



## TRANSPORTATION APPEAL TRIBUNAL OF CANADA

**Citation:** *Mark Dinan v. Canada (Minister of Transport)*, 2019 TATCE 40 (Review)

**TATC File No.:** A-4436-68

**Sector:** Aviation

### **BETWEEN:**

**Mark Dinan**, Applicant

- and -

**Canada (Minister of Transport)**, Respondent

**Heard in:** Halifax, Nova Scotia, on May 29, 2019

**Before:** Keith B. Whalen, Member

**Rendered:** September 12, 2019

### **REVIEW DETERMINATION AND REASONS**

**Held:** The Minister of Transport has not proven on a balance of probabilities that it was justified in refusing to issue a Canadian aviation document to the applicant, Captain Mark Dinan, on the basis that he did not meet the required skill standard for a Line Operational Evaluation. The decision is referred back to the Minister for reconsideration as per subsection 6.72(4) of the *Aeronautics Act*.

## I. BACKGROUND

[1] Transport Canada advised Captain Mark Dinan, by Notice of Refusal to Issue or Amend a Canadian Aviation Document (Notice) dated July 6, 2018, and pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act*, that his EA32 Line Operational Evaluation (LOE) would not be issued, as he had failed an LOE on June 26, 2018 (Exhibit M-4).

[2] Appendix A of the Notice noted that Captain Dinan did not meet the required skill standard for an LOE. Specifically, in accordance with TP 14672—Advanced Qualification Program Evaluator Manual (AQP Evaluator Manual), the LOE was assessed as “Failed” due to the candidate being unsuccessful on the initial attempt of three separate event sets. Also included with the Notice was the Flight Test Report—Pilot Proficiency Check (Aeroplane), dated June 26, 2018 (Exhibit M-3). It contained the following notes:

LOE graded unsatisfactory

Leg #2 Event Set #8

TPO [terminal proficiency objective] #11 Perform Precision Approach

Standard Statement ID #18 - Notifies Cabin Crew

For the emergency landing the required announcements to notify cabin crew were not completed as per the FOM [flight operations manual]

This was the third event set graded 1 with no repeats available.

[3] The LOE is the primary mode of proficiency evaluation under the Advanced Qualification Program (AQP), as noted in Chapter 8.10 of the AQP Evaluator Manual (Exhibit M-2, page 44).

[4] The Transportation Appeal Tribunal of Canada (Tribunal) received Captain Dinan’s request for review on August 7, 2018.

[5] On March 22, 2019, the Tribunal informed the parties of the hearing date set for May 29, 2019 in Halifax, Nova Scotia, and the hearing subsequently took place on that date.

## II. ANALYSIS

[6] The Minister based its decision on paragraph 6.71(1)(b) of the *Aeronautics Act*, which provides that the Minister may refuse to issue or amend a Canadian aviation document on the grounds that “the applicant ... does not meet the qualifications or fulfil the conditions necessary for the issuance or amendment of the document ...”.

[7] Paragraphs 705.106(1)(c) and (d) of the *Canadian Aviation Regulations* state that “... no person shall act as the pilot-in-command, second-in-command or cruise relief pilot ...” unless that person

(c) has successfully completed a **pilot proficiency check**, the validity period of which has not expired, for that type of aircraft, in accordance with the *Commercial Air Service Standards*; and

(d) has successfully completed or is undergoing a **line check or line indoctrination** training, the validity period of which has not expired, for that type of aircraft, in accordance with the *Commercial Air Services Standards*; ...

[emphasis added]

[8] The issue before this Tribunal is whether the Minister was justified in refusing to issue a Canadian aviation document, in this case an EA32 LOE, to Captain Dinan, and whether there are any grounds to refer the matter back to the Minister for reconsideration.

[9] The Minister has the burden of proof to demonstrate that the refusal to issue the Canadian aviation document to Captain Dinan, based on his failure on the initial attempt of three separate event sets, was justified. The standard of proof is the balance of probabilities, pursuant to subsection 15(5) of the *Transportation Appeal Tribunal of Canada Act*.

[10] The respondent adduced evidence through the submission of twelve exhibits and the testimony of two witnesses, Michel Paré, Civil Aviation Safety Inspector, National Flight Operations Division, Transport Canada, and Captain Peter Jaworski, Transport Canada Approved Check Pilot and Air Canada LOE Evaluator.

[11] The applicant adduced evidence through one exhibit, was self-represented and testified on his own behalf.

[12] The Minister's representative introduced the AQP Evaluator Manual (Exhibit M-2). Mr. Paré explained that the AQP is a voluntary program offered to Canadian air operators seeking an alternative method to train, evaluate and qualify flight crew members, instructors and evaluators. Air Canada is currently the only operator in Canada that has implemented an AQP.

