveled that led the claimants to be entitled to recovery for debts incurred by the MMA for the interline payments was abandoned post-bankruptcy by the MMA. He argues that, in consequence, these claims seek payments in connection with expenses that cannot possibly have been "necessarily incurred" by the MMA.

But, Keach offers no authority to support the proposition on which this argument necessarily rests: that we must construe the words "indispensable" and "necessary" in Boston & Maine II to make the necessity to the operation of the railroad of the particular route over which the freight traversed itself determinative of whether an expense incurred in operating that particular route was necessary or indispensable to the railroad's operation. Nor do either Miltenberger or Boston & Maine II require that we endorse such a proposition.

In Miltenberger, the Supreme Court affirmed the receiver's decision immediately to pay out freight balances that he deemed to be "indispensable to the business of the road," and

without which, "the business of the road would suffer great detriment." See 106 U.S. at 311. The Court found that it was "easy to see that . . . the payment of limited amounts due to . . . connecting lines of road . . . for unpaid ticket and freight balances" could be so significant as to authorize such payment, because "a stoppage of the continuance of [indispensable] business relations would be a probable result . . . of non-payment." Id. at 311-12. The Court at no point conducted an inquiry into the necessity of any particular line to the railroad's capacity to stay in business, even if in a much-diminished state.

Similarly, Boston & Maine II read Miltenberger to be "defining the classes of claims payment of which was indispensable to the business of the road." Boston & Maine II, 634 F.2d at 1377. Boston & Maine II then went on to indicate, again based on Miltenberger, that interline claims may fall into that class because the "disastrous consequences of failing to pay . . . interline claims" include "a stoppage of traffic interchange." Id. Boston & Maine II did not in so stating at any point suggest that the necessity of making interline payments hinges on whether those interline payments were made in connection with a route that itself is one without which the railroad could not operate, even in a much-reduced manner.

Keach's suggested approach to defining "necessarily incurred" is also in tension with some of his own contentions. If

the proper inquiry were focused on the necessity of the line to the debtor railroad's operations rather than on the necessity of the expense in consequence of the debtor railroad operating that line, then it would be hard to see how claims for expenses the debtor railroad incurred to pay for fuel, labor, or even repairs could qualify as Six Months Rule claims insofar as those expenses were incurred in connection with any aspect of the operation of an important line for a debtor railroad that the debtor railroad could jettison post-bankruptcy and survive. Yet Keach portrays each of those types of claims -- whether concerning fuel, labor, or repairs -- as quintessential types of qualifying claims without suggesting that their ability to qualify as Six Months Rule claims depends on whether they seek recovery of debts that arise from expenses incurred by the debtor railroad in connection with its operation of a rail route without which the debtor railroad could not remain a going concern.

That leaves, then, only the question whether, in operating the particular route at issue, the MMA necessarily incurred the expenses represented by the share of the interline payments that the Irving Railroads seek to recover with their claims. But, Keach does not dispute that the record here adequately supports the Bankruptcy Court's finding that "the inability of MMA to interchange traffic with the [Irving Railroads] on the . . . 'critical rail artery' . . . between St. John and

Montreal would have had a significant adverse effect on MMA's operations, including . . . the possible loss of business with Irving as well as a reduction in revenue." Nor do we see how he could, given the testimony that the Bankruptcy Court deemed credible from Ian Simpson, the General Manager for the Irving Railroads. Simpson's testimony, moreover, also supports the Bankruptcy Court's finding that "it would not be practical or economical" for the MMA to use an alternative route to ship oil to St. John.[5]

Keach does cite to a number of cases that he contends emphasize that the bar for an expense to qualify as being "necessarily incurred" is a high one. But, most of those cases neither elaborate on the contours of the necessity test nor deal with facts analogous to the ones presented here. See Commonwealth

