

ESPORTS, PLAYER POSITIONS, AND THE BENEFITS OF UNIONIZATION

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ABSTRACT

This Note examines the current state and implications of unionization within the eSports industry. eSports currently lags behind other industries, particularly other sports leagues like the NBA and NFL, in terms of unionization. Unaware of the benefits that unionization could bring to them, many eSports players lack bargaining power and are subject to abusive contracts and poor working and living conditions. This Note argues that eSports players hold immense power compared to workers in other industries and would greatly benefit from unionization. Although eSports players may face challenges in forming a unionized eSports industry, they are also in a unique position as a part of an industry that differs significantly in structure from traditional sports leagues. This Note will explore the possible benefits of and difficulties with achieving unionization in eSports.

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INTRODUCTION

When video games were first getting started, few probably thought that competitive gaming would become a multi-million dollar industry.¹ Even fewer would have thought that famous NBA players and financiers would invest in this industry.² Today, however, eSports is experiencing a tremendous growth and is making its way into the mainstream.³ From established games like DOTA 2 and League of Legends, to new and incredibly popular games like Fortnite, eSports is reaching a wider audience and affecting more and more gamers as time goes on.⁴ Global revenue in eSports for the year 2019 is expected to top \$1 billion and could be as high as \$1.8 billion by 2022.⁵

However, “eSports” does not refer to one organization, such as the NFL or NBA, under which players compete against each other. Rather, it merely refers to the general competitive video gaming scene and covers various games from sports games like Madden to shooters like Fortnite and Call of Duty.⁶ Generally, each gaming publisher hosts its own

¹ See Trefis Team, *How Much Can the eSports Market Grow in 2018?*, FORBES (July 11, 2018, 1:36 PM),

<https://www.forbes.com/sites/greatspeculations/2018/07/11/how-big-can-esports-grow-in-2018/> (noting that “total eSports revenue jumped from \$493 million in 2016 to \$655 million in 2017, and total revenue could exceed \$900 million in 2018”).

² See Graham Ashton, *Michael Jordan, Drake Find Investment Opportunities in Esports*, ESPORTS OBSERVER (Oct. 29, 2018), <https://esportsobserver.com/teomonday-briefing-oct-29/> (stating that Michael Jordan and David Rubenstein joined a \$26 million funding round for aXiomatic, the ownership group of Team Liquid, a competitive gaming organization involved in numerous games).

³ See Bus. Insider Intelligence, *Why Competitive Video Gaming Will Soon Become a Billion Dollar Opportunity*, BUS. INSIDER (Mar. 15, 2017, 1:40 PM), <https://www.businessinsider.com/esports-market-growth-ready-for-mainstream-2018-3-21> (“Goldman Sachs valued eSports at \$500 million in 2016 and expects the market will grow at 22% annually compounded over the next three years into a more than \$1 billion opportunity.”).

⁴ Nick Statt, *Epic Will Provide \$100 Million for Fortnite Competition Prize Pools in Its First Year*, VERGE (May 21, 2018, 1:26 PM), <https://www.theverge.com/2018/5/21/17376748/fortnite-battle-royale-epic-games-e-sports-100-million-prize-pool-tournaments>.

⁵ Hilary Russ, *Global eSports Revenues to Top \$1 Billion in 2019: Report*, REUTERS (Feb. 12, 2019, 11:05 AM), <https://www.reuters.com/article/us-videogames-outlook/global-esports-revenues-to-top-1-billion-in-2019-report-idUSKCN1Q11XY>.

⁶ AJ Willingham, *What is eSports? A Look at an Explosive Billion-Dollar Industry*, CNN (Aug. 27, 2018, 2:18 PM), <https://www.cnn.com/2018/08/27/us/esports-what-is-video-game-professional->

eSports competition(s). For example, Fortnite publisher Epic Games recently hosted its “Fall Skirmish Series,” which ended in a competition at TwitchCon⁷ and consisted of \$10,000,000 in prize money.⁸ Even though they are not required to, video game publishers regularly contribute to large prize pools to garner interest in their games.⁹

With such large prize pools, some of the most talented and popular players are able to win as much as \$500,000 in a single¹⁰ tournament.¹¹ However, similar to traditional sports, this situation does not describe most eSports competitors, only the most talented. Such large prize pools and a growing population of gamers raise the need for protection, given the positional vulnerability of less famous and less skilled players.

