

In re Sargent Karch. Case AD-5

July 22, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS,
DEVANEY, BROWNING, AND COHEN

The issue in this case is whether Sargent Karch, the attorney for the Respondent Constituent Member Clubs in *National Football League (NFL)*, 309 NLRB 78 (1992), committed "aggravated misconduct" warranting suspension under Section 102.44(b) of the Board's Rules by giving a copy of the transcript of a General Counsel witness' testimony to a prospective Respondent witness in violation of the administrative law judge's sequestration order.¹ For the reasons fully set forth below, we find that Karch's conduct did in fact constitute "aggravated misconduct" under Section 102.44(b), and that his conduct warrants a 6-month suspension from practice before the Board.

I. BACKGROUND

The relevant facts regarding the *NFL* proceeding are essentially undisputed. Briefly, the complaint in the *NFL* case alleged that the NFL Management Council and the Constituent Member Clubs of the NFL had committed various unfair labor practices during the 1987 strike by the NFL's professional football players. The hearing in the proceeding opened in Washington, D.C., on May 9, 1988, before Administrative Law Judge Benjamin Schlesinger. The Respondents were separately represented at the hearing, with the Respondent Constituent Member Clubs being represented by Sargent Karch, a partner in the law firm of Baker & Hostetler.

The matter of witness sequestration was first raised at the hearing on June 6, 1988, just prior to counsel for the General Counsel's opening statement. The matter was raised by counsel for the Management Council, who stated that it was his understanding that counsel for the General Counsel intended to move for sequestration. When counsel for the General Counsel confirmed his understanding, counsel for the Management Council requested that an exception be made for medical experts, which Judge Schlesinger granted. Thereafter, a discussion ensued about who the party representatives would be. At that time, Karch designated John Johns as the representative for the Constituent

Member Clubs to sit through the hearing, and Joe Bailey for the Dallas Cowboys, which was named as a Respondent in a separate consolidated case. In addition, Karch stated that he would like to reserve the right, after adequate notice to the General Counsel, to designate an additional representative for each of the individual clubs as the allegations involving them arose or were added to the complaint. Counsel for the General Counsel, however, objected to this, arguing that Karch was entitled to only one representative at a time. Judge Schlesinger ruled that he would take up the issue as to whether more than one representative could remain in the hearing room when the individual allegations arose regarding the individual clubs. Thereafter, a discussion ensued about whether Johns would be allowed to talk to the press, in response to which Judge Schlesinger stated as follows:

You may advise . . . all prospective witnesses that the reason for the sequestration rule is to permit them when they testify to testify to the best of their recollection. And they are not to discuss with anybody else involved in this case, what their testimony is going to be or the nature or subject of their testimony. And they are not to ask other witnesses what are you going to testify to. And so that is a blanket order from this point forward, that all witnesses who are to testify in this proceeding are not to discuss their testimony with any of the other witnesses to the proceeding.

I am not going to prohibit anybody from talking with the press and saying what they desire. And I don't know how I can prevent the witnesses from reading the newspaper, assuming that there should be publication of the details of testimony. But, I would hope that witnesses would be prepared to testify to the best of their recollection without having their testimony at all altered or swayed by what they hear from others.

Thereafter, on the following day of the hearing, the issue of sequestration was again raised. The issue was first raised by counsel for the General Counsel, who asked that Judge Schlesinger instruct Johns that if he talked to the media, he do so in a manner that the conversation not be overheard by potential witnesses. Judge Schlesinger granted the request, stating as follows:

[T]he essential rule that is being applied is to permit witnesses to testify to the best of their recollection and not have their memories either refreshed or swayed by what may transpire in this room. So I would hope that everybody would be tactful in expressing to anybody what occurs in this room.

¹ Sec. 102.44 provides, in relevant part, as follows:

(a) Misconduct at any hearing before an administrative law judge or before the Board shall be ground for summary exclusion from the hearing.

(b) Such misconduct of an aggravated character, when engaged in by an attorney or other representative of a party, shall be ground for suspension or disbarment by the Board from further practice before it after due notice and hearing.

