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## NOTES

### COLLECTIVE BARGAINING CHALLENGES IN THE RISE OF ESPORTS AND PROFESSIONAL VIDEO GAMING

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#### INTRODUCTION

On July 24, 2018, North American League of Legends team Echo Fox released player Kim “Fenix” Jae-Hun from its roster.<sup>1</sup> Echo Fox released Fenix at noon that day, and because teams were required to lock in their full team roster for the next season split by 5 p.m., Fenix had only five hours to reach out to other teams, negotiate with those teams, agree on contract terms, and sign a contract with a team before the deadline.<sup>2</sup> Fenix was unable to do so and, consequently, could not play in the 2018 summer split.<sup>3</sup> The imbalance of bargaining power between teams and players in this nascent professional scene means situations like Fenix’s happen every year, and not just in League of Legends. Such player mistreatment in the NFL or NBA would draw the attention of ESPN and social media activists, but for someone like Fenix, people unfamiliar with the professional esports scene may have less sympathy or might just not care about a player who makes a living playing video games.

Even if the typical American cannot sympathize with a twenty-something-year-old who makes a living playing video games, the typical American can appreciate how much is at stake for these players. For North American League of Legends players, the current average player salary is around \$320,000 per year, the same amount the average Major League Soccer player makes and even more

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1. Youngbo “Roxyy” Sim & David “Viion” Jang, *Fenix Speaks of the Behind Stories on the Release from Echo Fox: “They Just Suddenly Released Me.”* INVENGLOBAL (Aug. 10, 2018), <https://www.invenglobal.com/articles/5916/fenix-speaks-of-the-behind-stories-on-the-release-from-echo-fox-they-just-suddenly-released-me> [perma.cc/4B7S-CJ2N].

2. *Id.*

3. *Id.*

than the average doctor or attorney makes.<sup>4</sup> While other esports salaries are not as high, they are still above \$100,000 per year.<sup>5</sup> Despite these competitive salaries, appropriate safeguards found in traditional professional sports are not in place to protect esports players and their livelihoods and careers. Players and other concerned parties are responding to this imbalance by discussing the possibility of unions or players' associations for their respective sport.<sup>6</sup> To some, the idea of professional unions representing video game players may seem premature, even though esports are becoming a sizable presence in the modern professional competitive scene.

Riot Games created the game League of Legends in 2009, and in 2018, the world championship match of League of Legends garnered 99.6 million viewers globally.<sup>7</sup> The world championship featured team Invictus Gaming of China and team Fnatic of Europe, the two remaining teams of twenty-four teams from five different continents that qualified for the world championship.<sup>8</sup> The match was broadcast in nineteen different languages and could be watched on more than thirty platforms and television channels.<sup>9</sup> League of Legends is one of a few video games that has translated into competitive video game playing, otherwise known as esports.<sup>10</sup> Esports is a growing phenomenon globally, with the global esports market predicted to be greater than \$3 billion in 2022.<sup>11</sup> This growth has drawn

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4. Darren Heitner, *A Look Inside Riot Games, From \$320,000 Player Salaries To Using Esports As a Catalyst For Sales*, FORBES (May 2, 2018, 8:00 AM), <https://www.forbes.com/sites/darrenheitner/2018/05/02/a-look-inside-riot-games-from-320000-player-salaries-to-using-esports-as-a-catalyst-for-sales/#8a8ebe32c6a7> [perma.cc/C49T-T2XK]; Eli Blumenthal, *A Six-Figure Career Playing Video Games? Welcome to the World of Professional Esports*, USA TODAY (Mar. 22, 2019, 4:37 PM), <https://www.usatoday.com/story/tech/2019/03/18/playing-league-legends-esports-video-games-can-become-six-figure-career/2288351002/> [perma.cc/T3SP-3TXE].

5. *OpTic Gaming LoL Manager Reveals the Huge Salaries Players Receive in the NA LCS*, DEXERTO (Feb. 27, 2018), <https://www.dexerto.com/news/optic-gaming-lol-manager-reveals-huge-salaries-players-receive-na-lcs/45062> [perma.cc/J62D-KRNE].

6. See generally Maddy Myers, *Pro Gamers Are Getting Serious About Unionizing*, COMPETE BY DEADSPIN AND KOTAKU (Mar. 14, 2018, 1:30 PM), <https://compete.kotaku.com/pro-gamers-are-getting-serious-about-unionizing-1823770452> [perma.cc/CSB9-9V9Y]; Paresh Dave, *In E-sports, It's the Bosses Who Are Rallying for a Union*, L.A. TIMES (May 26, 2017, 12:55 PM), <https://www.latimes.com/business/technology/la-fi-tn-esports-unions-20170526-htmllstory.html> [perma.cc/DQU7-6VDT].

7. LOLEsports Staff, *2018 Events by the Numbers*, LEAGUE OF LEGENDS (Jan. 2019), <https://nexus.leagueoflegends.com/en-us/2018/12/2018-events-by-the-numbers/> [perma.cc/73PN-UXQT].

8. *Id.*

9. *Id.*

10. Jas Purewal & Isabel Davies, *The eSports Explosion: Legal Challenges and Opportunities*, ABA LANDSLIDE (Nov. 2016), [https://www.americanbar.org/groups/intellectual\\_property\\_law/publications/landslide/2016-17/november-december/esports-explosion-legal-challenges-opportunities/](https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2016-17/november-december/esports-explosion-legal-challenges-opportunities/) [perma.cc/T4LM-J6LQ].

11. *eSports Joins the Big Leagues*, GOLDMAN SACHS, <https://www.goldmansachs.com/>

comparisons to professional sports leagues like the National Football League and the National Basketball Association.<sup>12</sup> The absence of any esports players' unions is a notable exception to the similarities, although the discussion of beginning some sort of collective bargaining arrangement has started in the more popular esports.<sup>13</sup> The issue of collective bargaining is new to esports in general, but collective bargaining for other professional sports in the United States is decades old.<sup>14</sup>

Part I of this Note explains the background of collective bargaining in the United States and how professional sports in this country have utilized collective bargaining. Part II of this Note transitions to an explanation of esports in the United States. With this background, Part III of this Note discusses the different challenges that esports faces in creating players' unions under the National Labor Relations Act. Part III closes with recommendations that more financially developed, team-based esports whose primary source of player revenue derives from established season gameplay should take advantage of unionizing, while less developed esports or esports whose players derive their revenue from tournament-style gameplay should not take advantage of esports. Before discussing the option of collective bargaining, each esports league and its stakeholders should consider whether the game developer has promulgated a sophisticated set of league rules, whether the game developer has created a formal league structure in which a defined set of teams will compete, and whether the league and the competing teams have substantial financial investment to sustain their operations.

## I. COLLECTIVE BARGAINING

### A. Collective Bargaining Defined and Relevant Law

The primary federal statute governing unions is the National Labor Relations Act (NLRA).<sup>15</sup> Congress enacted the NLRA in 1935 with the purpose of

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insights/pages/infographics/e-sports/ [perma.cc/5U6J-NUKR] (last visited Mar. 19, 2019).

12. John T. Holden, Anastasios Kaburakis & Ryan Rodenburg, *The Future is Now: Esports Policy Considerations and Potential Litigation*, 27 J. LEGAL ASPECTS SPORT 46, 47-48 (2017).

13. See u/FreeRadicalAttack, *PSA: The Player's Association is not an AFL-CIO American Union! The Association has not drafted an issues program, they have not held a union election with the federal labor board, they have not drafted a union contract. THE ASSOCIATION HAS NO LEGAL UNION STANDING.*, REDDIT (July 2, 2018, 10:12 AM), [https://www.reddit.com/r/leagueoflegends/comments/8vixva/psa\\_the\\_players\\_association\\_is\\_not\\_an\\_aflcio/](https://www.reddit.com/r/leagueoflegends/comments/8vixva/psa_the_players_association_is_not_an_aflcio/) [perma.cc/N2KG-EEG3] (last visited Oct. 19, 2018); u/rohansamal, *The Overwatch League Players Union is a necessity*, REDDIT (Mar. 25, 2018, 12:35 PM), [https://www.reddit.com/r/OverwatchLeague/comments/871tok/the\\_overwatch\\_league\\_players\\_union\\_is\\_a\\_necessity/](https://www.reddit.com/r/OverwatchLeague/comments/871tok/the_overwatch_league_players_union_is_a_necessity/) [perma.cc/L8KA-PEMQ] (last visited Oct. 19, 2018).

14. GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 529 (4th ed. 2010) (noting that "there was not an official [professional sports] players' union until the mid-1950s.").

15. DOUGLAS E. RAY, CALVIN WILLIAM SHARPE & ROBERT N. STRASSFELD, *UNDERSTANDING LABOR LAW* 10 (2d ed. 2005).

“promoting industrial peace” and “restor[ing] an element of fairness and industrial democracy to the workplace.”<sup>16</sup> The NLRA sought to balance bargaining power between workers and management and was a feature of President Roosevelt’s “New Deal” package in response to the “devastating effects” of the Great Depression.<sup>17</sup> This balance included “formaliz[ing] workers’ rights to form unions” and “prohibit[ing] employers from discriminating against workers because of their union activity.”<sup>18</sup> As originally enacted, the NLRA was meant to protect employee rights through the protection of their “freedoms of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”<sup>19</sup> In the context of professional sports, collective bargaining describes the “activity whereby two groups, union and management representatives, attempt to resolve conflicting interests by exchanging in commitments pertaining to the terms and conditions of employment.”<sup>20</sup>

Section 8(d) of the NLRA defines collective bargaining as:

[T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.<sup>21</sup>

Collective bargaining requires groups of employees to come together in “bargaining unit[s]” in order to unionize.<sup>22</sup> A bargaining unit is “the unit [of employees] appropriate for the purposes of collective bargaining.”<sup>23</sup> In order for the NLRB to define a group of employees as an “appropriate unit for bargaining,” it must weigh several factors “to determine whether there is a sufficient community of interest among the employees,” such as: (1) “similarity in skills, interests, duties, and working conditions”; (2) “the employees’ desires”; (3) “integration of personnel and functions”; (4) “bargaining history”; (5) “the employer’s organizational structure”; and (6) “the extent of union organization.”<sup>24</sup>

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16. *Id.*

17. FRAN QUIGLEY, IF WE CAN WIN HERE: THE NEW FRONT LINES OF THE LABOR MOVEMENT 76 (2015).

18. *Id.*

19. George Blum, et al., *National Labor Relations Act (NLRA)—Purposes*, 48 AM. JUR. 2D LABOR AND LABOR RELATIONS § 2 (2019).

20. WONG, *supra* note 14, at 525.

21. 29 U.S.C. § 158(d) (2019).

22. 29 U.S.C. § 159 (2019).

23. 29 U.S.C. § 159(b) (2019).

24. Nat’l Labor Relations Bd. v. Retail Clerks Local 558, Retail Clerks Int’l Ass’n, AFL-

Section 7 of the NLRA gives these bargaining units the power to organize,<sup>25</sup> but first the bargaining unit must be recognized and certified as an appropriate bargaining unit by the National Labor Relations Board (“the Board”) in order to unionize.<sup>26</sup> Section 8 of the NLRA empowers the Board to enforce the NLRA and to prosecute unfair labor practices,<sup>27</sup> such as a violation of parties’ collective bargaining agreement.<sup>28</sup>

Individuals in a bargaining unit must be designated “employees” by the Board in order to bargain collectively.<sup>29</sup> Section 2 of the NLRA states:

The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . .<sup>30</sup>

The Supreme Court held that the term “employee” should be confined to its “established meaning” because the NLRA does not explicitly define “employee” in statute.<sup>31</sup> Supreme Court case law places the definition of “employee” into the context of the employee-employer relationship, which “describe[s] the conventional master-servant relationship as understood by common-law agency doctrine.”<sup>32</sup> According to the Supreme Court, because Congress assigned to the Board the task of defining employees in the collective bargaining context, the Board’s “construction of that term is entitled to considerable deference.”<sup>33</sup> However, a court may rule the Board’s interpretation of “employee” to be “unreasonable” if it departs from “the common law of agency” and other reasonable considerations under the NLRA<sup>34</sup> or if the Board “fails to explain adequately its reasoning.”<sup>35</sup>

Section 9 of the NLRA sets out the full process for establishing a union.<sup>36</sup> In

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CIO, 587 F.2d 984, 987 (9th Cir. 1978).

25. 29 U.S.C. § 157 (2019).

26. 29 U.S.C. § 159 (2019).

27. 29 U.S.C. § 158 (2019).

28. 29 U.S.C. § 158(a)(3) (2019).

29. 29 U.S.C. § 158(d) (2019).

30. 29 U.S.C. § 152(3) (2019).

31. Nat’l Labor Relations Bd. v. Town & Country Elec., Inc., 516 U.S. 85, 94 (1995).

32. *Id.* (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992)).

33. *Id.* (citation omitted).

34. *Id.*; see also *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 166 (1971) (“But we have never immunized Board judgments from judicial review in this respect. ‘[T]he Board’s determination that specified persons are ‘employees’ under this Act is to be accepted if it has ‘warrant in the record’ and a reasonable basis in law.’” (citation omitted)).

35. *Point Park Univ. v. Nat’l Labor Relations Bd.*, 457 F.3d 42 (D.C. Cir. 2006).

36. 29 U.S.C. § 159 (2019).

general, there are two ways to establish a union in the context of sports leagues:

First, if at least 30% of employees sign cards or a petition saying they want a union, the [Board] will conduct an election. If a majority of those who vote choose the union, the [Board] will certify the union as its representative for collective bargaining with team owners and the league officials. Second, an employer may voluntarily recognize a union based on evidence – typically signed union-authorization cards – that a majority of employees want it to represent them.<sup>37</sup>

A union may also be certified through “[b]oard-ordered recognition without election,” but this is more common in other employment contexts rather than professional sports.<sup>38</sup> A collective bargaining agreement is required for certification under the NLRA, and “[w]hen two parties sit down at the negotiating table, they are required to negotiate certain items,” such as “wages, hours, and terms and conditions of employment.”<sup>39</sup> In professional sports, the collective bargaining agreement between the players’ union and the teams establishes:

- Union rights;
- Management rights;
- Discipline procedures by the league;
- Grievance procedures for the players;
- What a “standard player contract” looks like;
- College drafting procedures;
- Salary caps;
- Free agency;
- Player/club relations and issues;
- Salaries;
- Benefits; and
- Other “incidental[]” issues common to an employee-employer relationship.<sup>40</sup>

The NLRA was seen as very employee-friendly and union-friendly when it was enacted.<sup>41</sup> Twelve years after its enactment, the NLRA was amended by the Taft-Hartley Act, whose purpose was to “promote the full flow of commerce” by “striking a balance between the rights and obligations of employers and employees.”<sup>42</sup> This included “outlaw[ing] mass picketing and secondary strikes and allow[ing] employers the option to block the practice of ‘card checks’ that

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37. Jonathan Kogel, *State of the Esports Player Union: Drawbacks and Legal Challenges*, THE ESPORTS OBSERVER (May 8, 2018), <https://esportsobserver.com/state-of-the-esports-union/perma.cc/L8U2-H89H>.

38. WONG, *supra* note 14, at 524.

39. *Id.* at 527.

40. *Id.* at 555-56.

41. QUIGLEY, *supra* note 17, at 76 (enumerating the different employee protections afforded workers under the NLRA and describing the NLRA as “union-friendly”).

42. George Blum et al., *Labor Management Relations Act (Taft-Hartley Act): Nature and Purpose*, 48 AM. JUR. 2D LABOR AND LABOR RELATIONS § 3 (2019).

enabled unions to be recognized when a majority of workers signed cards saying they wanted to join.”<sup>43</sup> In essence, the Taft-Hartley Act addressed some practices that unions and employees had been using to promote union formation and activity since the enactment of the original NLRA.<sup>44</sup> Unfair labor practices, which are prohibited practices for employers and unions engaged in collective bargaining enumerated under section 8 of the NLRA, were further addressed in 1959 by the Landrum-Griffin Act.<sup>45</sup> The Landrum-Griffin Act was enacted in order to “eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the [Taft-Hartley Act].”<sup>46</sup> The Landrum-Griffin Act accomplished such things as “strengthen[ing] the secondary boycott provisions” already made illegal under the Taft-Hartley Act and prohibited “picketing to force an employer to recognize or bargain with a labor organization.”<sup>47</sup> What remains in the NLRA after the enactment of the Taft-Hartley Act and the Landrum-Griffin Act constitutes the core of labor law here in the United States.<sup>48</sup>

### *B. Collective Bargaining in Traditional Sports*

The professional sports landscape in the United States can be organized into two groups of leagues based on their organizational structure. The organizational structure of the league matters because it impacts the nature of a union’s relationship with the league and its teams.<sup>49</sup> First, sports leagues may structure themselves in the same manner that the four most popular professional sports leagues have organized themselves, as an “unincorporated joint venture among individual teams.”<sup>50</sup> This first group of leagues is known as the “Big Four” leagues, so named because these four leagues are the most popular leagues in the United States, where most professional sports revenue exists and where the most fans flock.<sup>51</sup> The Big Four refers to the National Football League (NFL), National Basketball Association (NBA), Major League Baseball (MLB), and National Hockey League (NHL).<sup>52</sup>

The Big Four leagues are constructed through the leagues’ governing

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43. QUIGLEY, *supra* note 17, at 76.