This Note will examine the case for player unionization, as well as the advantages and difficulties players may face. While players in traditional sports, such as football and baseball, have made much more progress via unionization than eSports, eSports players have many differences that may put them in a better position to achieve unionization. However, the current structure of eSports and the plethora of games available serve as obstacles to achieving this goal.

league-madden-trnd/index.html (listing Fortnite, League of Legends, Counter-Strike, Call of Duty, Overwatch, and Madden NFL as eSports games).

⁷ TwitchCon is an annual video game convention centered around the streaming website Twitch. *See generally* TWITCHCON, <https://www.twitchcon.com/#na> (last visited Oct. 22, 2019).

⁸ James Davenport, *\$10 Million Fortnite Fall Skirmish Announced*, PC GAMER (Sept. 10, 2018), <https://www.pcgamer.com/dollar10-million-fortnite-fall-skirmish-announced/>.

⁹ *See* Colin Campbell, *Life is Tough on the Counter-Strike Pro Circuit*, POLYGON (Apr. 12, 2016, 9:00 AM), <https://www.polygon.com/2016/4/12/11388750/cs-gold-rush> (noting that revenue from in-game purchases increased after raising major tournament prize pools from \$250,000 to \$1,000,000).

¹⁰ Tournament length and prizes can vary according to the game, event, and venue, but more popular games like Fortnite are more likely to have large prize pools. For example, the Fortnite Summer Skirmish was an 8-week tournament that offered \$8 million in prize money. *See Fortnite Summer Skirmish Series*, EPIC GAMES, <https://www.epicgames.com/fortnite/en-US/summer-skirmish> (last accessed Dec. 30, 2019).

¹¹ Preston Byers, *FaZe Clan’s Tfue and Cloak Win the Fall Skirmish Grand Finals at TwitchCon*, DOT ESPORTS (Oct. 28, 2018, 6:02 PM), <https://dotesports.com/fortnite/news/faze-clans-tfue-and-cloak-win-the-fall-skirmish-grand-finals-at-twitchcon>.

I. BACKGROUND

A. The Current State of Unionization of eSports

A recent and substantial effort for unionization in eSports has been with Blizzard Entertainment's *Overwatch* and Riot Games' *League of Legends*.¹² However, even though Riot Games calls its player association a "union," it is not a formal union recognized by the federal government.¹³ Therefore, it lacks a key aspect of unionization—legal protection.¹⁴

Instead, what Riot Games is really creating is a "players" or "trade" association, intending to give *League of Legends* players a voice in negotiations between teams and Riot Games. Although moving in the right direction to give strong bargaining power to gamers, the association doesn't have any formal obligations under federal law.¹⁵

B. What is a Union?

A "union" is a term of art under United States law. Unions in the United States are certified by the National Labor Relations Board (NLRB), the federal agency that enforces that National Labor Relations Act (NLRA).¹⁶ A union can be certified by the NLRB in two ways.¹⁷ First, if at least thirty percent of employees sign "authorization cards" supporting the formation a union, the NLRB will conduct a general election for all employees, and a union will be created if the majority

¹² See Jonathan Kogel, *State of the Esports Player Union: Drawbacks and Legal Challenges*, ESPORTS OBSERVER (May 8, 2018), <https://esportsobserver.com/state-of-the-esports-union/> (discussing the rise of informal eSports unions).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See *National Labor Relations Act*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/resources/national-labor-relations-act-nlra> (last visited Oct. 22, 2019) ("Congress enacted the National Labor Relations Act [] in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.").