Subsequently, counsel for the Charging Party NFL Players Association (NFLPA) also raised an issue regarding sequestration, asking to replace his party representative with another NFLPA agent. Counsel for the Respondents vigorously objected to this request, with Karch himself specifically stating that the Respondent Constituent Member Clubs would “strongly object if he’s going to be a possible rebuttal witness that he sits through and hears all the testimony of all the witnesses throughout the hearing, it’s the reason for the sequestration.” Judge Schlesinger, however, granted the request, noting that there was no present expectation, and only an outside chance, that the representative would be testifying.

Thereafter, on June 22, 1988, the issue of sequestration was raised again in connection with whether counsel for the Management Council had the right to prepare or consult with a witness who was a designated representative during breaks in that witness’ examination by counsel for the General Counsel. Judge Schlesinger initially ruled that he could not, but on June 27, 1988, after a several-day recess, subsequently ruled that, notwithstanding the sequestration rule, counsel for the Management Council should have been allowed to prepare the witness for the remainder of his testimony during the recess. Accordingly, he granted counsel for the Management Council a short recess to do so.

Several days later, on June 29, 1988, the complaint was amended to allege that the Minnesota Vikings, through its executive vice president and general manager, Mike Lynn, had violated Section 8(a)(1) of the Act by informing injured defensive end Mark Mullaney that he had to resign from the Union in order to obtain physical therapy-treatment at the Vikings’ facility. In support of this allegation, on October 20, 1988, counsel for the General Counsel called Mullaney, who was thereafter cross-examined by Karch. In accordance with the sequestration order, at the conclusion of Mullaney’s testimony, Judge Schlesinger told Mullaney not to discuss his testimony with any other witness.

Thereafter, approximately 5 months later and after a 10-day recess, on Tuesday, March 14, 1989, Karch called both Lynn and Vikings trainer Fred Zamberletti to testify regarding the Mullaney allegation. During the course of their respective cross-examinations, both Lynn and Zamberletti revealed in response to questions from counsel for the General Counsel that they had read the transcript of Mullaney’s testimony prior to testifying. Lynn testified that he had received the transcript from Karch the previous Thursday and had read it on a plane. Zamberletti testified that he had received the transcript on Saturday.

On hearing this testimony, counsel for the General Counsel moved that the testimony of both Lynn and Zamberletti be struck inasmuch as it appeared Karch

had violated the sequestration rule as to those two witnesses. In response, Karch stated that he had only given a copy of the transcript to Lynn, and that it was Lynn who gave it to Zamberletti. Further, Karch stated that the only reason he gave the transcript to Lynn was because he was in a meeting with Lynn and had no other time to work on preparation between that time and the hearing, and he thought it would be helpful for Lynn to see adverse testimony. In response, Judge Schlesinger indicated that he would reserve ruling on the General Counsel’s motion.²

Thereafter, on March 21, 1991, Judge Schlesinger issued his decision in the *NFL* case. In his decision, Judge Schlesinger found, in agreement with the General Counsel, that Karch had in fact violated his sequestration order by giving the transcript of Mullaney’s testimony to Lynn.³ In so finding, he rejected Karch’s argument that the sequestration order was not specific enough to prohibit showing transcripts of testimony to other witnesses, finding that Karch’s argument in that regard “makes a mockery of this proceeding and his own intelligence.” 309 NLRB at 131.

Nevertheless, Judge Schlesinger denied the General Counsel’s motion to strike Lynn and Zamberletti’s testimony, finding that such a result would unfairly place the burden of Karch’s conduct on the Vikings, which he found was innocent of the 8(a)(1) Mullaney allegation. However, noting that Karch had been found to have violated a sequestration order in a prior case as well, *Seattle Seahawks*, 292 NLRB 899, 908 (1989), enf. mem. 888 F.2d 125 (2d Cir. 1989), Judge Schlesinger recommended that the Board order a hearing into his conduct pursuant to Section 102.44 of the Board’s Rules and consider whether Karch should be suspended from practice before the Board for a specified period for his conduct. 309 NLRB at 130–131.

Thereafter, on September 30, 1992, the Board issued its Decision and Order in *NFL* in which it affirmed as modified Judge Schlesinger’s findings with respect to the alleged unfair labor practices. In addition, the Board also addressed Judge Schlesinger’s recommendation regarding Karch’s alleged violation of the sequestration order in that proceeding. Noting that Karch had previously been admonished by the Board in *Seattle Seahawks*, supra, for violating the judge’s sequestration order in that case, the Board ordered a hearing pursuant to Section 102.44 to determine: (1)

² Thereafter, on May 2, 1989, the sequestration issue was raised again when counsel for the Management Council, joined by Karch, requested Judge Schlesinger to ask a NFLPA representative to leave the hearing room during the testimony of a Respondent witness. Judge Schlesinger denied the motion, except as to those points where there was a direct conflict or the witnesses were both allegedly present at the same events.

