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# THE OVERWATCH LEAGUE’S STRUCTURE PROVIDES ESPORTS WITH THE ULTIMATE CHARGE FOR A “GAMERS UNION” TRANSCENDENCE

KYLE T. KASPER\*

## I. INTRODUCTION

Although video gaming competitions began underground,<sup>1</sup> they are now sufficiently mainstream.<sup>2</sup> The recent boom in demand for electronic sports (Esports) competitions is not surprising and, in large part, is due to its assimilation into popular culture.<sup>3</sup> The advent of live streaming services such as Amazon’s Twitch and YouTube Gaming played a major role in this assimilation process.<sup>4</sup> Marketing itself as a place “where millions of people come together live every day to chat, interact, and make their own entertainment together,”<sup>5</sup> Twitch (and other streaming services) provides gaming fans with direct connection to watch their favorite streamers and video games from the comfort

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1. Many consider the 1997 “Red Annihilation,” featuring the video game Quake, to be the first true competitive Esports competition. Lawrence Phillips, *The History of Esports*, AM. ESPORTS (Apr. 1, 2020, 4:01 PM), <https://americansports.net/blog/the-history-of-esports/> [https://perma.cc/7TP2-4XYM].

2. “[T]he [E]sports ecosystem [is] on track to surpass \$1 billion in revenue” in 2021. *Esports Ecosystem in 2023: Key Industry Companies, Viewership Growth Trends, and Market Revenue Stats*, INSIDER INTEL. (Jan. 1, 2023), <https://www.insiderintelligence.com/insights/esports-ecosystem-market-report/>.

3. “The pop-culturization of the esports industry has helped power the explosions in esports investment and revenue.” *Id.*

4. Brandon Brathwaite, *Breaking Down the Major Streaming Platforms in Esports*, ESPORTS OBSERVER (Aug. 31, 2018), <https://archive.esportsobserver.com/breakdown-streaming-platforms/>.

5. *About Us*, TWITCH, <https://www.twitch.tv/p/en/about/> (last visited May 2, 2023).

of their homes.<sup>6</sup> This ease of access was especially crucial during the Covid-19 pandemic. Whereas traditional professional sports leagues were forced to suspend or shorten their seasons,<sup>7</sup> Esports continued to hold competitions with players streaming from remote locations.<sup>8</sup> Thus, while the major professional sports leagues lost revenue,<sup>9</sup> Esports' revenue remained generally stable<sup>10</sup> as viewership on streaming services increased,<sup>11</sup> and Esports leagues landed larger sponsorship deals.<sup>12</sup>

Despite Esports' incorporation into popular culture resulting in its increased viewership and market revenue, no "Gamers Union" (what this comment calls the Esports equivalent to traditional sports' "Players Associations") exists. While every major traditional professional sports league has a Players Association that serves as the exclusive bargaining representative for its players,<sup>13</sup> Esports players are afforded no such representation. Without this representation at the bargaining table, they are left with contracts that are "grossly oppressive, onerous, and one-sided."<sup>14</sup> One Esports lawyer has claimed that the disparate bargaining power in the Esports industry is reminiscent of Major League Baseball before the players unionized.<sup>15</sup>

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6. See *Esports Ecosystem in 2023: Key Industry Companies, Viewership Growth Trends, and Market Revenue Stats*, *supra* note 2.

7. Victor Mather & Joe Ward, *Where the Major Sports Stand Amid the Coronavirus Pandemic*, N.Y. TIMES (May 15, 2021), <https://www.nytimes.com/article/coronavirus-sports-leagues-returning-canceled.html>.

8. Anser Haider, *CES 2021: Esports Growth 'Turbocharged' in 2020 Due to Covid-19 Pandemic*, S&P GLOB. (Jan. 14, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/ces-2021-esports-growth-turbocharged-in-2020-due-to-covid-19-pandemic-62108738>.

9. Justin Birnbaum, *Major Sports Leagues Lost Jaw-Dropping Amount of Money in 2020*, FORBES (Mar. 6, 2021, 6:30 AM), <https://www.forbes.com/sites/justinbirnbaum/2021/03/06/major-sports-leagues-lost-jaw-dropping-amount-of-money-in-2020/?sh=77af95e469c2>.

10. Christina Gough, *Revenue of the Global Esports Market 2020 to 2025*, STATISTA (Sept. 22, 2022), <https://www.statista.com/statistics/490522/global-esports-market-revenue/#statisticContainer>.

11. Across Twitch, YouTube Gaming, and Facebook Gaming, between April 2020 and June 2020, a total of 7,391,938,316 hours of gaming was watched—a significant increase from the first quarter of 2020 in which those streaming services previously set record high numbers. See Ethan May, *Streamlabs & Stream Hatchet Q2 2020 Live Streaming Industry Report*, STREAMLABS BLOG (July 1, 2020), <https://blog.streamlabs.com/streamlabs-stream-hatchet-q2-2020-live-streaming-industry-report-44298e0d15bc>. See also *Twitch Statistics & Charts*, TWITCH, <https://twitchtracker.com/statistics> (last visited May 2, 2023).

12. See Haider, *supra* note 8.

13. See *About*, MLB PLAYERS, <https://www.mlbplayers.com/about> (last visited May 2, 2023); *How the NFLPA Works*, NFLPA, <https://nflpa.com/about> (last visited May 2, 2023); *Overview & History*, NBPA, <https://nbpa.com/about> (last visited May 3, 2023); *What We Do*, NHLPA, <https://www.nhlpa.com/the-pa/what-we-do> (last visited May 2, 2023).

14. Ben Kessler, *A 'Fortnite' Player's Lawsuit Against His Own Team is Taking on the 'Wild West' of Esports*, NBC NEWS (May 26, 2019, 2:50 AM), <https://www.nbcnews.com/tech/tech-news/fortnite-player-s-lawsuit-against-his-own-team-taking-wild-n1010161>.

15. *Id.*

The critical distinction that enables the formation of Players Associations for traditional professional sports, but no comparable Gamers Union for Esports, rests on the players’ differing employment classifications. Because traditional sports athletes are classified as employees, the National Labor Relations Act (NLRA) confers and protects rights that Esports players, who are either classified or treated by the law as independent contractors, are not accorded.<sup>16</sup> Thus, if Esports players are to form a Gamers Union, they must establish that they are employees—not independent contractors.