[13] The AQP Evaluator Manual provides that a Canadian air operator that implements an AQP is exempted from conducting pilot proficiency checks, line checks and line indoctrination training, in accordance with the document "Exemption from Paragraphs 705.106(1)(c) and (d) of the Canadian Aviation Regulations" (Exhibit M-1).

[14] Mr. Paré further explained that the AQP is a progressive training and evaluation program and the LOE is the part of the program where the total skill set of the flight crew is evaluated. The LOE is conducted only by a Transport Canada-approved type E evaluator.

[15] Mr. Paré was the Transport Canada Acting Technical Team Lead who evaluated the Flight Test Report (Exhibit M-3) and issued the Notice dated July 6, 2018 (Exhibit M-4). He based his decision on paragraph 9.8.1(b) of the AQP Evaluator Manual, which states, "A LOE will receive a General Assessment of 'Failed', if: the candidate is unsuccessful on the initial attempt of three separate event sets" (Exhibit M-2, page 51).

[16] Captain Jaworski testified that he was a qualified Type E AQP Evaluator (Exhibit M-5) and conducted the flight check on Captain Dinan on June 26, 2018. Captain Phil Cameron, Company Check Pilot under training as an LOE Evaluator, assisted him during the flight check. While Captain Cameron ran the scripts and assumed the duties of Flight Dispatch, Maintenance Dispatch, Cabin Flight Attendant, and Air Traffic Control, and filled out the Flight Test Report, Captain Jaworski conducted the flight check and made the final flight check assessment.

[17] The Minister's representative introduced the Air Canada LOE 31 Script (Exhibit M-9), and Captain Jaworski provided a summary of how it is used and the protocols to be followed in conducting an LOE flight check. The LOE 31 Script has 11 event sets in Leg 1, and 8 event sets were introduced to Captain Dinan, with the flight check being terminated during event set 8 due to the unsuccessful completion on the first attempt of event sets 2, 3 and 8.

[18] The Minister's representative also introduced the Air Canada AQP Grading Guidelines (Grading Guidelines) (Exhibit M-10), and Captain Jaworski explained the four-point system used to grade a flight crew during a flight check. There are numerous elements contained in these Grading Guidelines, each with criteria for identifying the performance as a 4 through 1, with 1 being considered unsatisfactory. This document was drafted by Air Canada and was available to Captain Jaworski during the flight check.

[19] The Tribunal notes that the AQP Evaluator Manual provides that "Each AQP must have a grading methodology for grading the performance of the proficiency objectives against the Qualifications Standard". Section 10.3.1 also states that "each air operator will develop their own grading scale(s), which will be described in the air operator's approved AQP documentation" (Exhibit M-2, page 54).

[20] Therefore, according to the AQP Evaluator Manual, the Grading Guidelines are the appropriate assessment tool used to grade performance for the applicant's LOE. The applicable flight operations manual (FOM) may also be relevant in grading, as per section 9.5.2 of the AQP Evaluator Manual, which states that during a pre-flight briefing, it must be noted that emergency procedures are assessed in accordance with the qualification standards, with reference to the FOM (Exhibit M-2, page 49).

#### **A. Event Set 2 – Assess Aircraft Equipment / Maintenance Status / Preflight**

[21] According to the LOE 31 Script, the objective of this event set was for the flight crew to discover a "No Go" message on the Aircraft Communications Addressing and Reporting System (ACARS) printer when they arrived at the aircraft. This message was due to a maintenance issue that was not recorded properly in the electronic tracking system. The event set objective states that "The Crew shall follow FOM protocol for handling a NO GO message. They will not receive clearance from maintenance to depart unless they have acknowledged they need it". The LOE 31 Script also states, "Ensure the NO GO Message is waiting on the printer when the crew takes their seats" (Exhibit M-9, page 9).

[22] Captain Jaworski testified that the message was placed on the ACARS printer prior to the flight crew arriving approximately 30 minutes before scheduled departure time, and that it was sticking out of the ACARS printer in a vertical position. He also testified that the First Officer removed the message from the ACARS printer and advised Captain Dinan that there was an ACARS message, but that Captain Dinan did not see it and that it was possible that it got buried with other paperwork. Captain Jaworski testified that the crew did not acknowledge the message or receive clearance to depart the gate, and that therefore, the event set was graded as 1.

[23] Captain Dinan testified that he did not recall any conversation regarding the No Go message and that on the climb out from Toronto, a message printed on the ACARS indicating

that the necessary work had not been completed before departure. This was the first time that he was made aware of the No Go message.