44. *Id.*

45. 29 U.S.C. § 158 (2019); Blum, *supra* note 42.

46. 29 U.S.C. § 401(c) (2019).

47. Blum et al., *supra* note 42, at § 4.

48. QUIGLEY, *supra* note 17, at 76.

49. Gabe Feldman, *Collective Bargaining in Professional Sports: The Duel Between Players and Owners and Labor Law and Antitrust Law*, in THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW 209, 217 (Michael A. McCann ed. 2018).

50. Lacie L. Kaiser, *The Flight From Single-Entity Structured Sport Leagues*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 1 (Spring 2004).

51. WONG, *supra* note 14, at 2.

52. *Id.*

documents, which include the collective bargaining agreement, the league constitution, and the league's bylaws.<sup>53</sup> The Big Four leagues' constitution is a joint venture agreement where "all types of *private* franchise ownership, including sole proprietorships, partnerships, and corporations," come together to form the professional sports league.<sup>54</sup> These private franchises are "unincorporated association[s]" and separately owned teams, which means that each league is a joint venture of separately owned businesses.<sup>55</sup> In fact, the Supreme Court explicitly found that "each of the [NFL] teams is a substantial, independently owned, and independently managed business" when it held in *American Needle, Inc. v. National Football League* that the NFL was not a single entity for antitrust purposes.<sup>56</sup> Through the joint venture agreement, the Big Four leagues create a professional sports league through the cooperation of individually owned teams that contract with their own players.<sup>57</sup>

While the financial details of each professional sports franchise are not identical between the different teams, each franchise generates revenue from similar activities.<sup>58</sup> Revenue streams like "ticket sales, sponsorships agreements, . . . merchandise sales, and national and local broadcast agreements" are common to all professional sports franchises, while those franchises fortunate enough to own their stadium also can reap the benefits of such a profitable revenue stream through "concession sales, parking, signage, and non-franchise-related events held in their arena, such as concerts."<sup>59</sup> While the costs associated with professional sports are high, franchises can realize a profit in several different ways related to the brand of their team.<sup>60</sup>

Some sports leagues are organized as "single entity leagues," which are professional sports leagues that have organized differently than the Big Four Leagues meant to avoid antitrust scrutiny.<sup>61</sup> The Big Four leagues are organized as a league of separately-owned teams, while single entity leagues are organized as a single organization that owns the teams competing in its league.<sup>62</sup> Their difference in structure stems from the Sherman Act, which is the federal statute that establishes antitrust regulation and prohibits anticompetitive conduct in the

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53. *Id.* at 4.

54. *Id.*

55. Brief of Major League Baseball, the National Basketball Association and the National Hockey League as Amici Curiae in Support of Appellant/Cross-Appellee National Football League and for Reversal of the Portion of the May 22, 2009 Decision that Denied Preemption and Remanded Plaintiffs-Appellees' State Statutory Claims, *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009) (where representatives for the NBA, NHL, and MLB describe each of their leagues as "unincorporated associations").

56. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 200-01 (2010).

57. Nadelle Grossman, *What is the NBA?*, 25 MARQ. SPORTS L. REV. 101, 103 (2014).

58. WONG, *supra* note 14, at 4.

59. *Id.*

60. *Id.*

61. *Id.* at 15.

62. *Id.*



national marketplace.<sup>63</sup> Section 1 of the Sherman Act prohibits “contract[s], combination[s] . . . or conspiracy[ies]” between multiple actors “in restraint of trade or commerce among the several States.”<sup>64</sup> Contracts, combinations, or conspiracies necessarily require more than one actor acting “in restraint of trade,” meaning that Section 1 of the Sherman Act only governs “separate economic actors pursuing separate economic interests.”<sup>65</sup> However, if “the coordinated activity of a parent and its wholly owned subsidiary [are] viewed as that of a single enterprise for purposes of § 1 of the Sherman Act,” then a league cannot be subjected to section 1 antitrust scrutiny.<sup>66</sup> Consequently, single entity leagues structure their leagues under one parent corporation as a way to avoid antitrust scrutiny, unlike the Big Four leagues which are operated through joint venture agreements between privately owned organizations.<sup>67</sup> While the legal business structure of the Big Four leagues and single entity leagues are different, many of their revenue streams are similar with all being involved in professional sports.<sup>68</sup>

Major League Soccer (MLS) is one of the most popular single entity leagues in the United States.<sup>69</sup> The MLS “was established in 1996 as a limited liability corporation organized under Delaware law,” and instead of team owners like the Big Four leagues, the MLS has “operator-investors” controlling the operations of each team.<sup>70</sup> Unlike the Big Four leagues, players for the MLS “are hired by MLS, sign a contract with the league [MLS], and then are assigned to the various teams rather than being direct employees of a team.”<sup>71</sup> The MLS also has structured its distribution of profits and losses “in a way similar to distribution of dividends to shareholders of a corporation.”<sup>72</sup>

Professional sports players in the NFL, NBA, MLB, NHL, and MLS all have decided to collectively bargain within their respective league and are represented by their own union.<sup>73</sup> Each of the Big Four leagues voluntarily recognized their respective unions, but “[t]his does not necessarily mean that the leagues recognized the unions willingly.”<sup>74</sup> For example, according to the National

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63. Kaiser, *supra* note 50, at 2-3.

64. 15 U.S.C. § 1 (2019).

65. *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 195 (2010) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)).

66. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984).

67. WONG, *supra* note 14, at 4.

68. *Id.*

69. For the purposes of this Note, the MLS will be used as the example of a single entity league, because there is existing case law specifically discussing the structure of the MLS for antitrust purposes and because of the popularity of the MLS nationally. The Women’s National Basketball Association (WNBA) is the other popular sports league that utilizes the single entity league structure. Kaiser, *supra* note 50.

70. WONG, *supra* note 14, at 15.

71. *Id.*

72. *Id.*

73. Feldman, *supra* note 49, at 209-10.

74. WONG, *supra* note 14, at 525.

Basketball Players' Association (NBPA), which is the official union for NBA players, "the NBA refused to recognize the union at its inception in 1954, and did not do so until the players' threatened boycott of the 1964 All-Star Game."<sup>75</sup> The NBPA's characterization of its early struggles to unionize underline how inherently adversarial the collective bargaining process is. Team owners resisted early efforts by the players associations to provide "basic economic rights," such as "pensions, health benefits, minimum salaries, and greater ease of movement between teams."<sup>76</sup> Only later did professional sports collective bargaining agreements include more modern provisions that are almost ubiquitous in professional sports leagues today, such as salary caps or players receiving a "percentage of league-generated revenues."<sup>77</sup>

The content of collective bargaining negotiations changes in small ways from industry to industry depending on the nature of the employees' work, but in terms of bargaining position, professional sports unions occupy a much different position than traditional industrial unions such as steel workers' unions.<sup>78</sup> For example, "[c]ontracts in professional sports are different from *most* other forms of unionized employment, in that employees can negotiate their own contracts," while in traditional employment situations the union and the union representatives negotiate contracts for specific employee positions.<sup>79</sup> In addition, professional athletes "have highly specialized skills that are difficult to replace," unlike traditional industrial employees whose skill sets are "relatively homogeneous" and "are relatively easy to replace."<sup>80</sup> This specialized skill set typically does not translate to many other careers once athletes leave the league.<sup>81</sup> Professional athletes also, depending on the amount of physical contact involved in their sport, have short careers, while industrial employees rely on the unions to negotiate employment terms to secure a long career in their chosen field.<sup>82</sup>

The bargaining process is different between athletes in the Big Four leagues compared to those athletes competing in single entity leagues. Big Four athletes, as a union, bargain with multiple teams at once, in a process called "multiemployer bargaining."<sup>83</sup> While firms in other industries negotiate with multiple employers in order to reduce transaction costs, sports unions bargain with multiple employers out of necessity.<sup>84</sup> Reduced transaction costs may be a secondary motivation, but the real reason a sports union must bargain with the teams collectively is to ensure "uniform rules across the league" because trying to reach individual bargaining agreements with individual teams would create a

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75. *Id.*

76. Feldman, *supra* note 49, at 209, 213.

77. *Id.* at 213.