³ Judge Schlesinger further noted that Karch was also certainly not blameless as to Zamberletti, as he should have reasonably anticipated that Lynn would show the transcript to Zamberletti.

whether Karch violated Judge Schlesinger's sequestration order; and (2) whether he should be disciplined for violation of the sequestration order and, if so, what discipline should be imposed, up to and including suspension or disbarment.⁴

Pursuant to the Board's Order, on February 2, 1993, a hearing was conducted before Administrative Law Judge Arline Pacht. Karch testified at the hearing that he initially interpreted Judge Schlesinger's sequestration order as pretty broad and inclusive, but that he thought later developments watered it down. In particular, he testified that it was his impression that after Judge Schlesinger's ruling on June 27, 1988, counsel had considerable latitude in preparing witnesses. Karch acknowledged, however, that he did not similarly provide transcripts to the 10-15 other witnesses he had called prior to calling Lynn on March 14, 1989, since he "did not think it was the preferred method, that it was the best method," and because he "did take the admonition [in *Seattle Seahawks*] to heart."

With respect to the circumstances in which he gave the transcript to Lynn, Karch testified that he had intended to prepare Lynn in San Francisco following a trustees' meeting for the NFL Retirement Plan which both Karch and Lynn would be attending during the recess the week before Lynn was to testify. Knowing that Lynn would be at the meeting, Karch testified that he had prepared an outline of questions for Lynn, and that he took the outline along with his only copy of the transcript of Mullaney's testimony with him to San Francisco. Karch testified that he had not intended to give the transcript to Lynn, but that, as was his usual practice in preparing witnesses, he intended to use it himself in preparing Lynn. When the trustees' meeting adjourned on Thursday, however, Karch testified that Lynn indicated to him that he had to leave right away; that he was flying out of San Francisco in about an hour or so. Karch testified that he responded by saying, "Well, wait a minute Mike, we were going to sit down and prepare this afternoon," at which point he pulled out his materials and said, "What are we going to do about this?" Karch testified that Lynn, who was not an attorney and did not know about the sequestration order, responded, "Well, give me what you got and I can read it on the plane." Karch testified that at that point he made a split second decision and gave Lynn a copy of both the outline and the transcript.

As for his state of mind, Karch testified that he really did not think about the sequestration order when he gave the transcript to Lynn since Lynn was the chief operating officer of the Vikings, one of his clients, and one of the trustees he answered to as co-counsel of the NFL Retirement Plan. He acknowledged, however, that

he had never specifically designated Lynn or anyone else as a party representative for the Vikings case, and that he never thereafter disclosed to Judge Schlesinger that either Lynn or Zamberletti had read the transcript prior to testifying, even though he was aware the day before the hearing resumed on Tuesday that Lynn had forwarded Zamberletti a copy of the transcript.

On November 5, 1993, Judge Pacht issued her decision. Judge Pacht found that Karch did in fact violate Judge Schlesinger's sequestration order in *NFL* by giving a copy of the transcript of Mullaney's testimony to Lynn prior to testifying, and that Karch did so knowingly, but that Karch's knowing violation of that order did not rise to the level of "aggravated misconduct" warranting suspension under Section 102.44(b). Judge Pacht recommended instead that the Board formally censure Karch for his misconduct.

On December 13, 1993, the General Counsel filed exceptions and a supporting brief, and on January 14, 1994, Karch filed cross-exceptions to Judge Pacht's decision.⁵ Thereafter, on January 24 and February 4, 1994, Karch and the General Counsel, respectively, filed answering briefs.⁶ The General Counsel urges the Board, inter alia, to reverse Judge Pacht's finding that Karch's knowing violation did not constitute "aggravated misconduct" under Section 102.44(b), and re-

⁵ By motion filed February 9, 1994, the General Counsel moved that Karch's cross-exceptions be stricken because they were conditional (i.e., because Karch requested therein that the Board affirm Judge Pacht's decision and stated that his cross-exceptions were being filed solely to preserve his rights in the event the Board reversed or modified her decision), and because they lacked the specificity required by Sec. 102.46(b)(1) of the Board's Rules. We deny the General Counsel's motion. The Board's practice is to treat conditional cross-exceptions merely as cross-exceptions. See *Hyatt on Union Square*, 265 NLRB 612 fn. 1 (1982). Further, although Karch's cross-exceptions do not strictly comply with Sec. 102.46(b)(1), we find that they do not warrant striking. See generally *A.J.R. Coating Division Corp.*, 292 NLRB 148 fn. 1 (1988).