Part II of this comment briefly discusses Esports leagues and the traditional structure of those leagues. Then it focusses, for the rest of the comment, on the Overwatch League (“OWL” or the “League”) because its organizational structure—emulating traditional American sports leagues—is most conducive to its Esports players being classified as employees. Part III discusses the National Labor Relations Board’s (“NLRB” or the “Board”) current approach to assessing whether a worker is an employee or independent contractor under the NLRA: the common-law agency test. Part IV applies this ten-factor test to OWL players and concludes that OWL players should be classified as employees and not independent contractors. Therefore, OWL players should be entitled to the rights conferred and protected under the NLRA, as are traditional professional sports players. Finding that OWL players should be capable of unionizing based on their employment classification, Part V expands on an appropriate bargaining unit that would be viable in the OWL and Esports more broadly. It argues that like traditional sports leagues, the interdependence of OWL teams requires the consensual formation of a multiemployer unit for collective bargaining purposes. Then, Part VI provides some concluding points about the future of the OWL.

In sum, under the OWL’s current structure, its players should be able to form a Gamers Union which, as the players’ freely chosen and exclusive bargaining representative, would be legally obligated to bargain with League management “in good faith with respect to wages, hours, and other terms and conditions of employment.”<sup>17</sup> This would help remove the “inequality of bargaining power,” and enable the players to “negotiat[e] the terms and conditions of their employment or other mutual aid or protection.”<sup>18</sup>

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16. National Labor Relations Act, 29 U.S.C. §§ 151-69 (2023).

17. *Id.* at § 158(d).

18. *Id.* at § 151.

## II. TRADITIONAL APPROACH TO ESPORTS LEAGUES

Esports are succinctly described as “[c]ompetitive gaming at a professional level and in an organized format (a tournament or league) with a specific goal (i.e., winning a champion title or prize money) and a clear distinction between players and teams that are competing against each other.”<sup>19</sup> Just as there are numerous traditional sports leagues, there are various Esports leagues, which are typically differentiated by the video game its teams play.<sup>20</sup>

Because various Esports leagues exist, there are undoubtedly various Esports league structures. Some operate under a European model of sport, where the bottom finishing teams may be relegated to a lower division, and the top teams from the lower division may be promoted to the higher division.<sup>21</sup> Others, however, operate under an American model of sport, where the league maintains the same franchised teams every season, subject to the occasional league expansion or team relocation.<sup>22</sup>

Before diving into the organizational structure of the OWL, it is first necessary to define the roles of various actors in the Esports industry to properly understand the functions of these actors within Esports leagues. Esports companies “wear multiple hats within the industry.”<sup>23</sup> While video game developers are responsible for the actual creation of the video game itself, video game publishers are responsible for funding, marketing, and distributing the video game.<sup>24</sup> However, some large Esports companies act as both developers and publishers,<sup>25</sup> and there is incentive for such companies to market their game as a competitive one capable of becoming an Esport.<sup>26</sup> Once a video game is capable of being played competitively, there must be a forum for competitions

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19. Margarida Vila Nova, *Newzoo's Esports Terminology*, NEWZOO, <https://help.platform.newzoo.com/en/articles/3615815-newzoo-s-esports-terminology> (last visited May 2, 2023).

20. See Playerone Contributor, *The Most Popular Esports Leagues & Tournaments*, PLAYER.ONE (Jul. 2, 2021), <https://www.player.one/most-popular-esports-leagues-tournaments-141071> (showing leagues for League of Legends, Counter-Strike: Global Offensive, Call of Duty, and Fortnite).

21. See Harris Peskin, *The Argument For Franchising in The LCS—and Esports as a Whole*, DOT ESPORTS (May 9, 2017, 1:19 PM), <https://dotesports.com/league-of-legends/news/franchising-lcs-promotion-relegation-14542>.

22. Josh Chapman, *Esports Leagues: Stop Franchising*, MEDIUM (Feb. 6, 2019), <https://medium.com/konvoy/esports-leagues-stop-franchising-2c3ae29c16e9>.

23. *An Introduction to the Esports Ecosystem*, ESPORTS OBSERVER, <https://archive.esportsobserver.com/the-esports-eco-system/> (last visited May 2, 2023).

24. *Understanding the Relationship Between Game Developers and Publishers*, GAMING ST. (Sept. 4, 2019), <https://gamingstreet.com/game-developer-publisher-relationship/>.

25. Tomas Zegarra, *Game Developers vs Game Publishers: What's the Difference?*, HP (July 19, 2020), <https://www.hp.com/us-en/shop/tech-takes/game-developers-vs-game-publishers>.

26. Marketing a video game as a competitive one capable of becoming an Esport creates exposure for the game, and thus revenue for the company. *An Introduction to the Esports Ecosystem*, *supra* note 23.

to take place. Though some Esports companies exist solely to host leagues and tournaments, some publishers host their own competitions.<sup>27</sup> Finally, unsurprisingly like traditional sports, Esports teams are comprised of its players and coaches.<sup>28</sup>

#### *A. Activision Blizzard’s Earthshattering New Esports League Structure*

In 2016, Activision Blizzard acquired Major League Gaming to further its “plans to create the ESPN of Esports.”<sup>29</sup> This, along with Activision Blizzard’s creation of an Esports media networks division, was intended to “create new opportunities for players, fans and partners across the global Esports community.”<sup>30</sup> Activision Blizzard did just that and shook up the Esports industry with its formation of the Overwatch League, an Esports league based on its subsidiary developer and publisher company’s (Blizzard Entertainment) video game “Overwatch.”<sup>31</sup> Overwatch is a team-based action game where individual players play as one of three roles: tank, damage, or support.<sup>32</sup> Then, within each role, there are various characters or “heroes,” each with their own unique abilities.<sup>33</sup>

The OWL, borrowing aspects from traditional sports,<sup>34</sup> was created with the tenets of consistency, stability, and accessibility in mind.<sup>35</sup> To that end, unlike other Esports leagues at the time who generally followed the European

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27. Video game publisher “Riot Games promotes content creation by hosting and supporting tournaments and channels.” Thiemo Bräutigam, *A Profitable Business: Why Game Publishers Count on Esports*, ESPORTS OBSERVER (July 13, 2015), <https://archive.esportsobserver.com/a-profitable-business-why-game-publishers-and-developers-count-on-esports/>.

28. Tristan de la Navarre, *Esports Teams & Players: How Esports Teams Work*, LINEUPS (July 12, 2020, 5:04 PM), <https://www.lineups.com/esports/esports-teams-players/>.