78. *Id.*

79. WONG, *supra* note 14, at 529.

80. Feldman, *supra* note 49, at 209, 214.

81. *Id.* at 214.

82. *Id.*

83. *Id.*

84. *Id.*

patchwork of rules that likely would make league operations unworkable.<sup>85</sup> This concern is alleviated for athletes competing in single entity leagues like the MLS, for the union only must bargain with the one league as a whole, since the league owns the different teams and employs the athletes individually.<sup>86</sup>

In addition to the antitrust concerns avoided, the single entity leagues arguably hold a superior bargaining position to the union than the collective teams in the Big Four leagues hold over its sports union. For example, in the NFL, the union must bargain with thirty-two teams. These thirty-two teams have divergent interests in the labor market, and the teams' differences might work against each other in their collective bargaining with the players' union. A union representing players in a single entity league may occupy an inferior position than a union representing players in one of the Big Four leagues because the bargaining power of the single entity league is not diluted by thirty-two teams as it would be in one of the Big Four leagues. The difference between a union bargaining in a single entity league and a union bargaining in one of the Big Four leagues is the difference between a union bargaining with one single-minded party versus a union bargaining with thirty-two teams with competing interests.

## II. THE RISE OF ESPORTS

### *A. Defining Esports*

Esports is the “playing, and, just as importantly, the watching, of competitive video games.”<sup>87</sup> In its modern form, esports teams compete against each other in live events, are supported by their loyal fan bases, and have corporate sponsors typical in other professional sports scenes.<sup>88</sup> The term “esports” is an “umbrella term for many different games, just like the term ‘sport.’”<sup>89</sup> To use an analogy, the term “esports” is to the game of League of Legends what the term “sports” is to the game of basketball; esports refers to the many different video games that are played competitively in the professional scene. When people talk about a specific esports league, they are talking about the league organized for the competitive play of a specific video game. Modern esports leagues realize a profit through many different revenue streams that are not much different than the revenue streams of their professional sports league counterparts.<sup>90</sup> These revenue streams include advertising, ticket sales, media rights, and corporate sponsorships.<sup>91</sup>

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85. *Id.*

86. WONG, *supra* note 14, at 4.

87. Purewal & Davies, *supra* note 10.

88. *Id.*

89. *Id.*

90. *eSports Joins the Big Leagues*, *supra* note 11.

91. *Id.*

### *B. Popular Esports in the United States*

Today, the most popular and most successful esports in the United States are League of Legends, Defense of the Ancients 2, Counterstrike: Global Offensive, Overwatch, and Rocket League.<sup>92</sup> Newer titles like Call of Duty: Black Ops 4 and Apex Legends are beginning to enter the professional esports scene as well.<sup>93</sup> For the purposes of this article, I will primarily focus on League of Legends and Overwatch as they both have established professional leagues in the United States with sizable fan bases.<sup>94</sup>

## III. IDENTIFYING COLLECTIVE BARGAINING CHALLENGES IN ESPORTS

### *A. Modern Esports League Structures*

In terms of competitive play, modern esports leagues, in particular the League of Legends Championship Series (LCS) and the Overwatch League, mirror many aspects of professional sports. They have defined seasons, franchised teams, set league rules, and playoffs. League of Legends and Overwatch will become the model for future esports leagues because of their sophisticated league rules, defined league structures where a defined set of teams compete, and the amount of outside investment funding the leagues and their teams. The outside investment is evidence of the confidence professional investors have in this growing industry, as the revenue streams for the LCS and the Overwatch League begin to look more and more like those seen in professional sports leagues.<sup>95</sup>

In 2017, Riot Games, the developer of League of Legends, announced that it would implement a new franchising model for the LCS.<sup>96</sup> Teams had to apply for one of ten spots that Riot Games would make available for teams in the 2018 season.<sup>97</sup> Franchising was implemented in order to give the LCS and its teams better stability; previously, teams in the LCS were subject to “relegation,” where the team with the worst losing record was removed from the league and replaced with another team from what was essentially the LCS’s minor league.<sup>98</sup> Relegation meant “uncertainty” for newer teams who may have the financial backing to support a team but were still learning how to compete with the more

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92. Purewal & Davies, *supra* note 10.

93. *Call of Duty: Black Ops 4 – Blackout*, ACTIVISION, <https://www.callofduty.com/blackops4/blackout> [perma.cc/XJ3S-TDCA] (last visited Oct. 19, 2018); *Apex Legends*, EA GAMES, <https://www.ea.com/games/apex-legends> [perma.cc/K6QW-VR7V?type=image] (last visited Mar. 19, 2019).

94. Dave, *supra* note 6.

95. *eSports Joins the Big Leagues*, *supra* note 11.

96. Imad Khan, *Riot Releases Details on NA LCS Franchising with \$10M Flat-Fee Buy-in*, ESPN (June 1, 2017), [http://www.espn.com/esports/story/\\_/id/19511222/riot-releases-details-na-lcs-franchising-10m-flat-fee-buy-in](http://www.espn.com/esports/story/_/id/19511222/riot-releases-details-na-lcs-franchising-10m-flat-fee-buy-in) [perma.cc/G44L-D8SC].

97. *Id.*

98. *Id.*

established teams in the league.<sup>99</sup> Franchising, along with a new revenue-sharing system, provides long-term stability for those teams whose applications were accepted by Riot Games.<sup>100</sup> Franchising also made it easier for teams to acquire corporate sponsorships, because sponsors could rely on this long-term stability in determining the value of their sponsorships.<sup>101</sup> However, the price to compete was not cheap, since teams whose application Riot Games accepted had to pay a flat fee of \$10 million to participate in the LCS as well as a \$3 million fee to compensate the effort of those teams whose applications were not accepted.<sup>102</sup> The franchise teams are independently owned organizations who have individually entered into a contract with Riot Games.<sup>103</sup> Players sign individual contracts with their team, not with Riot Games.<sup>104</sup>

With the arrival of the LCS's franchising model, esports had seen its first professional league moves towards the league structure of the Big Four leagues. By awarding these franchises, Riot Games had distanced itself further from being seen as the entity in control of the LCS players, which is reflected in the league's official rules. Specifically, the official rules for the LCS state, "Team Members may not be employees of Riot Games Inc. ("RGI"), North American League of Legends Championship Series LLC or League of Legends eSports Federation LLC or any of their respective affiliates at the start of or at any point during the LCS Competitive Season."<sup>105</sup> Even though the official rules would not control any determination by the National Labor Relations Board, Riot Games has at least considered the possibility that LCS players would be considered employees for employment law purposes and made their position on that determination clear with proffering the official rules statement.

A year after the LCS franchised, another prominent video game developer announced that it would be establishing a franchised league for one of its most popular video games.<sup>106</sup> Overwatch is a video game created by Blizzard Entertainment, a division of Activision Blizzard.<sup>107</sup> Blizzard announced in 2017 a franchising model for its competitive Overwatch League for the 2018 season.<sup>108</sup> There are two divisions of the Overwatch League, the Pacific Division and the

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. 2018 *Official Rules – NA LCS and NA LACS*, NORTH AMERICAN LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, LLC 1, 8 (Version 18.05, Jan. 11, 2018), [https://esports-assets.s3.amazonaws.com/production/files/rules/2018\\_LCS\\_LACS\\_Rules.pdf](https://esports-assets.s3.amazonaws.com/production/files/rules/2018_LCS_LACS_Rules.pdf) [perma.cc/43T8-594V].

105. *Id.*

106. Darren Heitner, *Full 12 Franchises Announced for Initial Overwatch League Season*, FORBES (Sept. 20, 2017, 9:00 AM), <https://www.forbes.com/sites/darrenheitner/2017/09/20/full-12-franchises-announced-for-initial-overwatch-league-season/#28109c3f2c65> [perma.cc/J27F-Y6TG].