⁶ In its February 9, 1994 motion to strike, the General Counsel also moves to strike an addendum attached to Karch's answering brief which contains a list of NLRB cases he allegedly handled in whole or in part between June 1983 and May 1988 and a brief discussion of his alleged involvement with each case. On February 17, 1994, Karch filed an opposition to the General Counsel's motion contending that the Board should take official notice of such evidence or, alternatively, in the event the Board grants the General Counsel's motion, that the Board should strike the General Counsel's assertions that Karch does not have a substantial NLRB practice. On March 2, 1994, the General Counsel filed a reply to Karch's opposition. We find it unnecessary to address the issues raised by the parties' contentions in this regard as we find that the size of Karch's Agency practice is irrelevant to this proceeding. Although it is true that the Board mentioned the substantial size of the attorney's practice in *In the matter of an Attorney*, 307 NLRB 913 (1992), it did so only to explain, in response to the dissent in that case, why it believed the proposed settlement stipulation in that case should be approved. The issue here is not whether to approve a settlement of the misconduct allegations against the attorney, but whether the attorney did in fact commit misconduct and whether such misconduct warrants suspension. On this objective issue, we find the size of Karch's NLRB practice irrelevant.

⁴ 309 NLRB at 88. The Board's Order appears in the bound volume as amended by the Board's February 3, 1993 Order granting the General Counsel's motion for clarification.

quests that the Board issue an order suspending Karch for 1 year for his misconduct,⁷ in addition to any other remedies which the Board concludes are just and proper. Karch, on the other hand, takes exception to Judge Pacht's finding that he violated the sequestration order in *NFL*, to her finding that he did so knowingly, and to her recommendation that he be formally censured.⁸

The Board has considered the exceptions in light of the record and briefs. For the reasons fully set forth below, we have decided to adopt Judge Pacht's finding that Karch knowingly violated Judge Schlesinger's sequestration order in *NFL* when he gave a copy of the transcript of Mullaney's testimony to Lynn prior to testifying, but to reverse her finding that his knowing violation of the sequestration order in this regard did not constitute "aggravated misconduct" warranting suspension under Section 102.44(b).

II. ANALYSIS AND CONCLUSIONS

A. *Whether Karch Knowingly Violated NFL Sequestration Order*

In finding that Karch knowingly violated the sequestration order in *NFL*, Judge Pacht, like Judge Schlesinger before her, rejected Karch's argument that the order did not specifically prohibit the conduct at issue. Further, noting that Karch and his fellow counsel had actually invoked the sequestration order to their own advantage on more than one occasion, Judge Pacht found that it was also unlikely that Karch was uncertain about the scope of the order. Finally, noting that Karch acknowledged that he had taken the admonition in *Seattle Seahawks* to heart and had not provided transcripts to his other witnesses, Judge Pacht found that this essentially represented an admission by Karch that he had circumvented the sequestration order with respect to Lynn.

We find no basis to reverse Judge Pacht's findings in this regard. In agreement with Judge Pacht (and Judge Schlesinger), we find that the sequestration order in *NFL* was sufficiently broad to prohibit all prospective nonexpert witnesses from either hearing or reading the testimony of other witnesses, including opposing witnesses,⁹ and that Karch understood this when he

gave a copy of the transcript of Mullaney's testimony to Lynn.