29. Dean Takahashi, *Activision Blizzard Buys MLG For Estimated \$46M to Build ‘ESPN of Esports’*, VENTURE BEAT (Jan. 4, 2016, 2:00 PM), <https://venturebeat.com/2016/01/04/activision-blizzard-buys-mlg-for-estimated-46m-to-build-espn-of-esports/>.

30. *Id.*

31. *See About the Overwatch League*, OVERWATCH LEAGUE, <https://overwatchleague.com/en-us/about> (last visited May 2, 2023).

32. *Overwatch 2*, BLIZZARD, <https://overwatch.blizzard.com/en-us/> (last visited May 2, 2023).

33. *Heroes*, BLIZZARD, <https://overwatch.blizzard.com/en-us/heroes/> (last visited May 2, 2023).

34. Former OWL commissioner Nate Nanzer stated, “[w]e did a lot of research into traditional sports . . . and what we saw is that [] traditional sports teams make money because they have a venue and host home games and sell tickets and merchandise . . . and that’s completely missing from [E]sports.” Chaim Gartenberg, *Blizzard Announces First Overwatch League Teams and Owners, Including Robert Kraft and Jeff Wilpon*, VERGE (July 12, 2017, 8:16 AM), [https://www.theverge.com/2017/7/12/15958222/blizzard-overwatch-league-teams-owners-robert-kraft-jeff-wilpon-esports\\_](https://www.theverge.com/2017/7/12/15958222/blizzard-overwatch-league-teams-owners-robert-kraft-jeff-wilpon-esports_).

35. Philip Kollar, *Overwatch League is Blizzard’s Ambitious New Esports Org, Includes City-Based Teams*, POLYGON (Nov. 4, 2016, 2:34 PM), [https://www.polygon.com/2016/11/4/13511762/overwatch-league-is-blizzards-ambitious-new-esports-org-includes-city\\_](https://www.polygon.com/2016/11/4/13511762/overwatch-league-is-blizzards-ambitious-new-esports-org-includes-city_).

promotion and relegation organizational structure, the OWL features permanent, city-based franchise teams.<sup>36</sup> By hosting OWL competitions at live “home” venues, it provides a greater opportunities to engage those unfamiliar with Esports by bringing the action to their city, and it offers the hardcore fans the ability to root for their hometown team in-person.<sup>37</sup> Furthermore, like traditional sports, the OWL created a consistent schedule that includes an off-season.<sup>38</sup> Today, the OWL consists of twenty teams divided into two conferences: East and West.<sup>39</sup> Eleven of those teams are based in North America, six are based in Asia, two are based in Canada, and one is based in Europe.<sup>40</sup> The OWL’s city-based franchise model proved fruitful initially,<sup>41</sup> and has only continued to garner more viewers and revenue.<sup>42</sup>

Moreover, like any traditional sports league, the OWL must have rules and regulations. Since the OWL is owned by Activision Blizzard,<sup>43</sup> the parent company to Overwatch’s developer and publisher, Blizzard Entertainment,<sup>44</sup> Activision Blizzard is the entity in charge of promulgating the rules and regulations for the OWL. Thus, OWL players must adhere to the League’s official rules and code of conduct.<sup>45</sup> However, crucially, unlike traditional sports athletes who are exclusively represented by their Players Association for

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36. Nate Nanzer reasoned that “having permanent spots for teams is really going to give team owners confidence—and not just team owners, but media partners, sponsors, everyone that’s going to be involved in the Overwatch League.” *Id.*

37. Nanzer further said, “there’s an opportunity to bring in people who are interested in Esports but maybe haven’t engaged much with it by adding that geographic element.” *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. New England Patriots owner Robert Kraft, and former New York Mets Chief Operating Officer Jeff Wilpon, each purchased an OWL franchise. Gartenberg, *supra* note 34.

42. Activision Blizzard signed a \$160 million deal to broadcast the OWL exclusively on YouTube, and eight expansion teams were added with prices for the franchises ranging between \$30 and \$60 million. Kevin Webb, *The Overwatch League is Getting its First Big Test as an International Esports Organization This Season and Investors Have Millions on the Line*, BUS. INSIDER (Mar. 4, 2020, 2:30 PM), <https://www.businessinsider.com/overwatch-league-international-esports-investor-owner-team-value-breakdown-2020-3>.

Compared to the 2020 regular season viewership, measured by the average number of people watching the broadcast at any given minute, 2021 viewership increased between seventy-seven and ninety-one percent. Kris Holt, *Overwatch League Regular Season Viewership Increased Dramatically in 2021*, FORBES (Sept. 3, 2021, 8:30 AM), <https://www.forbes.com/sites/krisholt/2021/09/03/overwatch-league-regular-season-viewership-2021-youtube/?sh=86133ede5346>.

43. *Who We Are*, ACTIVISION BLIZZARD, <https://www.activisionblizzard.com/who-we-are> (last visited May 2, 2023).

44. *Featured Games*, BLIZZARD, <https://www.blizzard.com/en-us/> (last visited May 2, 2023).

45. *Summary of Official Rules and Code of Conduct 2020 Season*, OVERWATCH LEAGUE (2020), [https://bnctcmsus-a.akamaihd.net/cms/page\\_media/wg/WG2YO9KJ0I5I1587056527743.pdf](https://bnctcmsus-a.akamaihd.net/cms/page_media/wg/WG2YO9KJ0I5I1587056527743.pdf).

collective bargaining purposes, Esports players, without representation and bargaining power, have no such input in the matter.

### III. THE NLRB’S EVOLVING APPROACH TO DETERMINING WHETHER A WORKER IS COVERED UNDER THE NLRA

The NLRA<sup>46</sup> confers onto employees the rights to organize; “to form, join, or assist [a] labor organization[]; to bargain collectively through representatives of their own choosing; and to engage in other protected concerted activit[y] for the purpose of . . . mutual aid or protection.”<sup>47</sup> In addition to conferring employees these rights, it also protects them against unfair labor practices committed by their employer.<sup>48</sup> However, the NLRA only extends and protects such rights for employees as defined by the Act, and the Act expressly excludes independent contractors from its coverage.<sup>49</sup> This is problematic given that Esports players are often classified as independent contractors.<sup>50</sup>

#### A. *The Board Reverts Back on its Employee/Independent Contractor Analysis*

Despite the NLRB and United States Court of Appeals for the District of Columbia’s fairly recent quibble over the proper inquiry to determine whether a worker is an employee or independent contractor,<sup>51</sup> the Board returned to its longstanding common-law agency test in its 2019 *SuperShuttle DFW, Inc.* (*SuperShuttle*) decision.<sup>52</sup> There, SuperShuttle Dallas-Fort Worth (SuperShuttle DFW), an independent business, maintained a licensing agreement with SuperShuttle International and SuperShuttle Franchise Corporation whereby SuperShuttle DFW had the right to use the SuperShuttle trademark and transportation system in the Dallas-Fort Worth area.<sup>53</sup> In 2005, SuperShuttle converted to a franchise model in which franchisee drivers (for SuperShuttle DFW) signed a one-year agreement that explicitly classified drivers as

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46. National Labor Relations Act, 29 U.S.C. §§ 151-69 (2023).