¹⁷ See *Your Right to Form a Union*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/rights-we-protect/whats-law/employees/i-am-not-represented-union/your-right-form-union>.

votes in favor of one.¹⁸ Second, an employer may voluntarily recognize a union.¹⁹

The term “employee” excludes any supervisors, managers, or independent contractors.²⁰ “Supervisors” and “managers” are those who have the power to hire, layoff, discharge, and discipline employees.²¹ Therefore, for example, an eSports team manager would not be a part of the union formed by players. This would be problematic, however, if a team has one of its members also acting as a manager since the team manager could not be a part of the union.²²

Independent contractors include those who use their own independent judgment in doing their work,²³ such as a construction company hired by a corporation. Independent contractors are not employees of the company or organization for purposes of the NLRA.²⁴ A key factor in determining whether an individual is an independent contractor is the amount of control the employer has over the individual.²⁵ If the employer has substantial control, the NLRB or the courts will likely find the individual to be an employee rather than an independent contractor.²⁶ Because teams generally have a high degree of control over their players, it is likely that both the NLRB and courts would consider the players to be employees.²⁷

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ National Labor Relations Act, 29 U.S.C. § 152(3) (2018).

²¹ *Id.*

²² See Chris Higgins, *What Does an eSports Manager Actually Do?*, RED BULL (Dec. 5, 2014), <https://www.redbull.com/us-en/what-do-dota-smite-and-fps-team-managers-do> (stating that it is standard in the industry for managers of eSports teams to first be players themselves).

²³ See *Roadway Package System, Inc.*, 326 N.L.R.B. 842, 849–50, 853 (1998) (stating that in determining whether one is excluded from the term “employee” based on independent contractor status, courts commonly rely on the “common-law agency doctrine,” which “ultimately assesses the amount or degree of control exercised by an employing entity over an individual” including the “manner and means” of accomplishing the end result, but noting that this is not the only controlling factor).

²⁴ See 29 U.S.C. § 152(3) (“The term ‘employee’ shall . . . not include . . . any individual having the status of an independent contractor . . .”).

²⁵ See *Roadway Package System, Inc.*, 326 N.L.R.B. at 853 (holding that the control Roadway had over its drivers supports an employer-employee relationship).

²⁶ See *id.*

²⁷ See *eSports Contracts: 5 Things Every Athlete Should Consider*, GORDON L. GROUP (Feb. 6, 2018), <https://www.gordonlawltd.com/esports-contracts-5->

Certification or recognition is important because once a union is formed, the law requires employers to bargain over certain terms and conditions in the employment contract.²⁸ These conditions can include wages, hours, and other vital aspects of employment.²⁹ A refusal by the employer to bargain over these conditions would result in a violation of the NLRA.³⁰ Employees can also negotiate with employers to require bargaining over permissive subjects, which are subjects other than the required subjects (wages, hours, and other vital aspects of employment).³¹

Employers are obligated to bargain in good faith and can only unilaterally act on a subject of bargaining when an “impasse” is reached.³² An impasse occurs when negotiations have exhausted prospects of concluding an overall agreement.³³ When an impasse occurs, the employer can unilaterally implement the last proposal it made to the union.³⁴ The NLRA provides that, while negotiating in good faith is required, “such obligation does not compel either party to agree to a proposal or require the making of a concession.”³⁵

player-considerations/ (noting that non-gaming responsibilities, such as social media requirements, interviewing, and exclusion of independent streaming, are common provisions in eSports contracts).

²⁸ See 29 U.S.C. § 158(d) (2018) (establishing an obligation on the employer and the representative of the employees to bargain collectively).

²⁹ *Id.* (stating that “to bargain collectively is the 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”).

³⁰ 29 U.S.C. § 158(a)(5) (2018) (“It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . .”).

³¹ See *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349–50 (1958) (holding that a ballot clause which did not deal with “wages, hours, and other terms and conditions of employment” is not a subject of mandatory bargaining).

³² See *NLRB v. Katz*, 369 U.S. 736, 741–42 (1962) (holding that unilateral action by the employer on mandatory subjects of bargaining was permitted because the unilateral actions were taken after impasse was reached after bargaining with the union in good faith).

³³ *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 20 (D.C. Cir. 2012) (“A lawful impasse ‘occurs when “good faith negotiations have exhausted the prospects of concluding an agreement.””).

³⁴ *Katz*, 369 U.S. at 741–42.

³⁵ 29 U.S.C. § 158(a)(5).