B. *Whether Karch's Knowing Violation of NFL Sequestration Order Warrants Suspension*

As indicated, although finding that Karch knowingly violated the sequestration order in *NFL*, Judge Pacht ultimately concluded that that violation did not constitute "aggravated misconduct" warranting suspension under Section 102.44(b). Judge Pacht cited essentially five reasons for this conclusion: (1) Karch's prior infraction in *Seattle Seahawks* could not be regarded as a prior disciplinary offense; (2) the Board's Rules fail to provide guidance either with respect to what is "aggravated misconduct" or with respect to the extent of discipline for improper conduct; (3) the Board in prior cases involving similar or even worse sequestration violations apparently did not even consider sanctioning the offending attorneys; (4) the evidence in the instant case indicates that Karch acted on the spur of the moment and there is no evidence that he actually intended or planned to circumvent the sequestration order; and (5) no one was prejudiced by Karch's misconduct. We address each of these reasons below.

(1) *Karch's prior infraction was not a prior disciplinary offense.* Although acknowledging that the Board formally admonished Karch in *Seattle Seahawks* for violating the sequestration order in that case, Judge Pacht found that that admonishment constituted only a "mild rebuke" and "modest word of caution" given the Board's findings that Karch's violation of the order was neither knowing nor prejudicial and the Board's failure to specifically condemn his actions as misconduct under Section 102.44. Accordingly, Judge Pacht concluded that Karch's infraction in that case could not be regarded as a prior disciplinary offense. The General Counsel excepts to Judge Pacht's conclusions in this regard, contending that they constitute a misreading of the *Seattle Seahawks* decision.

We agree with the General Counsel. In *Seattle Seahawks*, the General Counsel and the Charging Party moved that the testimony of three of the Respondent's witnesses be stricken because Karch had mailed the

⁷ Although the General Counsel requested a 2-year suspension before Judge Pacht, the General Counsel only requests a 1-year suspension in the exceptions to her decision.

⁸ As indicated supra, notwithstanding these exceptions, Karch ultimately requests in both his cross-exceptions and answering brief that the Board adopt Judge Pacht's decision and recommended Order in their entirety inasmuch as he is prepared to submit to a formal reprimand. Nevertheless, as discussed supra, we have fully considered the issues raised by his exceptions.

⁹ See *Seattle Seahawks*, supra, 292 NLRB at 907; *Miller v. Universal City Studios*, 650 F.2d 1365, 1373 (5th Cir. 1981); and *Weeks Dredging & Contracting*, 11 Cl.Ct. 37, 48-53 (1986). See also *El Mundo Corp.*, 301 NLRB 351 (1991); and *Sunland Construction Co.*, 311 NLRB 685, 688-689 (1993). In this regard, we find it un-

necessary to pass on Karch's contention that it was improper for Judge Schlesinger's sequestration order in the *NFL* case to have precluded him from showing prospective witnesses transcripts of testimony by the opposing party's witnesses. That issue, in our view, is not raised by this disciplinary proceeding. As found above, the fact is that Judge Schlesinger's blanket sequestration order in *NFL* as understood by all counsel did prohibit such conduct, and that Karch knowingly violated that order. Further, although Karch made clear in his testimony at the disciplinary hearing that he does not believe there should be such a prohibition on counsel, there is no indication in the record that he ever timely objected to the scope of the sequestration order during the *NFL* proceeding. Finally, even if he had so objected, in our view that objection would not have justified or privileged his subsequent violation of the order. See generally *Maness v. Meyers*, 419 U.S. 449, 458-460 (1975).

entire transcript of the first portion of the recessed hearing, which included testimony from several General Counsel witnesses and one Respondent witness, to the three prospective Respondent witnesses prior to the hearing's resumption in violation of the administrative law judge's sequestration order. In a decision dated November 23, 1983, the administrative law judge (Bernard Ries), like Judge Schlesinger in the subsequent *NFL* case, found that Karch had in fact violated his blanket sequestration order by making the transcript available to the witnesses. Nevertheless, like Judge Schlesinger, he denied the motion to strike. Judge Ries found that excluding the witnesses' testimony was unwarranted given that Karch was beset by a demanding personal problem during the trial, that Karch had sent the transcripts to the witnesses solely as an expedient method of trial preparation, and that he did not believe Karch had consciously and knowingly circumvented the order. Instead, Judge Ries found that "a formal admonition to counsel is a sufficient sanction." 292 NLRB at 908. Thereafter, in its February 8, 1989 Decision and Order, the Board affirmed Judge Ries' foregoing findings and formal admonition of Karch without comment.