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[5] Keach at various points in his briefing suggests that the MMA was only a "collection agent" for the Irving Railroads. If Keach means to argue that the expenses incurred by the MMA could not have been "necessarily incurred" because the Irving Railroads could simply have bypassed the MMA and collected the payments itself directly from the customers whose freight shipments traversed their lines, he fails to develop this argument and has therefore waived it. See Zannino, 895 F.2d at 17. In any case, this argument would ignore the Bankruptcy Court's findings that the MMA's business at the relevant time depended in large part on shipping oil toward St. John. Thus, we have difficulty seeing how it would be clear error to find that the MMA's payments to compensate the Irving Railroads for the services the Irving Railroads performed in shipping the freight of customers were necessarily incurred, as they compensated the Irving Railroads for a service that was critical to the MMA's operation of that key aspect of its business at the time.

Edison Co. v. Cont'l Nat. Bank & Tr. Co. of Chi., 93 F.2d 265, 266 (7th Cir. 1937) (determining that electricity used to operate a railroad's "trains, lights and equipment" was "essential to the operation of its road"); N.Y. Guar. & Indem. Co. v. Tacoma Ry. & Motor Co., 83 F. 365, 368 (9th Cir. 1897) (deeming a cable rope "necessary" to a street railroad because "[i]t is impossible to imagine a case where anything was more necessary to keep [a] portion of the street railway a going concern"); Cent. Tr. Co. of N.Y. v. E. Tenn., V. & G.R. Co., 80 F. 624, 631 (6th Cir. 1897) (denying priority for advertising without invoking the necessity test). And, one of these cases even holds that legal expenses relating to "personal injury suits, collection actions, union contract disputes, and employee claims" are "necessary to the continued operation of the railroad." In re Mich. Interstate Ry. Co., Inc., 87 B.R. 921, 923 (Bankr. E.D. Mich. 1988). It is hard to divine the metric by which the payment for the legal services at issue there were necessary to the operation of the debtor railroad but the payments that the MMA had to make to the Irving railroads for the freight services that they provided are not.

The Eighth Circuit did, in an additional case highlighted by Keach, hold that claims to recover payments for debts arising from expenses incurred by a debtor railroad to support the operation of its non-railroad businesses are not eligible for priority. See Ill. Tr. & Sav. Bank v. Doud, 105 F.

123, 127-28 (8th Cir. 1900). But, Illinois Trust & Savings Bank merely stands for the commonsense proposition that the necessity prong of the test articulated in Boston & Maine II asks whether an expense was necessary for the operation of the railroad's rail system, not for other side businesses operated by the railroad. Id.

That proposition, which follows from Boston & Maine II's conclusion that Miltenberger had established the important role that interline payments played in facilitating effective rail service to the public, see Boston & Maine II, 634 F.2d at 1377, does not conflict with the findings by the Bankruptcy Court regarding the interline claims in this case. The expenses were incurred in connection with the operation of a rail route rather than a side business, and, moreover, the Bankruptcy Court supportably found that the rail route itself was a critical one.

The remaining case that Keach cites, Chicago & A.R. Co., does hold that evidence that the unpaid interline balances of a railroad "would disrupt [its] freight, and be a serious detriment to [its] business" was insufficient to prove "that the preferential payment of the . . . claim was . . . necessary to keep the . . . railroad a going concern." 225 F. at 946. But, Chicago & A.R. Co. based its restrictive reading of the necessity prong of the Six Months Rule on its conclusion that post-Miltenberger decisions of the Supreme Court "so narrowly limit . . . preferential claims"

that if the then-current Court had revisited the facts of Miltenberger, the creditors "would be denied preference." Id. at 945. Boston & Maine II, however, precludes us from adopting the limited view of Miltenberger's precedential value that Chicago & A.R. Co. recognized, because Boston & Maine II specifically considered and rejected the view of cases like Chicago & A.R. Co. that read subsequent Supreme Court precedent to have "reduc[ed] Miltenberger to a . . . holding [of] the starkest economic duress form." Boston & Maine II, 634 F.2d at 1378; see also id. at 1374 (describing Chicago & A.R. Co. as one of the cases adopting this reading of Supreme Court precedent).