Section 7 provides that employees have the right to engage in “concerted” activities that are intended to provide “mutual aid or protection” and are conducted through a proper means.³⁶ Thus, if employees take action against an employer that is meant to benefit the position of many employees, the employer cannot punish them for taking such action. In some instances, a concerted act can include actions by a single individual if it has the goal of mutual aid or protection for all employees.³⁷

Another powerful tool for unions is the ability to strike, which is a refusal by two or more employees to work in response to a labor dispute.³⁸ Striking is protected by § 13 of the NLRA, and employees cannot be fired for participating in a strike as long as the strike is in relation to an ongoing labor dispute.³⁹ This prohibition on firing employees would be uniquely beneficial for players in the eSports context. Generally, when a strike occurs, employers have the right to employ temporary replacements.⁴⁰ However, in an eSports team, replacements would be hard to find, especially in team-based games. Because video game teams are usually very small, every player is critical to success. Some may even have unique roles within their team if they are particularly good at a particular aspect of a game. In team-based

³⁶ *Id.* at § 157.

³⁷ See *NLRB v. City Disposal, Inc.*, 465 U.S. 822, 822–23 (1984) (holding that a single employee’s act of refusing to drive a truck for safety reasons constituted “concerted activity” under Section 7 of the NLRA because the right was invoked from the union’s collective bargaining agreement).

³⁸ See 29 U.S.C. § 163 (2018) (stating that nothing in the NLRA should be, unless specifically provided, construed to interfere, impede, or diminish the right to strike); *id.* at § 142(2) (defining “strike” as any strike or other concerted stoppage, slowdown, or interruption of work or operations by employees, including “a stoppage by reason of the expiration of a collective-bargaining agreement”).

³⁹ See *Interfering with employee rights (Section 7 & 8(a)(1))*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1> (last visited Aug. 12, 2019) (stating that under § 8(a)(1) of the NLRA, you may not threaten employees with adverse consequences including discharging, demoting, or disciplining employees for engaging in protected, concerted activity, and that an activity is “protected” if it concerns employees’ interests as employees).

⁴⁰ See *Laidlaw Corp. v. NLRB*, 171 N.L.R.B. 1366, 1369–70 (1968) (“[E]conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; (2) are entitled to full reinstatement upon the departure of replacements.”).

online gaming, replacing a team member would be similar to someone trying to replace a player like Tom Brady.

C. Are Competitive Gamers Employees?

In order for eSports players to form a union, they must be considered “employees” under the NLRA.⁴¹ Independent contractors, managers, and supervisors are excluded from being employees and are not covered under the Act.⁴² While the NLRA has a rather circular definition of “employee,” courts have come up with a body of case law stating that determining whether a worker or professional is an employee or an independent contractor depends on several different factors.⁴³ These factors include how essential the services are to the employer, how much control the employer has over the employee, whether the employer required prior experience or trains the employee themselves, whether the employee provides the tools for work, length of employment, and whether the employee does work in the company’s name.⁴⁴ These factors distinguish whether an individual is an employee or an independent contractor.⁴⁵

While players are not managers or supervisors, some may argue that they are independent contractors. Before joining a team, players are generally already some of the best at their game. Players often have to be some of the best at their respective games in order to make it onto a team. Further, their choices on play style and strategy during tournaments are independent judgments on each player’s part. Moreover, teams themselves generally do not “train” the players; there are no eSports coaches akin to the coaches involved in a professional football or basketball team.

However, and despite this, the multi-factor analysis would probably deem them as employees eligible for union protection under the NLRA. While becoming a professional player generally requires prior experience and a high degree of independent judgment, every other factor seems to favor categorizing competitive players as employees. The players are essential to the employer, for without them there would be no means of making revenue from the tournaments. Employers also exercise

⁴¹ See 29 U.S.C. § 157 (2018) (“*Employees* shall have the right to self-organization, to form, join, or assist labor organizations . . .”) (emphasis added).

⁴² *Id.* at § 152(3) (“The term ‘employee’ . . . shall not include . . . any individual having the status of an independent contractor, or any individual employed as a supervisor . . .”).

⁴³ *Id.* (stating that the term “employee” shall “include any employee”).

⁴⁴ See *Roadway Package System, Inc.*, 326 N.L.R.B. 842, 850 (1998).

⁴⁵ *Id.*

sufficient control over the players. For example, teams might force players to attend certain events and tournaments or to play for a certain amount of time. Teams often also provide the supplies and equipment for the players, whether at home or at a local area network (LAN) event.⁴⁶ The length of time of employment, while short for most players, is probably not a factor here because it is generally not included in the contract like it would be for a seasonal employee at a retail store.