107. *Id.*

108. *Id.*

Atlantic Division.<sup>109</sup> Each division consists of six franchise teams.<sup>110</sup> Unlike LCS teams, Overwatch teams are relegated to specific cities and given a unique franchise for that region, with the exception of Los Angeles which has two teams based out of the city.<sup>111</sup> These Overwatch League franchises include three teams not based in the United States.<sup>112</sup> The franchise fee for accepted teams was \$20 million, meaning that most of the team owners who could afford this franchise fee were largely venture capital firms, large corporations like Comcast, or organizations that own other sports teams like the Kraft Group, which owns the NFL team the New England Patriots.<sup>113</sup>

Like the LCS, the Overwatch League has official rules governing the operation of its league.<sup>114</sup> Each regular season of Overwatch “consist[s] of four distinct competition segments (each a ‘Stage’),” and “[e]ach Stage will consist of five weeks of competition followed by a two-match playoff among the three teams with the most match wins during that specific stage (each a ‘Stage Finals’).”<sup>115</sup> The finals include six teams competing for the top spot among all the teams in the Overwatch League.<sup>116</sup> Blizzard Entertainment also has contemplated how it may be viewed as a potential employer of Overwatch League players; the official rules for the Overwatch League specifically state, “In order to be eligible to participate in the League, each Player must be retained as an employee of his or her respective Team using the then-current form player professional services agreement as specified by the League Office.”<sup>117</sup> The Overwatch League must approve each player contract with the team.<sup>118</sup>

There are two major comparisons between the LCS and the Overwatch League that might have implications in the collective bargaining context. First, the official rules for the LCS state that players cannot be employees of Riot Games.<sup>119</sup> Meanwhile, the official rules for the Overwatch League state that its players must be “employee[s]” of their respective teams.<sup>120</sup> The official rules for the LCS do not specifically state whether its players must be “employees” of their respective teams, but the rules do require that “[a]ll players . . . must have a written contract with the Team they are playing for.”<sup>121</sup>

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109. *Rules of Competition Summary – 2018 Season*, OVERWATCH LEAGUE, [https://bnetcmsusa.akamaihd.net/cms/content\\_entry\\_media/eo/EOC4AITZTVME1519148239333.pdf](https://bnetcmsusa.akamaihd.net/cms/content_entry_media/eo/EOC4AITZTVME1519148239333.pdf) [perma.cc/XM2N-F7MH] (last visited Oct. 19, 2018).

110. *Id.*

111. Heitner, *supra* note 106.

112. *Id.*

113. *Id.*

114. *Rules of Competition Summary – 2018 Season*, *supra* note 109.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *2018 Official Rules – NA LCS and NA LACS*, *supra* note 104, at 5.

120. *Rules of Competition Summary – 2018 Season*, *supra* note 109.

121. *2018 Official Rules – NA LCS and NA LACS*, *supra* note 104.

Second, both franchising models for LCS and the Overwatch League provide for independently owned teams. Riot Games does not own the teams competing in the LCS, and Activision Blizzard does not own the teams competing in the Overwatch League. Further, both Riot Games and Blizzard unilaterally imposed the official rules for each league and unilaterally chose which teams would receive franchising agreements.<sup>122</sup> Riot Games and Blizzard are able to do this because they own the intellectual property rights to each video game as their developers and created each professional esports league. Developer-imposed aspects of the LCS and the Overwatch League highlight the tripartite structure of esports that includes the developer, the teams collectively, and the players collectively. This sort of bargaining arrangement is not found in any other traditional professional sports league.

### *B. Current Efforts Towards Unionization and Collective Bargaining*

Riot Games created the LCS Players Association, and it is the first esports players' association of its kind in the United States.<sup>123</sup> According to Riot Games, the purpose of the LCS Players' Association is to give LCS players "a real and actionable voice."<sup>124</sup> The LCS Players' Association will adopt a "Players Association constitution," elect professional esports players to represent the association, and provide input to the LCS for planning and league structures feedback.<sup>125</sup> So far, the only reported action that the LCS Players' Association has taken dealt with the earlier mentioned player Fenix and his unfortunate discharge from team Echo Fox.<sup>126</sup> Fenix was one of three players embroiled in this esports controversy, and with the help of the LCS Players' Association, the players were able to promulgate a new rule for the LCS that provides a "roster change deadline safe harbor," which will extend the deadline to sign with a new team by three days "for any player released from a team roster within forty-eight hours preceding the roster change deadline."<sup>127</sup>

While "players association" is a popular term to append to the name of a recognized and official professional sports union, the term is generic and is not

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122. Heitner, *supra* note 106; Khan, *supra* note 96.

123. Bear Schmiedicker & Chris Greeley, *Mid-Flight Update on Our Selection Process for NA LCS 2018*, LOL ESPORTS (Sept. 22, 2017, 3:59 PM), [https://www.lolesports.com/en\\_US/articles/mid-flight-update-our-selection-process-na-lcs-2018](https://www.lolesports.com/en_US/articles/mid-flight-update-our-selection-process-na-lcs-2018) [perma.cc/F49L-SREU].

124. *Id.*

125. *Id.*

126. NALCS Players Association (@NALCSPA), TWITTER (Jan. 14, 2019, 9:25 PM), <https://twitter.com/NALCSPA/status/1085045330578731010> [perma.cc/HE9U-YXFR]; NALCS Players Association (@NALCSPA), TWITTER (Jan. 14, 2019, 9:56 PM), <https://twitter.com/NALCSPA/status/1085053144709718016> [perma.cc/EA3E-Y2UN].

127. NALCS Players Association (@NALCSPA), TWITTER (Jan. 14, 2019, 9:25 PM), <https://twitter.com/NALCSPA/status/1085045330578731010> [perma.cc/HE9U-YXFR]; NALCS Players Association (@NALCSPA), TWITTER (Jan. 14, 2019, 9:56 PM), <https://twitter.com/NALCSPA/status/1085053144709718016> [perma.cc/EA3E-Y2UN].

an equivalent term to “union” until the players’ association is formally recognized by the National Labor Relations Board through the collective bargaining process.<sup>128</sup> For example, the National Basketball Players Association is the official union for “professional basketball players in the National Basketball Association,” as it has been recognized as such by National Labor Relations Board, even though it uses the term “players association” in its name.<sup>129</sup> However, the LCS Players’ Association is not a formal union recognized by the NLRB.<sup>130</sup> In fact, the LCS Players’ Association is not completely independent from Riot Games, because Riot Games “initiated, funded and supported” the players association itself rather than the players funding the operation themselves like most professional sports unions.<sup>131</sup> Funding by a party other than the players themselves is not the norm for players associations and even could be seen as a conflict of interest, but Riot Games has stated its intentions for the future of its relationship with the LCS Players’ Association.<sup>132</sup> According to Chris Greeley of Riot Games’ league operations team:

[A]t some point in the future if the players decided that they want to unionize and register with the NLRB, they will have the option to forgo Riot funding and self-fund. It is our expectation and our hope that that happens at some point in the future, but in the meantime this association is designed to give the players a seat at the table.<sup>133</sup>

With the report of the new LCS “roster change deadline safe harbor” rule brought about by the action of the LCS Players’ Association, Riot Games seems to be bargaining in good faith with the players association, even though it legally does not have to do so.<sup>134</sup> However, the LCS Players’ Association has not indicated any intention yet to go independent in hopes of formal unionization.<sup>135</sup>

Overwatch, however, may be the first esports to formally unionize. Thomas “Morte” Kerbusch, a former Overwatch player and now coach, and sports labor

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128. Liz Mullen, *Two Groups Vie to Establish Esports Players Associations*, SPORTS BUS. J. (Mar. 12, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/03/12/Esports/PAs.aspx> [perma.cc/8LY9-SJ2Y].

129. *About Us*, NBPA, <https://nbpa.com/about/> [perma.cc/4SP8-77MS] (last visited Dec. 1, 2018).

130. Kogel, *supra* note 37.

131. *Id.*

132. Myers, *supra* note 6.

133. *Id.*

134. NALCS Players Association (@NALCSPA), TWITTER (Jan. 14, 2019, 9:25 PM), <https://twitter.com/NALCSPA/status/1085045330578731010> [perma.cc/HE9U-YXFR]; NALCS Players Association (@NALCSPA), TWITTER (Jan. 14, 2019, 9:56 PM), <https://twitter.com/NALCSPA/status/1085053144709718016> [perma.cc/EA3E-Y2UN].

135. Myers, *supra* note 6. At the time of publication, the LCS Players’ Association had not publicly indicated that its players wanted to or would be moving towards unionization. NALCS Players Association (@NALCSPA), TWITTER (Mar. 19, 2019, 1:14 AM), <https://twitter.com/nalcspa?lang=en> [https://perma.cc/E864-BG2D].



attorney Ellen Zavian are leading the effort to create the first esports union in the country.<sup>136</sup> Unlike Riot Games, Blizzard has decided not to fund a players association, but the Overwatch League itself has indicated it would be supportive of its players unionizing.<sup>137</sup> Unfortunately, because the idea of a legitimate players union is so new, esports players already competing in these leagues have not taken the steps towards considering collective bargaining, and the game developers cannot establish these unions themselves.