[24] Captain Dinan referenced the Flight Operations Manual section 8.2.18 (Exhibit M-11) regarding the No Go message. It states that “A ‘NO GO MTC WORK NOT COMPLETE’ ACARS message is an alert sent approximately 20 minutes prior to scheduled departure time in order to ensure that the aircraft does not depart prior to the completion of any required maintenance work or action”. He expressed concern that the message was placed in the simulator earlier than it would have been in an actual aircraft during a normal flight and claimed that this resulted in the flight crew not noticing the No Go message. Captain Dinan argued that the message was placed on the printer without the flight crew’s knowledge and that Captain Cameron should have advised them of the message when they entered the cockpit. Captain Dinan stated that it was his “assumption ... that this message was collected by the candidates along with multiple ATIS [automated terminal information service] messages ...” (Exhibit A-1).

[25] Captain Dinan further argued that the ACARS message would normally be visually indicated on a display screen, and that this display was never activated during the test, nor did the evaluator verbalize that a message had been printed (Exhibit A-1). Captain Jaworski testified that when an ACARS message is received in the aircraft, there is a visual indication on the ECAM (Electronic Centralized Aircraft Monitor) that a message has been received. On the simulator, this feature was not operational, so the only way the flight crew would be aware that there was a message was to physically check the ACARS printer. He testified that this anomaly was part of the pre-flight briefing and that the flight crew was made aware of the requirement to check the ACARS printer for any messages.

[26] Given the discrepancy in testimony and the absence of evidence from the First Officer, I find Captain Jaworski’s testimony to be more credible regarding the placement of the No Go message on the ACARS printer approximately 30 minutes prior to departure and the subsequent flight crew actions. There was compelling testimony from Captain Jaworski that the First Officer removed the No Go message from the ACARS printer and advised Captain Dinan. Further, Captain Dinan conceded that the message was likely misplaced with other messages. Therefore, I find, based on the evidence, that Captain Dinan did receive a notification from the First Officer regarding receipt of the message, but did not acknowledge or take any further action regarding the No Go message. Further to the testimony of both parties, it is conceivable that the First Officer filed the message with the other paperwork, went on to other pre-flight duties, and subsequently forgot to take any further action on the message.

[27] I find, on a balance of probabilities, that the No Go message was on the ACARS printer, in accordance with the LOE 31 Script and the FOM, which allowed ample time for it to be detected prior to departure. The term “approximately” is used in the Flight Operations Manual and the LOE 31 Script, and this allows for flexibility in the time frame for sending and receiving No Go messages.

[28] I must now determine whether the crew’s actions warranted a grade of 1 for this event. Captain Jaworski rated this event as a failure, since the crew did not acknowledge the No Go message or receive clearance to leave the gate. However, he did not reference specific grading criteria from the Grading Guidelines.

[29] The Grading Guidelines set a grade of 1 for an LOE event set when “CRM [crew resource management] skills were ineffective unless continuously prompted by other crew members”. For professional management, a grading of 1 is warranted when standard operating procedures (SOPs) are not followed.

[30] I find that the event set was appropriately graded as a fail, and that the actions of the crew warranted a grading of 1 under the circumstances. In this case, the crew resource management (CRM) skills demonstrated by the Captain and First Officer were ineffective, as they did not acknowledge the No Go message. Further, as a result of the failure to acknowledge the message, they took off without having the proper clearance, in violation of the FOM and SOPs.

### **B. Event Set 3 – Perform Taxi Out (Low Vis)**

[31] The objective of this event set is for the flight crew to demonstrate their abilities during taxi operations in low visibility and to be able to adapt to a revised clearance while maintaining their situational awareness (Exhibit M-9, page 11).

[32] Both the LOE 31 Script and Captain Dinan’s testimony reflect that the flight crew received an initial clearance to turn right on Alpha taxiway, turn left on Romeo taxiway and hold short of Bravo taxiway (although Exhibit A-1 differs minimally from the applicant’s own testimony). Captain Dinan testified that after departing the ramp for Alpha taxiway, he mistakenly turned right too early, remained on the ramp and proceeded northbound, paralleling Alpha taxiway rather than turning onto Alpha taxiway and following it. As soon as he detected the error, he stopped the aircraft, set the parking brake, and then called the ground air traffic controller, advising them of the taxi error and his current location. He then received an amended taxi clearance of Alpha Juliet, cross Alpha taxiway, proceed southbound on Bravo taxiway, right on Victor taxiway to hold short of Runway 33R (Exhibit A-1).

[33] Captain Dinan testified that there were two simulators available in this facility and they were taking the flight check in Simulator #1 (Exhibit M-9). This simulator has a notable degradation in the visual acuity as compared to the other simulator, #3. He stated that on two occasions during the LOE, the simulator instructor advised the crew in normal visual conditions that the simulator visuals were poor, and in one case, the instructor provided progressive taxi instructions due to the limitations of the simulator visuals (Exhibit A-1). Captain Dinan argued that the crew was “expected to proceed away from [their] departure runway, using extremely poor simulated visual conditions, with taxi instructions which were exceeding difficult” [*sic*]. Captain Dinan also stated that while he accepted responsibility for the failure to follow taxi instructions, he believed “that the instructors and the script deliberately tried to induce conditions which led to the mistake being made” (Exhibit A-1).

