



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Gary Smith v. Canada (Minister of Transport)*, 2021 TATCE 18 (Review)

TATC File No.: O-4571-68

Sector: Aviation

BETWEEN:

Gary Smith, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard by: Videoconference on April 29, 2021

Before: Francis Hane, Member

Rendered: June 21, 2021

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport's decision to refuse to issue a Canadian aviation document, pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act*, is confirmed. The applicant failed to meet the qualifications necessary for the issuance of the BE02 pilot proficiency check.

I. BACKGROUND

[1] On October 19, 2019, the applicant, First Officer Gary Smith, attempted a pilot proficiency check (PPC) on a Beech 1900 (BE02) aircraft administered by Capt. Timothy Crits, an approved check pilot (ACP). Capt. Jim Krupp was assigned as a seat substitute to act as the captain for this PPC and his performance was not being evaluated. At the time of the PPC, First Officer Smith was employed by SkyLink Express Inc., a cargo airline based out of the Hamilton Airport (CYHM) in Ontario, operating under *Canadian Aviation Regulations (CARs)* Subpart 704.

[2] Due to several critical errors and deviations, notably during the Non-Directional Beacon (NDB) approach to runway 12 at Hamilton Airport, circling runway 06, First Officer Smith was assessed a failing grade of “1” on Exercise 16 – Approach – NDB – Circling.

[3] On November 22, 2019, First Officer Smith requested that the Transportation Appeal Tribunal of Canada review the refusal to issue him a PPC.

II. LEGAL FRAMEWORK

[4] Standard 724.108 of the *Commercial Air Service Standards (Standards)* outlines the requirements of PPCs that are used to satisfy the qualification requirement of pilots operating commuter aircraft.

[5] Subparagraph 724.108(1)(b)(ii) of the *Standards* states:

724.108(1)(b) A pilot proficiency check shall be conducted in a manner that enables the pilot to demonstrate the knowledge and skills respecting:

[...]

(ii) proper control of airspeed, direction, altitude, attitude and configuration of the aeroplane, in accordance with normal, abnormal and emergency procedures and limitations set out in the aeroplane flight manual, aeroplane operating manual (where applicable), the air operator’s standard operating procedures, the check list, and any other information relating to the operation of the aeroplane type;

[...]

III. ANALYSIS

A. Issue – Was the assessment of a “1” correct for Exercise 16 – Approach – NDB – Circling?

[6] The Minister of Transport (Minister) led its case with testimony from the ACP, Capt. Crits. I found Capt. Crits’ testimony to be credible and reliable. There was no evidence of any animus towards First Officer Smith or any sign of bias. His testimony was objective and discussed at length his rationale for each mark that he assigned to First Officer Smith. Capt. Crits generously assigned marks of “3” for steep turns, and “2” for both the engine failure and the instrument landing system (ILS) approach into the London Airport (CYXU). Despite receiving a

passing grade on these items, First Officer Smith testified at length as to his reasons why he was not satisfied with the assessment of the ILS approach and engine failure. But it was First Officer Smith's performance of the NDB approach, not the ILS approach and engine failure, that was the cause of the failing grade. Therefore, I need not discuss these other two exercises that were assessed a passing grade.

[7] Near the conclusion of the PPC, Capt. Crits assigned an NDB approach to runway 12, circling runway 06 at Hamilton Airport. Capt. Crits testified that during the NDB approach, First Officer Smith made numerous major critical errors and deviations including:

- a. NDB tracking;
- b. failure to configure in accordance with the standard operating procedures (SOPs) profile;
- c. few configuration changes without prompting by the captain;
- d. excessively high approach speed of 180 knots when the SOPs profile calls for an approach speed of 130 knots;
- e. flying with the landing gear in the UP position to the minimum descent altitude (MDA) resulting in a Ground Proximity Warning System (GPWS) landing gear aural warning;
- f. selecting "Take-Off Flaps";
- g. descending 80 feet below the MDA;
- h. climbing 220 feet above the MDA during a checklist;
- i. attempting to conduct a stabilized constant descent angle (SCDA) approach when the SkyLink Express SOPs call for a traditional step-down (colloquially a "dive-and-drive") non-precision approach; and
- j. failing to execute a go-around when the aircraft was not in a stabilized state.

[8] First Officer Smith's testimony seemed to reflect a general disagreement with Capt. Crits' extensive technical questions (for which First Officer Smith was assessed a "4" – a perfect mark – on his responses). He also disagreed with the assignment of a seat substitute captain with whom he had little experience, the assignment of an aircraft for the PPC in which he did not do his training, and Capt. Crits having him conduct an ILS approach at an airport (London) with which he was unfamiliar. The particulars of Capt. Crits' testimony were not contradicted by First Officer Smith during his examination-in-chief. Rather, First Officer Smith corroborated Capt. Crits' testimony related to the NDB approach. First Officer Smith conceded that:

- a. he was not close to being stable until over Ancaster (the final approach fix);
- b. "all the bells" sounded when the flaps came out;
- c. "we got it under control, which was marginal at any best"; and
- d. "I had thought I had ruined the ride".