47. *Id.* at § 157.

48. *Id.* at § 158(a)(1).

49. “The term ‘employee’ . . . shall not include . . . any individual having the status of an independent contractor.” *Id.* at § 152(3).

50. Esports player Turner Tenney was classified as an independent contractor in his contract. Michael McCann, *Inside the Lawsuit That Could Shake Up the Entire Esports Industry*, SPORTS ILLUSTRATED (May 30, 2019), <https://www.si.com/more-sports/2019/05/31/turner-tenney-faze-clan-esports-lawsuit-fortnite>. See also *supra* notes 14-15 and accompanying text.

51. FedEx Home Delivery, 351 N.L.R.B. No. 16 (2007), *vacated*, FedEx Home Delivery v. NLRB, 563 F.3d 492 (D.C. Cir. 2009); FedEx Home Delivery, 361 N.L.R.B. 610 (2014), *vacated*, FedEx Home Delivery v. NLRB, 849 F.3d 1123 (D.C. Cir. 2017).

52. SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, at \*1-2 (2019).

53. *Id.* at \*3.



independent contractors.<sup>54</sup> Franchisees were thus required to purchase their own vans and pay a weekly fee for the right to utilize the SuperShuttle brand.<sup>55</sup> Moreover, the franchisee drivers had no set schedule or minimum hours they were required to work.<sup>56</sup> Instead, they chose when they wanted to work and were compensated based on the assignments they selected.<sup>57</sup> Finally, franchisee drivers were also permitted to hire and employ “relief drivers” who could operate their vans.<sup>58</sup> Despite there being eighty-eight franchisee drivers, there was only one relief driver.<sup>59</sup>

In *SuperShuttle*, the NLRB overruled its 2014 *FedEx* decision,<sup>60</sup> concluding that the *FedEx* Board “impermissibly altered the Board’s traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial opportunity to the analysis.”<sup>61</sup> In overruling *FedEx* and returning the Board to the common-law agency test, it made clear that “entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor’s independence to pursue economic gain.”<sup>62</sup> Generally, the more employer control, the less entrepreneurial opportunity that exists for the worker.<sup>63</sup>

Thus, to determine whether a worker is an employee or an independent contractor, the NLRB, assessing “the total factual context . . . in light of the pertinent common-law agency principles,”<sup>64</sup> applies the following ten-factor test:

- (a) The extent of control which, by the agreement, the employer may exercise over the details of the work[;]
- (b) [w]hether or not [the worker] is engaged in a distinct occupation or business[;]

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54. *Id.*

55. *Id.* at \*5.

56. *Id.*

57. *Id.*

58. *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, at \*5 (2019).

59. *Id.*

60. *See FedEx Home Delivery*, 361 N.L.R.B. 610 (2014), *overruled by SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75 (2019).

61. *SuperShuttle DFW, Inc.*, 367 N.L.R.B. at \*21. *See also id.* at \*1 n.2 (“Supreme Court cases ‘teach us not only that the common law of agency is the standard to measure employee status but also that we have no authority to change it.’” (quoting *Roadway Package Sys., Inc.*, 326 N.L.R.B. 842, 849 (1998))).

62. *Id.* at \*15.

63. *Id.* at \*17.

64. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968).

- (c) [t]he kind of occupation, with reference to whether . . . the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) [t]he skill required in the particular occupation[;]
- (e) [w]hether the employer or the work[er] supplies the instrumentalities, tools, and the place of work for the person doing the work[;]
- (f) [t]he length of time for which the person is employed[;]
- (g) [t]he method of payment, whether by the time or by the job[;]
- (h) [w]hether or not the work is part of the regular business of the employer[;]
- (i) [w]hether or not the parties believe they are creating [an employer-employee relationship; and]
- (j) [w]hether the employer is or is not in [the same business as the worker].<sup>65</sup>

In holding that the SuperShuttle DFW drivers were independent contractors, the NLRB gave particular weight to the fact that the drivers owned and controlled their vans, had nearly total control over their daily work schedule and working conditions, and were in charge of their compensation based on the assignments they chose.<sup>66</sup> These factors, along with the absence of supervision and the drivers’ understanding that franchisee drivers were independent contractors, outweighed the factors leaning in favor of an employee classification.<sup>67</sup>

#### IV. ARE OWL PLAYERS EMPLOYEES OR INDEPENDENT CONTRACTORS?

As clarified by *SuperShuttle*, the NLRB applies the ten factors contained in common-law agency test to determine whether a worker is an employee or an independent contractor. Accordingly, applying these factors will determine whether OWL players are properly classified as employees or independent contractors.

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65. SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, at \*2 (2019).

66. *Id.* at \*14.

67. *Id.* at \*14-15 (concluding the second, fourth, eighth, and tenth factors weighed in favor of employee status).

A. *Factors Weighing in Favor of OWL Players' Employee Classification*

1. First Factor: The OWL Has All of the Control

The first factor assesses “[t]he extent of control which, by the agreement, the [employer] may exercise over the details of the work.”<sup>68</sup> In *SuperShuttle*, the franchisee drivers were free from employer control in the most significant aspects of their day-to-day work.<sup>69</sup> SuperShuttle DFW drivers chose when they worked, how long they worked, and the exact assignments they undertook.<sup>70</sup> Though the drivers had to wear SuperShuttle attire, that condition was imposed by the state-run Dallas-Fort Worth Airport, not SuperShuttle.<sup>71</sup>

Unlike in *SuperShuttle*, the OWL possesses substantial control over OWL players. As a prerequisite for participation in the OWL, the players must accept and comply with the rules, to which they have no bargaining power over.<sup>72</sup> Moreover, these rules apply to “all pre-season, regular-season, and post-season games, matches and tournaments and all other League Office-organized exhibition matches, promotional events, marketing events, streaming sessions, sponsor events, photo shoots, press conferences and interviews, charitable events, webcasts and chats, media events, opening and closing ceremonies, [and] awards ceremonies.”<sup>73</sup> OWL players must also avail themselves for media appearances and other promotional events whenever reasonably requested by the League, even when not in-season.<sup>74</sup> The League also retains the right to “host [mandatory] training and education events for the benefit of Players, which may include a Player Summit and certain ongoing training and education events during the course of each season.”<sup>75</sup>

Although the OWL does not regulate how often or when OWL teams must practice (so players and their respective teams have control over their practice structure and schedule), the OWL determines the format of the league; the schedule for pre-season, regular season, and post-season; and “other calendar

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68. *Id.* at \*1.