Thus, it is likely that courts would hold that competitive players are employees rather than independent contractors and that they are protected by the NLRA if they decide to unionize.

D. Effects of the Lack of Player Unionization

Absent unionization, players lack the power to efficiently reach compromises with employers. An average player does not earn more than six figures every year and thus lacks the leverage that comes with being a big revenue bringer. Therefore, most players would have to succumb to the employer's demands and requirements. Ultimately, this means tougher working conditions for players.

Lack of unionization has many work-life balance and lifestyle effects on eSports players. Team owners may lack the incentive to protect against player fatigue or promote a healthy work-life balance.⁴⁷ Players may also abandon eSports altogether because the lifestyle is not conducive to maintaining relationships outside of work or starting a family.⁴⁸ In addition, many professional video game players are very young,⁴⁹ and their lack of life experience may make them vulnerable to exploitation by employers. Therefore, legal protection of current and prospective players in the eSports industry is even more pressing.

Counter Strike: Global Offensive (CS:GO) is one of the biggest eSports games in the world and provides an example of the grueling

⁴⁶ See Eric Van Allen, *Tools of the Trade: The Importance of Quality eSports Equipment*, ESPN (May 20, 2016),

http://www.espn.com/esports/story/_/id/15616253/importance-quality-esports-equipment (“Much like Nike and LeBron James, players and teams are getting their own branded versions of mice, mouse pads, keyboards and headsets.”).

⁴⁷ See Campbell, *supra* note 9 (reporting that Rod Breslau, a journalist with ESPN, stated that “pro players are fatigued” and that “[t]here are way too many tournaments, way too many leagues”).

⁴⁸ *Id.*

⁴⁹ See *Average Age in esports vs. Major Sports*, ESPN (Sept. 19, 2017), http://www.espn.com/esports/story/_/id/20733853/the-average-age-esports-versus-nfl-nba-mlb-nhl (“But overall, e[S]ports players are significantly younger than their counterparts in other major sports.”).

conditions many players experience.⁵⁰ Players regularly practice ten or more hours a day, travel from competition to competition, and, all the while, try to maintain a positive image with the public and their fans.⁵¹

II. BENEFITS OF UNIONIZATION

A. Mandatory Bargaining

As mentioned above, unionization means that the employer must bargain in good faith with the union over wages, hours, and other terms and conditions of employment.⁵² Before a change in any of these terms or conditions of employment can be made, the employer must negotiate with the union.

For players, this means a group of players representing the respective teams must negotiate on behalf of all players in the team in regard to wages, hours, and other terms and conditions of employment.⁵³ This structure benefits players because an employer may not negotiate with each individual player on subjects that are mandatory bargaining subjects for the union. This concept is known as the Exclusivity Principle and will be further discussed below.⁵⁴

While some may think collective bargaining is a bad deal for the best players, it should be noted that collective bargaining agreements can allow employers and players to contract around some of the default rules provided by the NLRA. For example, the agreement between the union and employer can have a clause stating that “in certain circumstances involving famous or highly skilled players, the employer may negotiate with such a player on an individual basis.” This is especially common in the collective bargaining agreements of sports unions.

B. The Exclusivity Principle and its Unique Application in eSports

⁵⁰ See *The 10 Biggest Esports of the First Half of 2019 by Total Prize Pool*, THE ESPORTS OBSERVER (July 4, 2019), <https://esportsobserver.com/top10-prize-pools-h1-2019/> (showing that Counter Strike is only second to Fortnite in terms of prize pool size).

⁵¹ See Campbell, *supra* note 9 (describing how Jonathan Jablonowski, a player with Team Liquid, “spends about four hours a day practicing alone, and then another six hours practicing with the team[,]” and when he’s not on the road, he is “at [his] house all day, trying to get better”).

⁵² 29 U.S.C. § 158(d) (2018); see *supra* notes 28–35 and accompanying text.

⁵³ See 29 U.S.C. § 159 (2018).

⁵⁴ See *infra* Section II.B (The Exclusivity Principle and its Unique Application in eSports).