3.

The last of Keach's more narrowly drawn arguments focuses, unlike the two others that we have just considered, on the third prong of the Six Months Rule test. That prong, as we explained earlier, concerns the means by which the debtor railroad was expected to pay the debt for which the creditor railroads' claims seek recovery. That prong does so by focusing not on whether a claim is for payment of an expense that was necessarily incurred by the debtor railroad but on whether the creditor was expecting payment "out of current operating revenues of the railroad." Id. at 1378. If, instead of relying on such revenues, a creditor made a payment "in reliance on the road's general

credit," then it cannot obtain the benefit of priority under the Six Months Rule. Id.

We note that, although Boston & Maine II did not have occasion to address the issue, the presence of a security arrangement might inform an inquiry under the third prong of the Boston & Maine II test into whether a claimant had expected to be "paid for out of current operating revenues of the railroad." Id. at 1378. As some courts have observed, a creditor's insistence on such an arrangement might show that it thought that payment from current operating revenues was uncertain and thus that the creditor was not relying on those revenues for payment. See Lackawanna Iron & Coal Co. v. Farmers' Loan & Tr. Co., 176 U.S. 298, 316 (1900) (identifying the existence of a large "collateral security" as "a circumstance tending to show that [the creditor] . . . relied upon the general credit of the railroad company"); Commonwealth Edison Co., 93 F.2d at 270 (noting that "evidentiary facts of other security taken" could establish a "lack of expectation or intention that [the claimant] should be paid out of current earnings").

Keach contends that, notwithstanding the contrary findings of the Bankruptcy Court, the record precludes the claimants from making the showing required by this third prong of the Miltenberger-derived test that Boston & Maine II sets forth. But, for the following reasons, we do not agree. We begin by saying a bit more about how we apply the third prong of the test.

We then explain why we conclude that the Bankruptcy Court supportably found it met.

a.

As we have explained, the third prong of the Boston & Maine II test reflects a sensible intuition. The Six Months Rule, as elaborated in Boston & Maine II, is designed to protect providers of certain critical goods and services who were expecting to be paid out of the railroad's current operating expenses in the ordinary course of business. See 634 F.2d at 1378. Thus, it makes sense that the Six Months Rule would not permit a creditor to reap the benefits of priority in bankruptcy if that creditor implicitly assumed the risk that the debtor railroad would not remain solvent, say, by hedging against that risk through a contract with interest terms that reflected its trust in the railroad's general financial health rather than an expectation of being promptly paid out of the railroad's current revenues in the normal course for debts arising from expenses necessarily incurred. See id. at 1379-80. Similarly, it makes sense that the Six Months Rule would not protect a creditor who hedges against the risk of nonpayment from operating expenses through a demand for security. See Lackawanna Iron & Coal Co., 176 U.S. at 316.

But, despite the sensible intuition that the third prong of the test reflects, it is not always easy to discern whether this prong has been met. As we have said before, "reliance on the

general credit of the railroad" is somewhat of "an illusory concept," Boston & Maine II, 634 F.2d at 1379, because of the wide variety of circumstances in which a party might expect payment from a railroad. In fact, in accord with that observation, the Bankruptcy Court recognized in this very case that it is possible that a party "might well rely on both the current operating revenues of the railroad as well as its general credit."

Nevertheless, Boston & Maine II provides us with some guidance as to how to draw this nebulous line. Boston & Maine II provides that:

> it will be for the reorganization court to determine . . . whether the non-payment reflects an intentional extension of credit to the railroad, or the intervention of the reorganization petition before expiration of the ordinary billing and payment period, or some noncontractual indulgence or inadvertence on the part of the claimant, or deferment of payment on the part of the railroad; and whether, if the transaction giving rise to the claim had any credit term, it was compatible with a general expectation of payment from current receipts or indicated reliance on the railroad's general credit.