69. *Id.* at \*12.

70. *Id.* at \*17.

71. SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, at \*18 (2019).

72. *Summary of Official Rules and Code of Conduct 2020 Season*, *supra* note 45, §§ 2.2(g), 3.3.

73. *Id.* § 1.1.

74. OWL players must make themselves “available as reasonably requested by the League Office for media and promotional appearances during the Player Selection Process, as well as complying with [other] Media Obligations.” *Id.* § 3.2. Players are also required to “fully participate in certain matchday media obligations, as well as other media obligations ancillary to regular season, Mid-Season Tournament, post-season, All-Star[,] and Grand Finals match days.” *Id.*

75. *Id.* §§ 4.1-4.2.

items for the League,”<sup>76</sup> which requires OWL teams and players to be present and comply with OWL rules.<sup>77</sup> Lastly, despite these extensive requirements restricting the independence of OWL players, the League Office has the power to “[c]reat[e], amend[], modify[], interpret[], and/or apply[] all or any of the Official Rules.”<sup>78</sup>

Thus, regarding employer control, by determining the format of the league, the schedule, dates, accompanying obligations of OWL players at League events, and by retaining the power to create, amend, or modify League rules unilaterally, the OWL possesses a significant amount of control over OWL players’ work. Accordingly, the first factor weighs in favor of OWL players’ employee classification.

## 2. Fifth Factor: The OWL Chooses the Venue and Provides the Equipment and Uniform

The fifth factor of the common-law agency test asks “[w]hether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.”<sup>79</sup> In *SuperShuttle*, it was of particular importance to the Board that the franchisee drivers owned and operated their own vans, “the principal instrumentality of their work.”<sup>80</sup>

However, the contrary is the reality for OWL players. Due to the OWL’s city-based franchise model, which enables it to host live competitions at venues across the world,<sup>81</sup> the OWL designates the place of work for OWL players.<sup>82</sup> The OWL also requires all players to use the following league provided equipment for all OWL competitions: gaming PC, monitor, noise cancelling headset with a microphone, competition desk, chair, and solid state drive.<sup>83</sup> Similarly, players are required to wear the league-sanctioned uniform for all OWL competitions.<sup>84</sup> For these reasons, the fifth factor weighs heavily in favor of OWL players’ employee classification.

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76. *Id.* §§ 2.2(a)-(b), 2.2(d).

77. *Id.* § 6.1(d).

78. *Id.* § 2.2(g).

79. *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, at \*2 (2019).

80. *Id.* at \*14.

81. *See* Kollar, *supra* note 35.

82. “Matches will be played at a venue pre-determined by the League Office.” *Summary of Official Rules and Code of Conduct 2020 Season*, *supra* note 45, § 5.3(f).

83. *Id.* §§ 5.10(a), 5.10(d).

84. The player uniform consists of the league-sanctioned jersey, hat, joggers, jacket, and compression sleeve. *Id.* § 5.11(a).

### 3. Seventh Factor: OWL Players are Salaried

The seventh factor considers workers' method of payment; specifically, whether their compensation is salaried or hourly, or dependent on the work they complete.<sup>85</sup> If a worker is paid a salary or hourly rate, that tends to suggest their employee status. But, like in *SuperShuttle*, when workers are compensated based on the tasks they complete, it is indicative of independent contractor status.<sup>86</sup>

Although it is difficult to determine the precise compensation received by OWL players, they are nevertheless paid on a salary basis.<sup>87</sup> In addition to their salary, OWL teams and individual players can earn bonuses based on their performance. For example, the first-place team earns \$1.5 million, second place earns \$750,000, third place earns \$450,000, and fourth place earns \$350,000.<sup>88</sup> Moreover, the individual player who wins the MVP award earns an extra \$100,000.<sup>89</sup>

However, despite these possible bonuses, OWL players are mainly paid pursuant to their salary. Therefore, the seventh factor weighs in favor of OWL players' employee classification.

### 4. Eighth and Tenth Factors: The OWL is Part of Activision Blizzard's Regular Business

The Board in *SuperShuttle* noted that the eighth and tenth factors of the test are closely related and therefore analyzed them together.<sup>90</sup> The eighth and tenth factors consider whether the work performed is part of the regular business of the employer, and whether the employer is engaged in the same business as the worker.<sup>91</sup>

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85. *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, at \*2 (2019).

86. *Id.* at \*19.

87. The median salary for the 2022 OWL season was reported to rise insignificantly from \$50,000 to \$50,700. *OWL Reveals New Roster Minimum, Salary Floor Among New Rules*, REUTERS (Sept. 20, 2021, 9:24 PM), <https://www.reuters.com/article/esports-overwatch-roster-rules/owl-reveals-new-roster-minimum-salary-floor-among-new-rules-idUSFLM6gd4mj>. But see *2021 Player Contract Status*, OVERWATCH LEAGUE (Oct. 21, 2020), <https://overwatchleague.com/en-us/news/2021-player-contract-status> (reporting that the average base salary for the 2020 season was \$106,000).

88. Chris Bumbaca, *Overwatch League Playoffs Preview: MVP Candidates Lead Contenders, With \$4 Million in Prize Money at Stake*, USA TODAY (Sept. 3, 2020, 6:52 AM), <https://www.usatoday.com/story/sports/gaming/2020/09/03/overwatch-league-playoffs-preview-shock-fusion/3455120001/>.

89. *Id.*

90. *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, at \*20 (2019).

91. *Id.* at \*2.

Activision Blizzard not only develops and publishes video games, but it also has a specific Esports division tasked with “lead[ing] the charge on extending the ways fans connect with [their] franchises” by running the OWL and the various other professional Esports leagues it has created.<sup>92</sup> Moreover, Activision Blizzard is undoubtedly in the business of Esports. Although its revenues earned solely from the OWL are not disclosed, in 2020, Activision Blizzard reported earning a total of \$687 million from the OWL, its Call of Duty Esports league, and its distribution business.<sup>93</sup> Suffice it to say Activision Blizzard is in the business of Esports, which constitutes part of its regular business. Thus, the eighth and tenth factors also weigh in favor of OWL players’ employee classification.