[34] Captain Jaworski agreed that the visual acuity is better on Simulator #3 than Simulator #1 but noted that both simulators are Transport Canada-approved level D simulators (Exhibit M-6).

[35] Captain Jaworski stated that the reason for assigning a grading of 1 for this event set was that the aircraft was placed in an Undesired Aircraft State (UAS). The AQP Evaluator Manual defines a UAS as “An aircraft position, speed, attitude or configuration that results from a flight crew error, action, or omission which clearly reduces safety margins” (Exhibit M-2, page 18).

[36] In reviewing the evidence and applying the Grading Guidelines for an LOE event set, I have to agree that a UAS was achieved. However, any deviation from an air traffic control clearance or FOM instruction could put the aircraft into a UAS.

[37] Therefore, in the absence of any explanation from the Minister's representative as to how to properly apply the criteria of the Grading Guidelines, I find that using the UAS criterion alone does not warrant a failure of this event set. I find that a better approach to using the Grading Guidelines would be to rate the event set based on the average grade corresponding to the most appropriate criteria as follows:

- A grade of 1 provides that "Safety of flight was jeopardized and threat management was unacceptable". I find that while the safety of the flight may have been reduced, it was not jeopardized, as the airport was operating in low visibility operations, they were the only aircraft taxing at that time, and the aircraft was stopped as soon as the error was detected. Further, no evidence was presented to show that the aircraft was in danger as a result of the taxi error. As a result, a grading of 2 would be more appropriate: "Safety of flight was not jeopardized, but threats were poorly managed".
- A grade of 1 provides that "CRM skills were ineffective unless continuously prompted by other crew members". In this case, I find that the CRM skills were effective, as the aircraft was stopped immediately after detecting the taxi error, the parking brake was set, and Air Traffic Control was advised of the taxi error and the current location. This would allow for a CRM skills grading as high as 3: "CRM skills were effective".
- A grade of 1 provides that "Major errors were not recognized". While I find that the taxi error was major, it was recognized and mitigated in a timely manner. This would fit squarely with a grading of 2: "Some errors were major, but were eventually recognized, trapped and mitigated".

As a result, I find that a grading of at least a 2 would be more appropriate to assess the actions of the flight crew for this event set.

[38] While Captain Dinan did make an error and turned early, which put the aircraft in conflict with the taxi clearance, I agree with Captain Dinan that the grading of 1 was not reasonable in this case, as the criteria for a failure do not completely align with the circumstances that arose during this event. However, I cannot find, based on the evidence, that there was a deliberate attempt by the evaluators or the LOE 31 Script to induce failure.

### **C. Event Set 8A – Perform Non-Precision Approach (Power Loss / Single Engine)**

[39] The objective of the event set was for the flight crew to conduct a single-engine non-precision approach in accordance with company and regulatory guidance (Exhibit M-9, page 18).

[40] Although there was no evidence provided by the Minister's representative as to the reason for the failing grade for this event, the failure was not contested by the applicant. Captain Jaworski testified that Captain Cameron advised the flight crew that this would be an emergency landing and got a confirmation from Captain Dinan that he was aware of the emergency landing. Captain Dinan noted that subsections 12.3.3(2) and (3) of the Flight Operations Manual (Exhibit M-11) require that the flight crew shall communicate with the flight attendants at two separate

times prior to touchdown during a prepared emergency landing: at approximately two minutes and again at approximately 30 seconds. He concedes that neither of these communications took place prior to touchdown and that since he did not make the calls in accordance with the Flight Operations Manual, this event set was graded correctly as a fail (Exhibit A-1).

#### **D. Conclusion**

[41] The Tribunal agrees with the Minister that event sets 2 and 8 were assessed correctly as unsuccessful on the first attempt and subsequently were considered a failure on the LOE.

[42] In the Tribunal's view, the Minister has not shown that it was justified in failing the applicant on event set 3. Based on the evidence, the grading of 2 fits better with the elements found in the Grading Guidelines. With only two unsuccessful initial attempts of the event sets, the Tribunal finds that the termination of the LOE was not justified and the Notice dated July 6, 2018 and pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act* should not have been issued.

### **III. DETERMINATION**

[43] The Minister of Transport has not proven on a balance of probabilities that it was justified in refusing to issue a Canadian aviation document to the applicant, Captain Mark Dinan, on the basis that he did not meet the required skill standard for a Line Operational Evaluation. The decision is referred back to the Minister for reconsideration as per subsection 6.72(4) of the *Aeronautics Act*.

September 12, 2019

(Original signed)

Keith B. Whalen

Member

Appearances

For the Minister: Michel Tremblay

For the Applicant: Self-represented