### *C. Collective Bargaining and the Tripartite Esports League Problem*

The process of collectively bargaining for esports players prompts many questions, but the three primary questions that need to be answered before any others are: (1) Does the National Labor Relations Board have jurisdiction over esports players in a particular league? (2) Can esports players be considered “employees” within the context of the NLRA? (3) Can teams or the game developers be considered “employers” within the context of the NLRA?

*1. Jurisdiction under the Commerce Clause.*—The National Labor Relations Board has “statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level.”<sup>138</sup> However, certain employers are excluded from the Board’s jurisdiction. “Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations” are excluded from the Board’s jurisdiction as employers.<sup>139</sup> In addition, the Board does not have jurisdiction over certain employees, including agricultural laborers, individuals employed in “domestic service of any family or person at his home” like babysitters, individuals employed by their parents or spouse, independent contractors, or supervisors.<sup>140</sup>

Congress vested in the Board the jurisdiction to oversee the activities of an employer and its employees engaged in interstate commerce.<sup>141</sup> The Supreme Court specifically found that “Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause” in the Board’s policing of labor practices.<sup>142</sup> This broad exercise of jurisdiction reins in any employer engaged in interstate commerce and engaged in a “labor dispute” “affecting commerce” as defined by the NLRA.<sup>143</sup> The definition of commerce under the NLRA means interstate commerce and includes

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136. Mullen, *supra* note 128.

137. Nicole Carpenter, *OWL commissioner Nate Nanzer: “Of Course We’d Be Supportive of a Players’ Union,”* DOT ESPORTS (2018), <https://dotesports.com/overwatch/news/overwatch-league-nate-nanzer-interview-21932#list-3> [perma.cc/J8FJ-YAJJ].

138. National Labor Relations Board, *Jurisdictional Standards*, <https://www.nlr.gov/rights-we-protect/law/jurisdictional-standards> [perma.cc/43X7-6X9S] (last visited Feb. 11, 2019).

139. *Id.*

140. 29 U.S.C. § 152(3) (2019).

141. Nat’l Labor Relations Bd. v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963).

142. *Id.*; see also U.S. CONST. art I, § 8, cl. 3 (Commerce Clause).

143. 29 U.S.C. § 152(6), (7), (9) (2019).

all “trade, traffic, commerce, transportation, or communication” between the states or between the states and a foreign country.<sup>144</sup> “Affecting commerce” means “in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.”<sup>145</sup> “Labor dispute” means “any controversy” concerning bargaining items that employers and unions typically discuss, like wages, hours, tenure, or other related terms and conditions of employment.<sup>146</sup>

The Board’s broad jurisdictional breadth covers most employers not already excluded under the NLRA, but the number of employers over whom the Board exercises control is limited by the Board’s own discretion over whether or not to exercise jurisdiction over the employer.<sup>147</sup> The Board’s control is further restricted by the Board’s own rules regarding thresholds for monetary amounts affecting interstate commerce.<sup>148</sup> For example, nonretail businesses must be engaged in “[d]irect sales of goods to consumers in other States, or indirect sales through others (called outflow), of at least \$50,000 a year; or direct purchases of goods from suppliers in other States, or indirect purchases through others (called inflow), of at least \$50,000 a year.”<sup>149</sup>

The Board likely could exercise jurisdiction over an esports league, depending on the details of the specific league. Neither esports players nor esports team owners fall within any exceptions delineated by the NLRA, and existing esports leagues like the LCS and the Overwatch League are engaged in the sorts of labor disputes with its players over which the Board has jurisdiction. In addition, game developers would need to be involved in this jurisdictional determination because the esports players and teams cannot compete in an esports league without the consent of the developer that owns the game.

In a multiemployer bargaining situation involving the game developer, esports players, and esports teams, all three parties would have to be involved in discussions over labor disputes. The question of adequately affecting interstate commerce is prominent, but for an esports league like the LCS, its game developer Riot Games spent over \$100 million a year supporting and developing the league, well over the jurisdictional inflow rule set by the Board itself.<sup>150</sup> If the Board makes a similar policy decision as it has with professional sports leagues, then the Board can and will exercise its jurisdiction over any union that were to

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144. 29 U.S.C. § 152(6) (2019).

145. 29 U.S.C. § 152(7) (2019).

146. 29 U.S.C. § 152(9) (2019).

147. National Labor Relations Board Office of the General Counsel, *Basic Guide to the National Labor Relations Act*, NLRB.GOV 1, 33 (1997), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf> [perma.cc/Z4RQ-MY56].

148. *Id.*

149. *Id.* at 34.

150. Steven Asarch, *'League of Legends' Cuts Esports Budget, Can Riot Games Bounce Back?*, NEWSWEEK (Aug. 28, 2018, 12:50 PM), <https://www.newsweek.com/league-legends-feargorm-esports-na-lcs-finals-eu-1093389> [perma.cc/T5BH-VH29].

form in the esports industry.

2. *Employees or Independent Contractors?*—“Employee” for the purposes of the NLRA describes the “conventional master-servant relationship as understood by common-law agency doctrine.”<sup>151</sup> According to the Second Restatement of Agency, a “servant” is “a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.”<sup>152</sup> According to a recent Board decision,<sup>153</sup> the following factors are relevant in determining whether a worker is an employee or an independent contractor:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.<sup>154</sup>

Ultimately, the “employee” determination is a question of whether the employee’s conduct is subject to the control of his or her employer.<sup>155</sup>

In the esports context, the esports players are the employees, and the Board likely would find that esports players are considered employees for the purposes of the NLRA. Under the Second Restatement of Agency definition, esports players are persons “employed to perform services in the affairs of another,” namely the team for whom they compete, and esports players’ “physical conduct . . . is subject to the [employer’s] control.”<sup>156</sup> Turning to the factor test, many of those factors weigh in favor of considering esports players as employees. For example, in both the LCS and the Overwatch League, esports players are provided all their equipment to compete by the game developers when they

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151. Nat’l Labor Relations Bd. v. Town & Country Elec., 516 U.S. 85, 94 (1995).

152. RESTATEMENT (SECOND) OF AGENCY § 220(1) (AM. LAW INST. 1958).

153. Super Shuttle, 367 N.L.R.B. 75 (Jan. 25, 2019).

154. RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958).

155. Nat’l Labor Relations Bd. v. Town & Country Elec., 516 U.S. 85, 95 (1995).

156. RESTATEMENT (SECOND) OF AGENCY § 220(1) (AM. LAW INST. 1958).

compete,<sup>157</sup> and competitive video gaming is “part of the regular business” of both the game developer and the team owners.<sup>158</sup> The biggest factor in favor of considering esports players to be employees is the degree of control factor. Esports players are subject to a player contract with their team, and both the LCS and the Overwatch League rules require that each player be retained by contract with their team.<sup>159</sup> While the Overwatch League’s rules state that each player must be an employee of their respective team,<sup>160</sup> the LCS states that each player may not be an employee of Riot Games.<sup>161</sup> Despite the difference in language, both provisions either imply or explicitly state that esports players should be considered employees of their respective teams at the very least.

Each league’s set of rules can be considered contract terms controlling the players because players must abide by the league rules or they cannot compete at all.<sup>162</sup> For the LCS, the league rules control several aspects of the players’ conduct and esports career, such as the format of the league, eligibility rules for players, rules governing team roster formation, rules on equipment, and rules controlling the relationship between players and teams.<sup>163</sup> While the Overwatch League rules seem to be pretty basic, the LCS rules include an important provision that may have implications for collective bargaining. Rule 16.1, “Finality of Decisions,” states, “All decisions regarding the interpretation of these rules, player eligibility, scheduling and staging of the League, and penalties for misconduct, lie solely with the League, the decisions of which are final.”<sup>164</sup> For right of control purposes, this means that Riot Games, as the League operators, has final decision power in the LCS, but in terms of collective bargaining, this provision is the type of provision that would be subject to negotiation during the bargaining process, as it involves the power of one party to control the other.

This entire discussion is reinforced by the parallel status of professional athletes as employees of their respective teams.<sup>165</sup> Physical exertion aside, esports players occupy the same position in their esports leagues that professional athletes do in their respective leagues. If professional athletes are considered employees of their team owners, then esports players should also be considered employees of their teams for the same reasons.