The Exclusivity Principle greatly enhances the power the union has over its members' working conditions. The Exclusivity Principle states that "representatives designated or selected . . . by the majority of employees in a unit appropriate for [collective bargaining] . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . ."⁵⁵ This means that the employer cannot negotiate with individual employees or other subgroups, unless such action is approved in the collective bargaining agreement.

For example, if the union collectively bargains with the employer and establishes a certain minimum wage for employees, the employer cannot then agree to pay less than the established wage to a new hire. The bargaining agreement cannot be contracted around on an individual basis, and the union represents *all* employees.

In the context of eSports, this would be a much better proposition for lower-skilled or less-famous players. Teams would not be able to offer players pay or benefits beneath a certain floor if the union established one. Without a union, lower-skilled or less-famous players would lack the bargaining power to establish better pay or working conditions.

C. More Player Leverage

Additionally, players in eSports unions may hold more leverage than do workers in traditionally unionized industries. Many players, in addition to competing at nationwide tournaments, livestream their gameplay on platforms such as Twitch and get paid to do so, either by donations from viewers or by Twitch via subscriptions.⁵⁶

Because many players are able to make a living through means outside of tournament winnings, players may be less afraid to organize with their teammates or more willing to drop from a team altogether if the employment terms are not satisfactory. This is very different from even traditional sporting leagues like the NFL or NBA, where players would not be able to continue making money playing the sport if they were not participating in the league.

D. A Look at Benefits of Unionization in Other Sports

⁵⁵ 29 U.S.C. § 159.

⁵⁶ See Tae Kim, *Tyler 'Ninja' Blevins Explains How He Makes More than \$500,000 a Month Playing Video Game 'Fortnite'*, CNBC, <https://www.cnbc.com/2018/03/19/tyler-ninja-blevins-explains-how-he-makes-more-than-500000-a-month-playing-video-game-fortnite.html> (last updated Mar. 19, 2018, 7:25 PM) (stating that professional video game player Tyler Blevins makes more than \$500,000 a month solely from Twitch).

The benefits of unionization can be seen in many other traditional sports as well. One example is the Major League Baseball Players Association (MLBPA).⁵⁷ MLBPA negotiated the “first-ever collective bargaining agreement (CBA) in professional sports.”⁵⁸ Shortly after forming the union, the MLBPA negotiated an agreement to raise the minimum salary in baseball from \$6,000—where it had been stuck for two decades—to \$10,000.⁵⁹

Additionally, MLBPA was the advent of free agency in the MLB. Prior to unionization, MLB players were contracted to stay on one team for life as long as the club decided to renew the contract.⁶⁰ One of the greatest achievements of the MLBPA was that players became free to play for other teams.⁶¹

These two examples show the power and benefits of unionization, even in an area as lucrative as American baseball. Beyond just higher compensation, there are many possible benefits of unionization that may not be as visible to the public eye. Today, it is rare for a major sports league to *not* be unionized, and the benefits are still being seen.⁶² For example, part of the 2004–05 NHL hockey season was cancelled due to an employer lockout—a situation where the employer temporarily closes business due to an impasse in bargaining—resulting from a disagreement between the players and the NHL over whether to impose salary caps.⁶³

⁵⁷ See *About*, MAJOR LEAGUE BASEBALL PLAYERS, http://www.mlbplayers.com/ViewArticle.dbml?DB_OEM_ID=34000&ATCLID=211047291 (last visited Mar. 26, 2018) (“The Major League Baseball Players Association is the collective bargaining representative for all professional baseball players of the thirty Major League baseball teams and serves as the exclusive group licensing agent for commercial and licensing activities involving active Major League baseball players.”).

⁵⁸ See Marc Normandin, *50 Years Ago, Marvin Miller and the MLBPA Changed Sports Forever*, SB NATION (June 11, 2018, 11:00 AM), <https://www.sbnation.com/mlb/2018/6/11/17437624/mlb-mlbpa-cba-marvin-miller-robert-cannon> (last visited Oct. 19, 2019).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ See *Lockout Over Salary Cap Shuts Down NHL*, ESPN (Feb. 16, 2005), <http://www.espn.com/nhl/news/story?id=1992793> (reporting that “[t]he NHL canceled what was left of its decimated schedule Wednesday after a round of last-gasp negotiations failed to resolve differences over a salary cap”).