Id. at 1380. In an early case elaborating on this constraint on Six Months Rule priority, moreover, the Supreme Court explained that among the factors to be considered are "the amount of the debt, the time and terms of payment, and all other circumstances attending the transaction." Carnegie Steel Co., 176 U.S. at 285. We thus apply this guidance in assessing the findings of the

Bankruptcy Court that bear on this third prong of the Boston & Maine II test.

b.

The Bankruptcy Court found here that the Irving Railroads expected to be paid from current receipts of the MMA and did not rely on the MMA's general credit or a security arrangement. To understand the finding, it helps to recall some of the details of the swap arrangement that was in place as of 2013, which is the year when all the debts for which the claims at issue sought recovery were incurred.

By then, as we noted at the outset, the volume of oil shipped across the rail systems of the Irving Railroads and the MMA to St. John had increased dramatically. As a result, the MMA typically owed the Irving Railroads more in interline payments than the Irving Paper Companies owed the MMA for shipping their freight. The increased oil volume also meant that the MMA at that time had difficulty meeting the timeline for payment under the then-existing agreement between the parties.

In consequence, in 2012, the Irving Railroads and the MMA carved certain payments out of their preexisting swap arrangement. Thus, based on the bifurcated agreement in place as of 2013, the Irving Railroads were expecting to receive two types of relevant payments from the MMA.

First, the MMA owed the Irving Railroads payments for freight shipments on the rail system that were to be collected by the MMA directly from the customer shipping the freight, namely payments for freight shipments that originated on lines belonging to either the Irving Railroads or the MMA. For these shipments, in which MMA was the billing railroad, the MMA would make them to the Irving Railroads at the same time that the Irving Railroads' affiliates, the Irving Paper Companies, would pay the MMA for what it was owed for their freight having traveled, at least in part, on its rail system. The MMA's transfers to the Irving Railroads would take place within 30 days of the freight having been shipped.

Second, the MMA owed the Irving Railroads their share of payments for charges to customers whose freight shipments traversed the Irving Railroads' rail systems but did not originate on either those rail systems or the MMA's rail system. After all, the MMA received through the ISS both its share of the payment for the charge to customers for shipping that freight and the Irving Railroads' share.

The share of the payments that the MMA owed to the Irving Railroads primarily related to shipments of oil to St. John. Moreover, all payments for charges to customers for oil shipments to St. John were payments of this type.

The MMA had to send the Irving Railroads their share of these payments within five days of the MMA's receipt of the

payments that it collected through the ISS. Due to the 45-to-60-day turnaround time for payments made to the MMA through the ISS, however, the Irving Railroads could expect to wait up to 65 days to receive their share of these payments.

In finding that, for both sets of these payments, the Irving Railroads counted on the current operating revenues of the MMA for payment, the Bankruptcy Court relied on witness testimony that indicated that the Irving Railroads intended to avoid relying on the MMA's credit. In so finding, the Bankruptcy Court explained that it "didn't find anything in that deal or that arrangement that had incorporated common conditions of the commercial credit, security interests, and the like."

The Bankruptcy Court supportably relied in particular on testimony from Karl Hansen, the General Manager of Corporate Credit and Financial for the Irving Paper Companies, who testified that the Irving Railroads "absolutely" did not rely on the MMA's general creditworthiness, but instead relied on the regularity of the ISS payments to the MMA. The Bankruptcy Court similarly pointed to testimony from Ian Simpson, the General Manager for the Irving Railroads, who testified that "[w]hen [the MMA] got paid, we were to be paid."