3. *The Joint Employer Problem.*—Finally, under the NLRA, an “employer” is a party that has “complete control over the hire, discharge, discipline, and promotion of employees, rates of pay, supervision, and determination of policy

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157. *Rules of Competition Summary – 2018 Season*, *supra* note 109; *2018 Official Rules – NA LCS and NA LACS*, *supra* note 104, at 16.

158. RESTATEMENT (SECOND) OF AGENCY § 220(2) CMT. (AM. LAW INST. 1958).

159. *Rules of Competition Summary – 2018 Season*, *supra* note 157; *2018 Official Rules – NA LCS and NA LACS*, NORTH AMERICAN LEAGUE OF LEGENDS SERIES, LLC, *supra* note 157.

160. *Rules of Competition Summary – 2018 Season*, *supra* note 109.

161. *2018 Official Rules – NA LCS and NA LACS*, *supra* note 104, at 5.

162. *Rules of Competition Summary – 2018 Season*, *supra* note 109.

163. *2018 Official Rules – NA LCS and NA LACS*, *supra* note 104, at 1.

164. *Id.* at 50.

165. Feldman, *supra* note 49, at 209, 217.

matters.”<sup>166</sup> For esports, the definition of “joint employers” is particularly pertinent as well.<sup>167</sup> While “employer” is defined under section 2(2) of the NLRA, the NLRA does not define or even mention “joint employer.”<sup>168</sup> According to the Board’s own rules, “two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.”<sup>169</sup> Further, a joint employer must “not only possess the authority to control employees’ terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a ‘limited and routine’ manner.”<sup>170</sup> Changes in the composition of the National Labor Relations Board, and, thus, the Board’s attitude towards the joint-employer standard, have made it difficult to discern what the exact rule is, but a recent Notice of Proposed Rulemaking issued by the Board has proposed that:

[A]n employer may be considered a joint employer of a separate employer’s employees only if the two employers share or codetermine the employees’ essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees’ essential terms and conditions of employment in a manner that is not limited and routine.<sup>171</sup>

Even though the rule has not yet been promulgated, recent case law and the Notice of Proposed Rulemaking provide enough guidance to determine whether esports team owners and game developers should be considered joint employers.

Both the team owners and the game developers should be considered employers within the context of the NLRA. Game developers like Riot Games, which produced League of Legends, or Blizzard Entertainment, which produced Overwatch, should have the ability to discipline the players competing in their

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166. Roane-Anderson Co., 95 N.L.R.B. 1501, at 3 (1951).

167. At the time of the submission of this Note, the National Labor Relations Board had issued a Notice of Proposed Rulemaking on the Board’s joint-employer standard, following the D.C. Circuit opinion in *Browning-Ferris Indus. of Cal., Inc. v. Nat’l Labor Relations Bd.*, 911 F.3d 1195 (D.C. Cir. 2018). See *Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46,681 (Sept. 14, 2018) (to be codified at 29 C.F.R. ch. 1). The Board has not yet promulgated a new standard or issued a final rule.

168. *Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46,681 (Sept. 14, 2018) (to be codified at 48 C.F.R. ch. 1).

169. *Nat’l Labor Relations Bd. v. CNN Am., Inc.*, 865 F.3d 740, 749 (D.C. Cir. 2017) (quoting *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 1599, 13 (2015)).

170. *Id.* (quoting *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 1599, at 13 (2015)).

171. *Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46,686 (Sept. 14, 2018) (to be codified at 29 C.F.R. ch. 1). According to the Notice of Proposed Rulemaking, the Board under President Obama’s administration and President Trump’s administration have taken conflicting approaches to the joint-employer standard. See *Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46,685 (Sept. 14, 2018) (to be codified at 29 C.F.R. ch. 1).

esports leagues, much like the commissioner of a professional sports league. For example, in League of Legends, Riot Games has the “sole and absolute discretion” to impose penalties on LCS players, and the “nature and extent” of those penalties are entirely up to Riot Games.<sup>172</sup> The Overwatch League rules do not include a penalty provision, although the rules do state that abiding by the rules is a “condition to participation in the League.”<sup>173</sup> The power to make competing in the league contingent on abiding by the league rules likely qualifies as “complete control over the hire, discharge, discipline . . . and determination of policy matters” identified by the Board as the key elements of employer status.<sup>174</sup>

Team owners in esports are like team owners in other professional sports leagues, with the exception that esports team owners have not yet had to sign collective bargaining agreements with their teams’ players. Those elements of employer status related to the direct supervision of players, such as rates of pay and the discharge of players, most strongly suggest that esports team owners and game developers should be treated as employers in these esports leagues. To use an earlier example, when LCS team Echo Fox released player Fenix five hours before every team had to finalize their roster for the next season split, Echo Fox made it nearly impossible for Fenix to sign with a new team for the rest of the season.<sup>175</sup> While the public is not privy to the sorts of contracts that esports players sign with their team, news stories, Reddit threads, and Twitter provide anecdotal evidence of the power that esports team owners have over players in the absence of a collective bargaining agreement to govern the two parties’ relationship.<sup>176</sup>

The question of employer status is complicated by the question of “joint employer” status for the game developers and the esports team owners. In professional sports leagues like the Big Four, leagues are an association of individually owned teams, and the commissioner of that association enforces the rules of gameplay throughout the season.<sup>177</sup> In professional single entity sports leagues, the league is one unified party, and that party exercises most of the administrative action of the league. In the context of esports, leagues seem to be more similar to the Big Four leagues than the single entity leagues because of the decision of game developers to sell franchises to independently owned teams, but even this comparison is not completely accurate. For example, in both the LCS and the Overwatch League, each team is individually owned, meaning that the team ownership is organized more like the Big Four leagues than a single entity league. However, every team competing in the LCS and the Overwatch League have been awarded a franchise by the game developer, making the team eligible to compete in the league.<sup>178</sup> By comparison, teams in the NFL are voluntarily

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172. 2018 Official Rules – NA LCS and NA LACS, *supra* note 104, at 48.

173. Rules of Competition Summary – 2018 Season, *supra* note 109.

174. Roane-Anderson Co., 95 N.L.R.B. 1501, 2 (1951).

175. Sim & Jang, *supra* note 1.

176. See, e.g., *id.*

177. Grossman, *supra* note 57, at 111.

178. Khan, *supra* note 96; Heitner, *supra* note 106.

associated with each other in order to create and operate the league.<sup>179</sup> Team owners can sell their team, although this requires the consent of the other team owners.<sup>180</sup> There is no entity entirely the same as the game developer in the professional sports world. While the NFL Commissioner may have discipline power like Riot Games has, the NFL Commissioner's position is a creation of the teams associating with each other, while Riot Games' existence precedes that of the LCS and its franchised teams.

This unique league structure is what makes the "joint employer" determination so interesting. If esports players in the LCS or the Overwatch League were to unionize in a manner similar to professional sports players, then esports players would collectively bargain with the team owners. However, if the game developers are considered "joint employers" of the esports players along with the players' team owners, then the game developers are also subject to the collective bargaining agreement.<sup>181</sup> Presumably, the game developers would want a stake in the initial collective bargaining agreement as interested parties, but under current law, they likely would be required to participate regardless.

According to the National Labor Relations Board, "two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment."<sup>182</sup> In the LCS and the Overwatch League, the game developers and the team owners jointly govern the players' conduct, and the two parties share responsibilities for operating the league. The game developers operate the matches and discipline players when necessary, while team owners train, pay, and sometimes even house players. Joint employers also must "exercise [the authority to control employees' terms and conditions of employment], and [must] do so directly, immediately, and not in a 'limited and routine' manner."<sup>183</sup> No other entities have so direct control over esports players as the game developer, which owns the video game the players play and operates the league in which the players play, and the team owners, who pay and train these players on a daily basis. There is nothing "limited and routine" about the game developers and the team owners' control over the esports players. For these reasons, game developers and team owners likely would be considered joint employers of those esports players competing in their league. Consequently, a collective bargaining agreement would bind all parties involved in this tripartite league structure.

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179. Paul Sullivan, *How to Bid for the N.F.L.'s Biggest Prize: Team Ownership*, N.Y. TIMES (Feb. 2, 2018), <https://www.nytimes.com/2018/02/02/your-money/buy-nfl-team.html> [perma.cc/KAX8-H4M5].