NHL still got its salary cap, but, as a result of the lockout, it was a more flexible salary cap system where the cap was tied to league revenues.⁶⁴

These examples not only illustrate the normalization of unionization in sports, but also the benefits and the bargaining power that even highly compensated players can gain from unionization. These benefits likely apply to eSports players as well. Some of the problems seen in major sports leagues, such as salary disputes, may even foreshadow events in the eSports industry.

III. DIFFICULTIES IN REACHING UNIONIZATION

There are many differences between eSports and traditional sports leagues like the NFL and NBA. The biggest difference is that while all the players are playing for teams, there is no overarching organization akin to the NFL or NBA. No single organization oversees all video game competitions; rather, each video game publisher or independent organization runs its own tournaments. This means that establishing a union would only allow collective bargaining on a game-by-game basis, unless the various publishers and/or leagues were to come together to form an umbrella organization under which they would all fall.

Another big difference in eSports is that the games that are played now may not be the games that are played ten years from now. Players change games once one is outdated or becomes less lucrative due to a declining player and audience base. Unlike eSports, there is only one game that football players are playing: football. These differences, the difficulties they create, and the possible solutions will be further expanded upon below.

A. *Constant Flux*

The first challenge in establishing unionization or incentivizing players to unionize is that the players in the industry are always changing. Competitive gaming, unlike the NFL or NBA, isn't an activity where gamers typically spend the majority of their career.⁶⁵ There are thousands of games out there, with hundreds being released every year. Once a game is no longer popular, or if a newer version of the game is

⁶⁴ Jamie Fitzpatrick, *NHL Lockouts and Strikes: A History*, LIVEABOUT, <https://www.thoughtco.com/nhl-lockouts-and-strikes-history-2778706> (last updated June 15, 2017).

⁶⁵ See Arijeta Lajka, *Esports Players Burn Out Young as the Grind Takes Mental, Physical Toll*, CBS NEWS (Dec. 21, 2018, 12:14 AM), <https://www.cbsnews.com/news/esports-burnout-in-video-gaming-cbsn-originals/> (“The world of esports is demanding, both physically and mentally. Professional gamers, barely past their teens, burn out even faster than athletes.”).

released, the competitive gaming scene for that game isn't as profitable. New games take its place and new gamers enter the competitive scene in place of the old ones.

Because of such flux, players may not find it to be a great use of their time to unionize. Only a very few will possess the skills to have long-term prospects in the industry, and most will see their time in the competitive scene as short. Given the short career span of most players in the industry, spending the time and effort to organize players or to conduct a strike once a union is already in place might just be seen as a loss of the limited opportunity to compete.⁶⁶

However, this disincentive effect could be minimized if an overarching organization is created. Although many players have short careers as professional players relative to other careers, many remain in the industry as commentators and in other roles.⁶⁷ Unionizing under an umbrella organization would minimize this disincentivizing effect of the flux because unionizing would benefit the players even after they leave their careers as players (excluding management and supervisors).

B. Lack of a League

The second, and probably the most major, challenge to unionization in eSports is the lack of an overarching league. While the NFL and NBA have several different teams, the teams are governed by an umbrella organization, such as the NFL or NBA. eSports lacks this structure.

Right now, if a union were formed, the bargaining parties would be the players versus the team owners and publishers. Neither side has a "permanent" aspect to it as does the NFL, NBA, or any other professional sports league. For example, if Riot Games decides to end League of Legends, any effort or bargained terms of the union end with it because the union can only bargain and exist as long as League of Legends exists. On the other hand, if the Carolina Panthers cease to exist, the NFL and every other team in the League will still be there.

So, this further demotivates the formation of unions. One union's efforts to bargain with its gaming publisher won't necessarily spread to every other publisher. What's more likely is that every game and its players will unionize and make progress individually. If players in eSports want to see benefits similar to those brought by MLBPA's

⁶⁶ *Id.*

⁶⁷ See Ben Sillis, *Master Caster: Players Turned Commentators*, RED BULL (Apr. 16, 2014), <https://www.redbull.com/int-en/master-caster-players-turned-commentators> ("[M]any high profile casters have [] been top level players before . . .").

bargaining with the MLB over the past one hundred years, they probably need to work toward establishing some sort of permanent umbrella organization.