Contrary to Judge Pacht, we fail to see how the above-described formal admonition of Karch in *Seattle Seahawks* could be read other than as a prior disciplinary action against him. Although it is true, as indicated above, that the Board found that Karch's violation of the sequestration order in that case was negligent as opposed to knowing and/or intentional, this does not mean that the formal admonition was something less than what it appeared or that the violation did not constitute a disciplinary offense. Indeed, a formal admonition or reprimand¹⁰ is generally considered the appropriate discipline for the negligent violation of an order or rule.¹¹

Nor is it significant that the Board in *Seattle Seahawks* found no prejudice resulting from Karch's negligent violation in that case. A formal admonition or reprimand is generally appropriate not only where there is actual injury to a party or interference with the proceeding, but also where there is potential injury or interference.¹² That sequestration-rule violations pose a threat to the integrity of the administrative process is obvious and, indeed, was specifically noted by the

Board in formally admonishing Karch in the *Seattle Seahawks* case.¹³

Finally, although it is also true that the Board failed to specifically cite Section 102.44 of its Rules in formally admonishing Karch in *Seattle Seahawks*, this is also insignificant or irrelevant in our view. The Board does not issue two kinds of formal admonitions, one kind under Section 102.44 and one kind not under Section 102.44, with only the former constituting discipline. Any sanction issued by the Board against an attorney or representative, be it an admonition, reprimand, suspension, disbarment, or some variation thereof, is clearly a disciplinary action against that attorney or representative, and this is so regardless of whether the Board specifically cites Section 102.44 (or its equivalent in representation cases, Section 102.66).

Accordingly, as the Board in *Seattle Seahawks* did in fact discipline Karch for his violation of the sequestration order in that case, contrary to Judge Pacht, we conclude that Karch's violation in that case does constitute a prior disciplinary offense.

(2) *The Board's rules fail to provide guidance.* In her decision, Judge Pacht also expressed concern, quoting from *In the Matter of an Attorney*, supra, 307 NLRB at 913, that "the Board does not now have any rules concerning attorney misconduct at hearings which would place an attorney on notice concerning the extent of disciplinary action for inappropriate conduct," and that such rules are also absent which would offer guidance as to the meaning of "aggravated." In Judge Pacht's view, the absence of such rules raises serious questions about finding that Karch's violation of the sequestration order in *NFL* constituted "aggravated" misconduct warranting suspension under Section 102.44(b).

We find Judge Pacht's concerns in this regard misplaced. The situation here is entirely different from *In the Matter of an Attorney*. In that case, which involved an attorney who used profanity and addressed the opposing counsel and witness in a rude, vulgar, and/or profane manner during a representation hearing, the Board specifically noted that there had been no prior disciplinary proceedings against the attorney. Here, in contrast, as discussed above, Karch had already been formally admonished in *Seattle Seahawks* for committing a similar sequestration-rule violation. By its very nature, that formal admonition itself declared the conduct improper and cautioned or warned Karch that repeating the offense would result in more severe discipline.¹⁴ Moreover, as discussed above, it also con-

¹⁰ As the Board's admonition of Karch in *Seattle Seahawks* was expressed as a "formal admonition" and was published, we find that it was in effect a "reprimand" as that term is generally defined. Compare secs. 2.5 and 2.6 of American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards), Lawyer's Guide for Professional Conduct (ABA/BNA) 01:812 (1992). See also Black's Law Dictionary 1302 (6th ed. 1990). Although the Board has not adopted the ABA Standards, we find that they are a helpful guide in resolving the specific issues presented in this case.

¹¹ See ABA Standards, sec. 6.23, supra at 01:833.

¹² Id.

¹³ See 292 NLRB at 908. See also *El Mundo Corp.*, supra, 301 NLRB at 351-352 and 357-358.

¹⁴ See ABA Standards, sec. 2.5, supra at 01:812; and Black's Law Dictionary 48-49 and 1302 (6th ed. 1990) (formal admonition or reprimand declares conduct improper and cautions offender that repetition of offense will result in more severe discipline).

stituted a prior disciplinary action against Karch, and it is well recognized that such prior disciplinary offenses constitute an “aggravating” factor justifying an increase in discipline.¹⁵

Accordingly, as the Board’s formal admonition in *Seattle Seahawks* itself specifically declared Karch’s conduct improper and warned him that further such misconduct would result in more severe discipline, contrary to Judge Pacht, we find it of no consequence that the Board’s Rules do not also do so.¹⁶

(3) *The Board in prior cases has not even considered sanctioning the offending attorneys.* Judge Pacht also expressed concern in her decision that the Board in prior cases involving similar or even worse sequestration violations had apparently not even considered sanctioning the offending attorneys.¹⁷ Judge Pacht stated that, without clear guidance from the Board, she was reluctant in such circumstances to issue a “draconian” order suspending Karch for his less offensive conduct in *NFL*.