180. *Id.*

181. Nat'l Labor Relations Bd. v. CNN Am., Inc., 865 F.3d 740, 748 (D.C. Cir. 2017) ("[I]f CNN was not a joint employer of TVS' employees, it would not have been bound by the collective-bargaining agreement between TVS and the union . . .").

182. *Id.* at 749 (quoting *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 1599, 13 (2015)).

183. *Id.* (quoting *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 1599, 13 (2015)).

*D. The Appropriateness of Collective Bargaining in Modern Esports*

While game developers and team owners are likely to be considered joint employers under the NLRA, collective bargaining still might not be appropriate for all esports. The definition of “esports” as competitive video gaming is an inclusive term; hypothetically, any multiplayer video game with a formal league or tournament structure in place for competing players can claim the “esports” tag. However, collective bargaining for a specific esports requires sophisticated league rules, a formal league structure with a defined set of teams, and a substantial amount of outside investment. These three criteria ensure that the league can sustain itself long-term, and they ensure that players seeking to collectively bargain in that specific league will be taken seriously because so much capital is at stake in the league.

In the LCS, the decision to franchise brought stability for the teams awarded a franchise, because those teams now had a permanent spot in the league by purchasing a franchise from Riot Games.<sup>184</sup> By moving away from relegation, LCS teams no longer would be removed from the league if they had a few bad years.<sup>185</sup> The outside investment followed the decision to franchise, with one of North America’s most popular LCS teams, Cloud9, securing \$50 million in its second round of venture capital funding this past October.<sup>186</sup> Cloud9 has teams competing in several different esports, such as League of Legends, Apex Legends, Counterstrike: Global Offensive, and Fortnite,<sup>187</sup> and the organization itself is worth \$310 million.<sup>188</sup> One of Cloud9’s rivals in the LCS is Team Liquid, another esports organization worth \$200 million that fields teams in League of Legends, Counterstrike: Global Offensive, and Fortnite.<sup>189</sup> The size of the esports organizations involved in the LCS might be surprising to those unfamiliar with the industry, but the valuation of these organizations shows how large esports are becoming and how many resources are required to operate an esports league effectively. Cloud9 and Team Liquid are among the top teams in the LCS, and their involvement in the LCS legitimizes the financial opportunity in these esports leagues.<sup>190</sup> These are sophisticated organizations, and if players in the LCS were to unionize, then these organizations would be involved in the bargaining process. Because League of Legends developer Riot Games has organized a formal league structure for the LCS and has promulgated clear rules governing gameplay for the league, esports organizations like Cloud9 and Team Liquid are now able to sell the opportunity to invest in esports to outside venture capital investors.<sup>191</sup>

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184. Khan, *supra* note 96.

185. *Id.*

186. Blumenthal, *supra* note 4.

187. Cloud9, CLOUD9, <https://www.cloud9.gg/> [perma.cc/E65U-DJ97] (last visited Mar. 20, 2019).

188. Blumenthal, *supra* note 4.

189. *Id.*

190. *Id.*

191. *Id.*



For esports leagues that are in their developmental years, increased costs may stifle or even prevent a league from fully forming. This is true with any growing industry or business; if the costs of doing business are too prohibitive, the business will never be able to sustain itself. The LCS has seen some of this with the new franchising and its increased player salaries, and some have floated the idea of collective bargaining as a way to control those labor costs through salary caps and long-term contracts.<sup>192</sup> For esports like League of Legends and Overwatch, collective bargaining could be used as a way to stabilize those costs and ensure that teams without enormous venture capital investors can compete with those teams that do. Team diversity is important, because a competitive league needs multiple teams with strengths and weaknesses to keep fans watching. In esports, where players are primarily compensated through their teams, like the LCS and the Overwatch League, collective bargaining makes sense, because the teams control bargain directly with the players regarding compensation. However, for those esports where most players' earnings stem from tournament winnings or sponsorships rather than team salaries, an esports players union might not make sense. This payment arrangement is popular for shooter-type games, such as Apex Legends or Call of Duty, where multiple teams can compete at once in a single match, whereas in League of Legends and Overwatch only two teams compete against each other. Tournament winnings are not guaranteed, whereas a salary is. Those esports leagues where players are primarily compensated through a salary should look to collective bargaining as a way to ensure every party has an equal voice in the bargaining process and to ensure that all costs are stabilized through a collective bargaining agreement.

Esports organizations still can and currently do sponsor teams that compete in esports that rely on tournament winnings, but these players are compensated through sponsorships and tournament winnings when they win, which is not a structure where collective bargaining can bring any more certainty to the stakeholders' financial stability. An esports where players are compensated primarily through tournament winnings and sponsorships may have promulgated sophisticated rules like the LCS and the Overwatch League, but the league structure is much less defined. For example, Call of Duty is a shooter-type esports, and the Call of Duty World League is where the video game's developer Activision organizes international tournaments.<sup>193</sup> A collective bargaining

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192. See Travis Gafford, *Loco litigates, big roster rumors and announcements, team trade hype - Hotline League 56*, YOUTUBE (Nov. 28, 2018), <https://www.youtube.com/watch?v=z4AffZ1iqNg&t=3650s> [perma.cc/6TLZ-TWK5] (Travis Gafford interview with Sebastian Park, Vice President of Esports for the Houston Rockets and Clutch Gaming, about how salary caps could help stabilize labor costs for esports teams); Travis Gafford, *Optic GM Romain Bigeard on coming to NA, building Optic LoL, crazy player salaries, and more*, YOUTUBE (Dec. 4, 2017), <https://www.youtube.com/watch?v=n2UvH-Owd3E> [perma.cc/H3RQ-4JPK] (Travis Gafford interview with Optic Gaming General Manager Romain Bigeard about how teams need to think long-term about their roster).

193. *Call of Duty World League*, ACTIVISION, <https://www.callofduty.com/esports/schedule> [perma.cc/D4XU-KU3F?type=image] (last visited Mar. 20, 2019).

agreement in this sort of league would not make sense because Activision would have to organize with an indefinite number of teams competing, along with players from several different countries. In contrast, in the LCS and the Overwatch League, there is a defined set of franchised teams allowed to compete, and they all compete in the United States.<sup>194</sup> The Overwatch League's international teams do complicate matters for collective bargaining purposes, but because primarily all activities along with the game developer are based in the United States, these teams would likely see the benefit in voluntarily participating in the collective bargaining process.

For those esports where unions make sense, unions should be video-game specific. Much like how the NBA, NFL, NHL, MLB, and MLS all have their own sport-specific union representing the professional athletes, esports unions should be different for each video game. Mechanical skills do not necessarily translate from one video game to the next, so each union would be representing a different type of player. Other game developers should follow Riot Games' lead and begin to look toward facilitating the formation of a players association for its players. The LCS Players' Association is the first esports players association of its kind, and the existence of such a players association can recruit new players and help every player make responsible decisions for their career. If the LCS players do eventually decide to unionize, then the LCS Players' Association will provide a strong foundation to do so through the work it has already accomplished in the league and for its players.

#### CONCLUSION

With the creation of the LCS Players' Association, esports players are beginning to take steps towards collective action. Formal unionization is a big step for esports leagues to take, but it is a step towards the public recognizing these esports leagues as legitimate and lucrative forms of professional sports entertainment. If esports continue to grow in the future as it has in the past few years, then eventually players will require protection in the collective bargaining process during these growing years as the players sit down at the negotiating table with venture capital firms, multi-million dollar esports organizations, and internationally renowned game developers.

This Note first set out the relevant labor law specifically related to the collective bargaining process, and by examining existing professional sports leagues and their unions, this Note set the background for esports leagues either to follow or learn from these existing structures. Collective action is important for esports players just as it is important for professional athletes, but the form of collective action needs to be considered carefully. Formal unionization can hinder a new esports league's growth before it can sustain itself. In addition, unions are not appropriate for every sport. Collective bargaining does not make sense for esports players competing in tournament style esports, and nascent esports do not

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194. *Rules of Competition Summary – 2018 Season*, *supra* note 109; *2018 Official Rules – NA LCS and NA LACS*, *supra* note 104, at 1.

have the requisite financial investment to sustain a union. Sophisticated league rules, formal league structures with a defined set of teams, and substantial financial investment in the league and its teams all should be present before the parties begin to engage in the difficult tripartite collective bargaining process. Certainty among the stakeholders, regarding what will be required of them legally and financially can be a strong catalyst for growth, and once an esports league has established all the requisite elements of a strong esports league, then collective bargaining can bring the sort of certainty that will bring long-term growth to the esports industry in the United States.