#### 5. Ninth Factor: OWL Players are Contractually Required to be an Employee of the Team

The ninth factor simply asks what the parties intended or believed their employment relationship was.<sup>94</sup> In *SuperShuttle*, the franchisee drivers’ contracts explicitly stated in bold and capital letters, “FRANCHISEE IS NOT AN EMPLOYEE OF EITHER SUPERSHUTTLE OR THE CITY LICENCEE.”<sup>95</sup> Under the heading “Relationship of Parties,” the contract again clarified, “IT IS ACKNOWLEDGED THAT THE FRANCHISEE IS THE INDEPENDENT OWNER OF ITS BUSINESS.”<sup>96</sup> This unequivocal notice led the NLRB to conclude that the parties intended to create an independent contractor relationship, and it thus constituted another factor weighing in favor of the franchisee drivers’ independent contractor classification.

But the contrary exists with respect to OWL players. The OWL’s official rules state, “[i]n order to be eligible to participate in the League, each Player must be retained *as an employee* by his or her respective team.”<sup>97</sup> Thus, the OWL conditions players’ participation in the League upon their signing a contract with their team that stipulates they are employees of the team. This evidences the League’s intention for its players to be classified as employees,

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92. *About Our Company*, ACTIVISION BLIZZARD, <https://www.activisionblizzard.com/about-us> (last visited May 2, 2023).

93. *Activision Blizzard Announces Fourth-Quarter and 2020 Financial Results*, ACTIVISION BLIZZARD (Feb. 4, 2021), <https://investor.activision.com/news-releases/news-release-details/activision-blizzard-announces-fourth-quarter-and-2020-financial>.

94. *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, at \*2 (2019).

95. *Id.* at \*20.

96. *Id.*

97. *Summary of Official Rules and Code of Conduct 2020 Season*, *supra* note 45, at § 5.16(a)(ii) (emphasis added).

and therefore the ninth factor weighs in favor of OWL players' employee classification.

#### 6. Second Factor: OWL Players' Occupation is Essential to the Employer's Business

The second factor asks whether the worker is engaged in a distinct occupation or business. If the occupation is distinct and separate from the employer's business, then that is indicative of an independent contractor classification. In *SuperShuttle*, the Board concluded that driving is not a distinct occupation, and that the franchisee drivers' work was part of SuperShuttle DFW's regular business of transporting customers.<sup>98</sup> Thus, there, this factor weighed in favor of the franchisee drivers' employee classification.

Moreover, art class models for an art academy in *Pennsylvania Academy of the Fine Arts* were free to discontinue their work with the academy to work for other schools or artists instead.<sup>99</sup> The Board, acknowledging the models were engaged in the distinct occupation of modeling, concluded that the models were free to take as many or as few jobs as they wanted, which indicated their independent contractor status.<sup>100</sup> Such freedom exemplified the models' entrepreneurial opportunity that is discussed in *SuperShuttle*.<sup>101</sup> Moreover, because the models' occupation of modeling was separate from the employer's business of providing instruction to art students (and after consideration of the other agency factors), the Board held that the models were independent contractors.<sup>102</sup>

Here, the situation of OWL players is more akin to the franchisee drivers in *SuperShuttle* than the models in *Pennsylvania Academy of the Fine Arts*. Although, unlike driving, professional gaming is a distinct occupation, it nevertheless is part of, if not *the* essential part of, the regular business of Activision Blizzard's Esports division. Furthermore, dissimilar from the models in *Pennsylvania Academy of the Fine Arts* who were free to model for other schools or artists, OWL players have no comparable alternatives to the OWL. The only other Overwatch leagues—Overwatch Contenders and Overwatch Open Division—are both run by Blizzard Entertainment and are designed as

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98. *SuperShuttle DFW, Inc.*, 367 N.L.R.B. at \*20.

99. *Pa. Acad. of the Fine Arts*, 343 N.L.R.B. 846, 847 (2004).

100. *Id.*

101. *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, at \*20 (2019).

102. *Pa. Acad. of the Fine Arts*, 343 N.L.R.B. at 848.

stepping-stones into the OWL.<sup>103</sup> Arguing that OWL players could transition to a different professional Esports league that plays a different video game would be like asking a professional athlete in a traditional sport to seamlessly transition to a different sport—unrealistic.

Accordingly, the fact that OWL players’ work is essential to Activision Blizzard’s Esports business, together with the absence of comparable employment opportunities and *SuperShuttle*’s increased reliance on entrepreneurial opportunity, the second factor weighs in favor of OWL players’ employee classification.

### *B. Factors Weighing in Favor of OWL Players’ Independent Contractor Classification*

#### 1. Fourth Factor: Professional Gaming Requires a High Level of Skill

In *SuperShuttle*, the Board concluded that because the franchisee drivers had no particularized skill and did not require specialized training, this factor weighed in favor of their employee status.<sup>104</sup> When no special skills are required, or the work can be taught relatively quickly, it leans in favor of employee status.<sup>105</sup>

Here, however, just as professional athletes in traditional sports are leaps beyond those who play them recreationally or at the amateur level, so too are professional gamers. Professional gamers, including OWL players, typically partake in six to eight hours of structured team practice daily, in addition to several more hours of individual practice.<sup>106</sup> Players and teams may also scrimmage one another, and these scrimmages are often recorded and reviewed for film study.<sup>107</sup> Many players’ entire life is dominated by and organized around their gaming, which is “clearly a by-product of the activity being their job.”<sup>108</sup> This increased time spent playing a particular game inevitably leads to

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103. *Path to Pro*, OVERWATCH LEAGUE, <https://overwatchleague.com/en-us/contenders> (last visited May 2, 2023); *About Open Division*, OVERWATCH LEAGUE, <https://overwatchleague.com/en-us/open-division-about> (last visited May 2, 2023).

104. *SuperShuttle DFW, Inc.*, 367 N.L.R.B. at \*20.

105. *E.g.*, *Prime Time Shuttle Int’l, Inc.*, 314 N.L.R.B. 838, 840 (1994) (noting that no special skills were required, and training could be conducted in a matter of days before finding van drivers were employees).

106. *The Daily Regimen of Players in Professional Gaming*, INTEL, <https://www.intel.com/content/www/us/en/gaming/resources/gamer-life> (last visited May 2, 2023).