[9] In his recollection of the NDB approach, I found First Officer Smith's testimony to be credible and reliable as it largely corroborated Capt. Crits' testimony. Further, First Officer Smith testified that, in hindsight, he should have done a 360 degree turn or called a missed approach.

[10] The SkyLink SOPs (Exhibit M-5) state that the circling approach will be flown with “flaps approach, gear down, 130 knots.” In contrast, the approach in question was flown with take-off flaps, gear up and 180 knots. Furthermore, the SkyLink SOPs specify a step-down non-precision approach and not an SCDA approach. The TP 14727 - *Pilot Proficiency Check and Aircraft Type Rating - Flight Test Guide (Aeroplanes) (Flight Test Guide)* (Exhibit M-4) defines a critical error as “[a]n action or inaction that is **consequential** to the completion of a task, procedure, or manoeuvre”. The divergence between the approach flown and the SOPs profile was consequential to the completion of the instrument approach procedure and therefore constitutes a critical error as defined in the *Flight Test Guide*.

[11] The *Flight Test Guide* specifies a marking scheme to be used in the evaluation of PPCs. Marks range from “4” to “1”. An assessment of “1” is assigned when the pilot commits a critical error or deviation. The assessment of a “1” on any exercise constitutes an unsuccessful PPC and a finding that the pilot is unqualified to operate the aircraft.

[12] The *Flight Test Guide* specifies the tolerances for an approach of “as required/-0 feet” at the MDA and a speed within 10 knots. It is generally accepted that the required positive tolerance on an approach is +100 feet. No evidence was adduced to suggest otherwise. The *Flight Test Guide* defines a critical deviation as “[a] deviation that **exceeds** a specified tolerance by **more than double;**” or “[r]epeated **major deviations** without achieving stability”. The descent below MDA of 80 feet, subsequent climb to 220 feet above the MDA, and airspeed of 50 knots above the SOPs approach speed exceeds the specified tolerance of more than double and therefore meets the definition of a critical deviation.

[13] First Officer Smith submitted that the NDB approach should have been assessed as a “2” because he recognized and corrected his deviation. However, this submission would only hold if he exceeded the stated tolerance, **but not more than double**, and corrected immediately. Regardless, the numerous other critical errors and deviations would still warrant an assessment of “1”.

[14] Capt. Crits testified that Capt. Krupp, the captain assigned to act as the captain for First Officer Smith’s PPC, gave excellent support and coaching that went above what is expected. First Officer Smith raised objections about Capt. Krupp’s lack of callouts, but these issues seem to have occurred during the engine failure exercise (assessed as a pass), not the NDB approach, and I therefore cannot consider them in this determination. While Capt. Krupp’s performance may not have been flawless throughout every exercise of the PPC, in no way does the evidence support a finding of incompetence or that his performance during the **engine failure** was the cause of First Officer Smith’s critical errors and deviations during the **NDB approach**.

[15] Furthermore, the reasons for the unstable approach offered by First Officer Smith were insufficient to affect this determination. Numerous options were available to First Officer Smith when he was unable to descend to the sector altitude because of conflicting VFR (visual flight rules) traffic, including slowing the aircraft, placing the aircraft in a high-drag configuration, asking for a vector from air traffic control, or discontinuing the approach.

[16] I cannot take into account the general displeasure First Officer Smith had with Capt. Crits’ questioning, his assignment of an unfamiliar captain and aircraft, or the choice of flight

route; I can only consider whether First Officer Smith’s performance was satisfactory during the NDB approach.

[17] First Officer Smith did not demonstrate “proper control of airspeed, direction, altitude, attitude and configuration of the aeroplane” under subparagraph 724.108(1)(b)(ii) of the *Standards*. While I empathize with the situation in which First Officer Smith finds himself during these difficult times, for the reasons above, a mark of “1” is correct for the NDB approach. As such, the ACP’s assessment is confirmed.

IV. DETERMINATION

[18] The Minister of Transport’s decision to refuse to issue a Canadian aviation document, pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act*, is confirmed. The applicant failed to meet the qualifications necessary for the issuance of the BE02 pilot proficiency check.

June 21, 2021

(Original signed)

Francis Hane
Member

Appearances

For the Minister: Michel Tremblay
For the Applicant: Self-represented