Again, we find Judge Pacht’s concerns in this regard misplaced. As discussed above, there was in fact clear guidance from the Board here in the form of its prior formal admonition in *Seattle Seahawks*. Further, the existence of such a prior reprimand clearly distinguishes the instant case from those prior cases in which other attorneys have committed sequestration violations. Although the sequestration violations in those cases may have been more offensive, they were not committed in the face of a direct and explicit formal admonition from the Board. In short, it is Karch’s failure to heed the Board’s formal admonition in *Seattle Seahawks*, as much as his actual violation of the *NFL* sequestration order, that justifies more severe discipline.

Accordingly, contrary to Judge Pacht, we find that such prior cases are clearly distinguishable, and do not preclude the issuance of a suspension order against Karch.

(4) *Karch’s violation was not intentional.* Although finding that Karch knowingly violated the sequestration order in *NFL* when he gave a copy of the tran-

script to Lynn, Judge Pacht found that there was no evidence that Karch had actually intended or planned to circumvent the sequestration order. Rather, Judge Pacht found that it was only when Lynn indicated that he would not be available for Karch to otherwise prepare him for trial that Karch succumbed and, on the spur of the moment, gave a copy of the transcript to Lynn.

Although we adopt Judge Pacht’s findings in this regard, we disagree with her conclusion therefrom that this is yet another basis for finding that Karch’s conduct was not “aggravated misconduct” warranting suspension under Section 102.44(b). Although a finding of intent to injure a party or interfere with a proceeding may be a prerequisite for disbaring an attorney,¹⁸ it is generally not considered a prerequisite for suspension.¹⁹ Rather, all that is generally required for suspension is a finding that the attorney acted knowingly²⁰—a finding which, as indicated, has been made here.

Accordingly, contrary to Judge Pacht, we find that the absence of any premeditation or intent by Karch also does not preclude a finding that his conduct warrants suspension.

(5) *No party suffered prejudice.* In support of her conclusion that Karch’s sequestration violation in *NFL* did not rise to the level of “aggravated misconduct” under Section 102.44, Judge Pacht finally noted that Judge Schlesinger had concluded in that case that Lynn’s testimony was not tainted by having read the transcript, and thus no one was prejudiced by Karch’s violation.

Assuming arguendo that Judge Pacht’s findings are correct in this regard,²¹ we nevertheless disagree with her conclusion that the absence of such prejudice precludes suspension. As with formal admonitions or reprimands, suspension is generally appropriate not only where there is actual injury to a party or interference with the proceeding, but also where there is potential injury or interference.²² And as indicated above, such

¹⁵ See ABA Standards, sec. 9.22, supra at 01:838 (prior disciplinary offense constitutes “aggravating” factor justifying increase in discipline).

¹⁶ In so finding, we do not mean to suggest or imply that suspension would never be appropriate in the absence of a prior formal admonition or reprimand. Indeed, we note that, notwithstanding the absence of any prior disciplinary proceedings against the attorney in *In re an Attorney*, the stipulated order in that case did in fact suspend the attorney for a significant period. See also *Roy T. Rhodes*, 152 NLRB 912 (1965) (attorneys who obtained General Counsel’s file at unfair labor practice hearing, and who retained, photocopied, and sought to introduce contents of file into evidence at hearing, given 6-month suspension notwithstanding that the record did not reveal any previous disciplinary proceedings against them).

¹⁷ The two cases specifically cited by Judge Pacht were *El Mundo Corp.*, supra; and *Uarco Inc.*, 286 NLRB 55 (1987).

¹⁸ See ABA Standards, sec. 6.21, supra at 01:832. Cf. *Kings Harbor Health Care*, 239 NLRB 679 (1978) (attorney who pled guilty in a criminal proceeding to subornation of perjury in unfair labor practice proceeding disbarred by Board).

¹⁹ See ABA Standards, sec. 6.22, supra at 01:832.