Given the dynamic nature of video games compared to traditional sports, an umbrella organization akin to the NFL may be difficult to establish. However, a successful execution of it would greatly benefit not only the players but also grow eSports generally by streamlining advertising and marketing through one organization rather than through many different game publishers.

While such a structure may not be achievable in the near future, it is conceivable. Multiple game publishers could delegate power to the umbrella organization. Such delegation could be paired with the right of each game publisher to have a representative on the “board” for the overarching organization. This would make game publishers more likely to agree to such a structure. The board could also prevent abuse by any one game publisher by requiring a certain number of votes to implement any changes.

One problem with this may be that although all professional players are in the industry of competitive video gaming, the types of games across leagues and publishers vary tremendously. What League of Legends, a third-person multiplayer online battle arena game with millions of monthly players,⁶⁸ may be interested in accomplishing with the creation of an umbrella organization would probably be completely different from what a gaming title with a much smaller player base would want to achieve. It may not be worth the administrative costs for smaller titles to form or join an overarching organization.

Despite this, creation of an overarching organization may be worth it. Given that larger titles with higher prize pools contain a larger number of players, it is possible that most players may still benefit from unionization even if smaller publishers choose not to participate.

C. Union Benefit at the Expense of Everyone Else

A drawback to unionization may be the creation of an additional barrier for new players looking to enter the eSports scene. In union-free industries, employers are not required to provide a certain salary or benefits package imposed by a union to employ a new hire. Therefore,

⁶⁸ See Phil Kollar, *The Past, Present, and Future of League of Legends Studio Riot Games*, POLYGON (Sept. 13, 2016), <https://www.polygon.com/2016/9/13/12891656/the-past-present-and-future-of-league-of-legends-studio-riot-games> (stating that more than 100 million people play League of Legends every month).

employers are more able to afford new hires or take risks on new employees.⁶⁹

However, while this may pose a problem in traditional industries, such as retail, unions probably pose little, or at least much less, threat in the eSports landscape. Unlike a factory or retail job, employers can directly observe player performance before taking them onto a team, whether that be through the form of streaming via a website like Twitch⁷⁰ or a highlight reel provided by the player. This makes investments in new employees much less of a risk than it would be in other industries, where it can be nearly impossible to know how someone might perform based solely on a resume or interview. For an eSports team, it would be much easier to know whether a player will be a net-positive for the team, just as it would in any other sports league like football or basketball.

CONCLUSION

Unionization in the eSports industry, while capable of providing many benefits for players, will be a challenge to achieve. After resolving the issue of whether players are considered “employees” under the NLRA, players will still have to go through the process of gathering majority support for a union in order to be recognized. This will be exacerbated by challenges inherent in the industry structure of eSports, such as the lack of an umbrella organization, the short careers of players, and possible increases in barriers to entry.

While these challenges will exist for the foreseeable future, they can be overcome with player and organization initiative. Competitive video gaming is still a very young industry, and there is no telling what its structure will look like in five or ten years. With more and more participants, viewers, and investors getting involved, change is bound to happen sooner or later.

The benefits of unionization can provide players with sustainable working conditions and teams with a better long-term structure. With the

⁶⁹ See Edward Montgomery, *Employment and Unemployment Effects of Unions*, 7 J. LAB. ECON. 170, 186–87 (1989), <https://www.jstor.org/stable/2534885> (describing how increases in areas where unionization is high or the union wage premium is high, workers are less likely to be employed or involved in the labor force).

⁷⁰ See Steven Asarch, *What is Twitch? Understanding the Explosive Live-Streaming Service*, NEWSWEEK (May 3, 2018, 11:00 AM), <https://www.newsweek.com/2018/05/11/twitch-909594.html> (stating that Twitch is a “mixture of entertainers and professionals playing video games for a large audience” with “355 million minutes watching 2 million streamers” in 2017).

ability to force their employer to bargain on certain terms and conditions, players will be able to secure better working conditions, more power to choose how to spend their time, and higher pay. Unionization in eSports could play a critical role in ending exploitation of professional players, new and old.