107. *Id.*

108. Kyle Faust et al., *Competitive and Professional Gaming: Discussing Potential Benefits of Scientific Study*, 3 INT’L J. CYBER BEHAV. PSYCH. & LEARNING 67, 70 (2013).



their increased game sense and game-specific proficiencies.<sup>109</sup> Furthermore, research demonstrates that professional gamers, compared to recreational gamers, possess increased short-term memory, pattern recognition, visual-spatial abilities, task-switching abilities, and more efficient problem-solving skills.<sup>110</sup> Professional gamers' skill is no happenstance, and it is not something that can merely be taught over the span of a few days.<sup>111</sup> Thus, the fourth factor weighs in favor of OWL players' independent contractor classification.<sup>112</sup>

### C. Neutral Factors

#### 1. Third Factor: There are (Likely) Varying Levels of Supervision

The third factor of the test seeks to determine the level of supervision employers exercise over their workers. The more autonomy workers have in performing their tasks, the more likely they are independent contractors. However, if workers are under consistent supervision and direction from their employer, then they are likely employees.

In *SuperShuttle*, the franchisee drivers' "near-absolute autonomy in performing their daily work" supported the Board's finding of their independent contractor classification.<sup>113</sup> With respect to OWL players, the likelihood of varying supervision among teams makes this factor difficult to apply. One can imagine an OWL team with considerable direct supervision from management. Management could devise the practice schedule and attend those practices. Moreover, management could mandate attendance at other team events. However, one can also imagine an OWL team where management purposefully avoids meddling with practice schedules/times and other events.

Nevertheless, it is safe to assume that management exercises no supervision or direction during actual competitions. Any supervision exerted by management during competitions would have no impact on the actual players or on the outcome of the competitions. Thus, if anything, this factor likely weighs in favor of an independent contractor classification. However, due to the varying degrees of supervision teams could theoretically exercise over their players, this comment concludes the third factor is neutral.

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109. Professional gamers have better game-sense, positioning, prediction of opposing team's movement, quick decision-making, and ability to stay calm under pressure. Michael Mamerow, *5 Skills of Pro Gamers That Make the Difference in FPS*, RAISE YOUR SKILLZ, <https://raiseyourskillz.com/5-skills-of-pro-gamers-that-make-the-difference-in-fps/> (last visited May 2, 2023).

110. Faust et al., *supra* note 108, at 69.

111. *Cf.* Prime Time Shuttle Int'l, Inc., 314 N.L.R.B. 838, 840 (1994).

112. SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, at \*20 (2019).

113. *Id.* at \*19.

## 2. Sixth Factor: There are Varying Lengths of Employment

The sixth factor of the NLRB’s test inquires into the length of time for which the person is employed. The longer the term of employment, the more indicative it is of an employee classification.<sup>114</sup> In *SuperShuttle*, the Regional Director concluded that the franchisee drivers’ one-year contracts leaned in favor of an independent contractor classification.<sup>115</sup> However, the Board concluded that this factor was neutral because most of the franchisee drivers renewed their agreements annually.<sup>116</sup>

For the 2021 OWL season, player contracts were required to have an initial minimum term of one season.<sup>117</sup> However, players may sign contracts for a maximum of three seasons.<sup>118</sup> Teams may also include player options that enable the club to retain its desired players before they hit free agency.<sup>119</sup> The 2021 season began in April, consisted of a twenty-four week regular season, and was followed by a week-long playoff and championship week in September.<sup>120</sup> Though the season does not span a full calendar year, OWL players have mandated obligations apart from the matches and outside of the regular season.<sup>121</sup> While player contracts are only required to be one season, many players renew their contract with their existing team or sign with another team.<sup>122</sup> Thus, like the Board in *SuperShuttle*, this comment concludes that the sixth factor is neutral.

### *D. On Balance, the Factors Weigh in Favor of OWL Players’ Employee Classification*

Analyzing all ten factors together, both qualitatively and quantitatively, leads to the conclusion that OWL players should be classified as employees—

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114. *Id.* at \*20.

115. *Id.*

116. *Id.*

117. *Roster Construction Rules For 2021 Overwatch League Season*, OVERWATCH LEAGUE (Aug. 11, 2020), <https://overwatchleague.com/en-us/news/roster-construction-rules-for-2021-overwatch-league-season>. The OWL is not expecting to change these requirements for the 2022 season. *Roster Construction Rules For 2022 Overwatch League Season*, OVERWATCH LEAGUE (Feb. 24, 2022), <https://overwatchleague.com/en-us/news/roster-construction-rules-for-the-2022-overwatch-league-season>.

118. *Roster Construction Rules For 2022 Overwatch League Season*, *supra* note 117.

119. *Id.*

120. *2021 Match Schedule*, OVERWATCH LEAGUE, [https://overwatchleague.com/en-us/schedule?stage=regular\\_season&week=24](https://overwatchleague.com/en-us/schedule?stage=regular_season&week=24) (last visited May 2, 2023).

121. *See supra* text accompanying notes 73-75.

122. Andrew Amos, *Live: Overwatch League 2021 Off-Season Rostermania: All Roster Changes*, DEXERTO (APR. 16, 2021, 11:43 AM), <https://www.dexerto.com/overwatch/live-overwatch-league-2021-off-season-rostermania-all-roster-changes-1433633/>.

not independent contractors. If this finding were made, it would then have major practical and legal ramifications for OWL players. Most notably, if OWL players are classified as employees, then they can unionize.

## V. A NEW SEASON AWAITS

Because the common-law agency test weighs heavily in favor of OWL players' classification as employees, they would have the ability to unionize, or form a "Gamers Union" under the NLRA. Since the OWL looked to and borrowed aspects from traditional sports leagues in its own formation,<sup>123</sup> player organization and collective bargaining in the OWL should look much like that of the traditional sports leagues' Players Associations. Thus, the next logical questions to ask are whether OWL players form an appropriate bargaining unit and, if so, whether such a unit could engage in multiemployer bargaining with the respective teams of the OWL.