²⁰ *Id.*

²¹ The General Counsel excepts to Judge Pacht’s findings in this regard, noting that Judge Schlesinger only concluded that one portion of Lynn’s testimony was not affected by Karch’s conduct. Moreover, we note that Zamberletti also read the transcript prior to testifying, and, although he received it from Lynn rather than from Karch, as indicated by Judge Schlesinger, Karch is certainly not blameless in this regard since he was the one who initially gave the transcript to Lynn. In any event, for the reasons set forth above, we find it unnecessary to decide whether any party was actually prejudiced as a result of the sequestration violation.

²² See ABA Standards, sec. 6.22, supra at 01:832.

violations clearly do pose a threat to the administrative process.

Accordingly, contrary to Judge Pacht, we find that the absence of actual prejudice also does not preclude a finding that Karch's conduct warrants suspension.

Having thus determined that suspension is not precluded by the various factors cited by Judge Pacht, the question remains, however, whether suspension is in fact the appropriate disciplinary sanction for Karch's conduct. We conclude that it is. As indicated above, Karch's sequestration violation in *NFL* was his second such violation, was committed knowingly in the face of a prior formal admonition from the Board in *Seattle Seahawks*, and posed a significant threat to the integrity of the administrative process.

Moreover, there are no mitigating circumstances here which would justify foregoing such a progressively stronger sanction against Karch. As noted by Judge Pacht, Karch is an experienced attorney and his violation in *NFL* cannot be rationalized as in *Seattle Seahawks*. Nor did Karch timely acknowledge the violation to the General Counsel or Judge Schlesinger;²³ rather, as indicated above the violation was only revealed on the General Counsel's cross-examination of the witnesses. Finally, although Karch has somewhat belatedly offered an apology for his conduct,²⁴ we are not persuaded that, under the circumstances, another reprimand would be enough to deter such misconduct in the future or protect the integrity of the administrative process.

Accordingly, for all the foregoing reasons, we find that Karch's violation of the sequestration order in *NFL* did in fact constitute "aggravated misconduct"

²³ As indicated above, Karch testified at the disciplinary hearing that he knew, prior to the time that Zamberletti took the witness stand in *NFL*, that Lynn had sent a copy of the transcript to Zamberletti, but that he nevertheless did not disclose to Judge Schlesinger that either Lynn or Zamberletti had read the transcript prior to the time they took the witness stand.

²⁴ Karch offered the following apology on redirect examination near the close of the disciplinary hearing:

Well, I'm sorry this whole thing happened. If I had known all this was going to come of it, I would have told Mike Lynn to go get his airplane and forget about it. I am sorry I did it. What more can I say? I apologize for creating this whole situation.

warranting suspension under Section 102.44(b) of the Board's Rules. Under all the circumstances, however, we believe that a 6-month suspension, rather than the full 1-year suspension requested by the General Counsel, is sufficient and appropriate.²⁵

ORDER

The National Labor Relations Board orders that Attorney Sargent Karch be suspended from appearing or otherwise practicing before the Agency as counsel or representative for a period of 6 months from the date of this Order.

MEMBER COHEN, concurring.

I agree with the result reached by my colleagues. However, I wish to emphasize that I do not pass on the appropriateness of the interpretation of the sequestration order as applied herein. Rather, I rely solely on the facts that: (1) Karch knew of the Board's interpretation of the sequestration order, having been admonished previously for a breach thereof; and (2) Karch then proceeded to disobey the order a second time. In these circumstances, even if the order, as applied, were improper, Karch was not free to ignore it.

Although, as noted, I do not pass on the appropriateness of the order as applied herein, I nonetheless wish to note several problems with the order as interpreted. First, there is a substantial question as to whether a sequestration order is properly applied to a witness who will testify *in opposition to* a prior witness. Second, assuming arguendo that the order would apply in such circumstances, the Board must be careful that such application does not unreasonably interfere with counsel's preparation of that opposition witness. This factor is all the more critical where, as here, the tribunal is operating without prehearing discovery procedures. Third, the Board must assure that, whatever the order, its precise context and parameters are clearly and unambiguously conveyed to all concerned. Finally, in fashioning such rules for the future, I believe that the Board should consider the views of those who practice before it.

²⁵ Cf. *Roy T. Rhodes*, supra.