This testimony was consistent with the nature of the swap agreement between the Irving Railroads and the MMA after the payment timeframe was extended in July 2012, which is the only

relevant timeframe for our purposes, given when the debts that the claims at issue seek to recover were incurred. By then, the swap arrangement had been modified to account for the change occasioned by the oil shipments to St. John. Nonetheless, the swap arrangement still required the MMA to send the Irving Railroads their share of the payments that the MMA collected within five days of the MMA itself receiving the payments, and nothing in the modified agreement suggests that the Irving Railroads received interest or any other compensation in exchange for the additional risk they took on by accepting this extended delay. See Boston & Maine II, 634 U.S. at 1380 (asking whether a "credit term . . . was compatible with a general expectation of payment from current receipts").

It is true that, as Keach notes, under the modified swap arrangement, the Irving Railroads could expect to wait as long as 65 days to be paid what the MMA owed with respect to at least some of what they were owed. But, we find supportable on this record the Bankruptcy Court's conclusion that -- notwithstanding that delay -- payments due to the Irving Railroads were still tied to the MMA's receipt of payments through the ISS and therefore were made in reliance on the current operating revenues of the MMA.

Notably, the Supreme Court has approved of affording priority to creditors based on contracts with payment terms of three and four months. See Carnegie Steel Co., 176 U.S. at 286-

87 (describing the claimant's credit arrangement as "short credit given"). The payment terms that it has found to be indicative of a reliance on the general credit of a railroad, by contrast, have been far lengthier than those that we confront here. See Lackawanna Iron & Coal Co., 176 U.S. at 316-17 (holding that a "long period of credit" -- a six-month repayment term that was renewable by the railroad -- was, as part of a totality-of-the-circumstances analysis, evidence that the debtor was relying on the railroad's general credit).

Indeed, the Bankruptcy Court recognized that, prior to 2012, when the swap arrangement still covered all payments between the parties, Keach may have had a "more powerful" argument that the Irving Railroads were not counting on the MMA's operating revenues for repayment. After all, at that point, the payments owed from the Irving Paper Companies to the MMA were much larger than the payments owed from the MMA to the Irving Railroads, and all of the payments owed to the Irving Railroads thus were made pursuant to a swap arrangement that, at least arguably, protected the Irving Railroads in the event that the MMA failed to pay.

In 2012, though, the Bankruptcy Court explained, "the oil started shipping," the MMA stopped being able to make all its payments under the swap arrangement, and the parties entered a "new reality." That new reality was reflected, in turn, in the new agreement that they reached to account for the change, as that

new agreement carved out from the swap arrangement the payments for the charges to customers for the critical oil shipments.

Under this new reality, the increased volume of oil shipments meant that the MMA typically owed more to the Irving Railroads than it expected to receive from the Irving Paper Companies. Thus, as Keach concedes, the Irving Railroads were as of that time "undersecured."

Thus, we read the Bankruptcy Court to have impliedly found that the swap arrangement was no longer serving whatever security function it may have served at the beginning of the parties' relationship. Rather, we understand the Bankruptcy Court to have determined that, by that point in time, the Irving Railroads continued to do business with the MMA because they expected that the MMA could pay them from the revenue that it was receiving in the form of both the interline payments that it received through the ISS and the payments that it received from customers that it directly billed. In other words, we understand the Bankruptcy Court to have supportably found that the parties' "new system" in 2012 no longer depended on the swap arrangement for security but instead on the Irving Railroads' confidence in the cash flow of the MMA.

Because we see no basis, on clear error review, for rejecting these findings, we conclude that the Bankruptcy Court supportably found that the Irving Railroads expected to be paid

out of the MMA's "current receipts," namely the ISS payments or other similar payments that the MMA collected, and not the general credit of the MMA or a security arrangement. As a result, the Bankruptcy Court's findings suffice to show that the claims in question satisfy the third prong of the test for giving them priority under the Miltenberger-derived test that Boston & Maine II sets forth.

Keach's attempts to resist this conclusion are not persuasive. Keach argues that the fact that the railroads laid out their ongoing business relationship in a written contract is evidence that the parties depended on each other's credit and not on their current operating revenues to cover the debts incurred. But, a detailed, documented agreement is perfectly compatible with repeated transactions made in reliance on current operating revenues. Indeed, the case Keach cites on this point, Louisville Bridge Co. v. Chicago, I. & L. Ry. Co., 253 F. 631, 634 (7th Cir. 1918), merely found that the specific contractual provisions at issue in that case, including a provision allowing the creditor to terminate the contract upon the railroad's failure to repay, when combined with other facts, such as the creditor's decision to delay receipt of payment, showed an extension of credit to the railroad. Louisville Bridge Co. does not stand for the implausible converse proposition that a contract specifying payment terms in and of

itself shows that the parties did not contemplate payment from current operating revenues.

Keach also contends that, because the Irving Railroads had what he contends was a "special security arrangement" with the MMA in the form of its swap agreement, they could not have been relying on the operating revenues of the MMA to pay the debts at issue. But, we see no basis for adopting a hard-and-fast rule -- insofar as Keach means to ask us to do so -- that the mere existence of a "'special security' . . . excepts creditors from the protections of the six months rule" regardless of its terms and limitations or practical effect.

The out-of-circuit cases to which Keach cites are not to the contrary. They merely show that -- just as the Bankruptcy Court recognized here -- such arrangements may be relevant, depending on the facts, to the Six Months Rule analysis. See Flournoy, 301 F.2d at 856 (finding that a cash-on-delivery arrangement, in which the railroad paid the creditor for old debts at the time of delivery, showed that the creditor "was not looking to current earnings for payment of current deliveries but rather for payment of the old balance"); Commonwealth Edison Co., 93 F.2d at 270 (summarizing the Six Months Rule as including a requirement that credit not be "given in reliance upon the railroad company's personal credit or some special security" (quoting Franklin W. M. Cutcheon, Some Legal Phases of Corporate Financing, Reorganization

and Regulation 106 (1931))); Gregg v. Mercantile Tr. Co., 109 F. 220, 223 (6th Cir. 1901) (finding that a lessor's right to "resume possession, and declare the lease forfeited" shows that "the lessor did not rely upon its rentals as constituting an equitable charge upon the current income of the lessee company"); In re Third Ave. Transit Corp., 138 F. Supp. 623, 625 (S.D.N.Y. 1955) (same quotation as Commonwealth Edison Co.).

Nor does Keach's contention fare better if we look at the actual details of the swap arrangement and how it worked in practice. As we have already explained, by the time the expenses relating to the claims at issue here were incurred, the Bankruptcy Court supportably found, the Irving Railroads were no longer relying on the swap arrangement for security. Thus, keeping in mind that "each case 'must depend largely upon its special facts,'" Boston & Maine II, 634 F.2d at 1379 (quoting Carnegie Steel Co., 176 U.S. at 292), and that it is "for the reorganization court to determine . . . whether the non-payment reflects an intentional extension of credit to the railroad," id. at 1380, we reject this final aspect of Keach's challenge to the ruling below.[6]

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[6] Keach also reasons, by analogy to the preferential transfer rules of 11 U.S.C. § 547, that the bankruptcy laws are designed to punish creditors who attempt to gain an advantage vis-à-vis similarly situated creditors through non-ordinary transactions, and that disqualifying creditors who resort to such measures from Six Months Rule protection is therefore appropriate. But, the preferential transfer rules are designed to place similarly

IV.

Accordingly, we **affirm** the decision of the Bankruptcy Court.

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situated creditors in the same position, not to punish the recipients of preferential transfers relative to those who did not receive such transfers. See 5 Collier on Bankruptcy ¶ 547.01 (Richard Levin & Henry J. Sommer eds., 16th ed. 2020) (identifying as the primary purpose of § 547 "the prime bankruptcy policy of equality of distribution among creditors of the debtor"). Thus, even accepting Keach's characterization of the parties' contract as out of the ordinary, there is little reason to extrapolate from the preferential transfer rules a general bankruptcy policy of penalizing creditors who resort to unusual contract terms to protect themselves prior to bankruptcy.