### A. OWL Players Share a Community of Interest

Assuming a finding that OWL players are properly classified as employees, OWL players' next step requires self-organization to garner majority support for union representation. Initial majority support is typically evidenced by employees' signatures of union authorization cards which, upon a showing of thirty percent employee support, "authorizes" the union to petition for investigation and certification with the appropriate regional NLRB office.<sup>124</sup> Upon inspection of the petition and the validity of the authorization cards, if the NLRB finds a "question of representation exists, it shall direct an election . . . and shall certify the results thereof."<sup>125</sup> Moreover, if an employer voluntarily recognizes a union's majority status, an election is unnecessary.<sup>126</sup>

Before holding a representation election, or even where an employer has voluntarily recognized a union, the Board must determine whether the petitioned-for bargaining unit is appropriate before it certifies the union.<sup>127</sup> A bargaining unit is best thought of as the election unit, or "the group of employees

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123. See *supra* notes 34-45 and accompanying text.

124. *Your Right to Form a Union*, NLRB, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/your-right-to-form-a-union> (last visited May 2, 2023). See also National Labor Relations Act, 29 U.S.C. § 159(c) (2023).

125. National Labor Relations Act, 29 U.S.C. § 159(c)(1)(B) (2023).

126. *Your Right to Form a Union*, *supra* note 124. But see *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 738 (1961) (holding that an employer who voluntarily recognized a union without majority support committed an unfair labor practice).

127. National Labor Relations Act, 29 U.S.C. § 159(b) (2023).

who may vote on [union] representation.”<sup>128</sup> While the NLRA grants the NLRB power to determine whether a petitioned-for unit is appropriate, it provides minimal guidance.<sup>129</sup> Nevertheless, the Board devised, and the Supreme Court has affirmed, the community of interest standard.<sup>130</sup>

In *Blue Man Vegas, LLC v. NLRB*, then-Judge Ginsburg for the Court of Appeals for the District of Columbia Circuit wrote, “[t]he Board’s principal concern in evaluating a proposed bargaining unit is whether the employees share a ‘community of interest.’”<sup>131</sup> Determining whether the petitioned-for employees share a community of interest requires a case-by-case analysis of all relevant factors.<sup>132</sup> Those factors include whether, compared to the excluded employees, the employees in the proposed unit have “different methods of compensation, hours of work, benefits, supervision, training and skills; if their contact with other employees is infrequent; if their work functions are not integrated with those of other employees; and if they have historically been part of a distinct bargaining unit.”<sup>133</sup> If the employees in the petitioned-for unit share a community of interest, the unit is *prima facie* appropriate.<sup>134</sup> More recently, in *Boeing Company*, the Board concluded that when determining whether the petitioned-for unit is appropriate, it will consider whether: (1) the employees share a community of interest, (2) the employees excluded from the unit have meaningfully distinct interests that outweigh their shared interests, and (3) the petitioned for unit meets any industry-specific guidelines the Board has established, if any.<sup>135</sup>

Clearly, then, a bargaining unit composed of all OWL players, just like those bargaining units that comprise traditional professional sports’ Players Associations, would be appropriate. Notably, while there may be more than one appropriate unit, the NLRB’s job is not to select the *most* appropriate unit—only *an* appropriate unit.<sup>136</sup> Given the interdependence of their work, all OWL

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128. Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353, 381 (1984).

129. The NLRA requires “[a] unit appropriate for . . . collective bargaining” and references “employer unit, craft unit, plant unit, or subdivision thereof.” National Labor Relations Act, 29 U.S.C. § 159(b) (2023).

130. “[I]n defining bargaining units, [the Board’s] focus is on whether the employees share a ‘community of interest.’” *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 491 (1985).

131. *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008).

132. *Id.*

133. *Id.* (quoting *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 n.11 (D.C. Cir. 1996)).

134. *Id.*

135. *Boeing Co.*, 368 N.L.R.B. No. 67, at \*3-4 (2019).

136. “More than one appropriate bargaining unit logically can be defined in any particular factual setting.” *Local 627, International Union of Operating Engineers v. NLRB*, 595 F.2d 844, 848 (D.C. Cir. 1979). “The Board need only select an appropriate unit, not the most appropriate unit.” *Cleveland Constr., Inc. v. NLRB*, 44 F.3d 1010, 1013 (D.C. Cir. 1995).

players share a sufficient community of interest. Employees excluded from the unit, coaches for example, have distinct enough interests from their players that justifies their exclusion from the unit—just as in traditional professional sports leagues. Finally, if there do exist any professional sports-specific standards, those standards would likely incline the Board to find a unit composed of all OWL players “appropriate,” given that smaller units would be impractical or, more pointedly, devastating for the League.

### *B. Multiemployer Bargaining is Necessary*

Finally, for collective bargaining to be viable in the context of a sports league, the employers, or team owners, must consensually form a multiemployer bargaining unit and bargain with the union as a single unit. This multiemployer unit is necessary due to “the highly interdependent nature of the teams and the need for uniform rules across the league.”<sup>137</sup> Multiemployer bargaining is thus indispensable for the OWL’s product to exist in the first place.<sup>138</sup>

The basis for finding that multiple employers can collectively form an “appropriate” multiemployer unit comes from the Board’s decision in *Shipowner’s Association of the Pacific Coast*.<sup>139</sup> Reading 29 U.S.C. § 159(b), which empowers the Board to determine whether the bargaining unit is appropriate, together with Section 152(2) which defines an “employer” as “any person acting in the interest of an employer,” and Section 152(1) which includes “associations” within the definition of “person,” the Board held that a multiemployer unit is appropriate when the employers have a history of bargaining on a joint basis, especially when bargaining as smaller units would not be as conducive to protecting employees’ rights under § 157.<sup>140</sup>

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137. Gabe Feldman, *Collective Bargaining in Professional Sports: The Duel Between Players and Owners and Labor Law and Antitrust Law*, in THE OXFORD HANDBOOK OF AM. SPORTS L. 209, 214 (Michael A. McCann ed., 2017).

138. *Cf.* Major League Baseball Props., Inc., v. Salvino, Inc., 542 F.3d 290, 333 (2d Cir. 2008) (“MLB teams, like all teams in sports leagues, need to cooperate in terms of scheduling, rulemaking, league format, competitive balance and both the live performance and televising of games, in order to create and market the product, which is baseball games.”) (emphasis omitted); L.A. Mem’l Coliseum Comm’n v. Nat’l Football League, 726 F.2d 1381, 1392 (9th Cir. 1984) (“Collective action in areas such as League divisions, scheduling and rules must be allowed, as should other activity that aids in producing the most marketable product attainable.”), *cert. denied*, 469 U.S. 990 (1984); Am. Needle, Inc. v. Nat’l Football League, 560 U.S. 183, 198 (2010) (NFL teams “depend upon a degree of cooperation [with one another] for economic survival.”) (quoting *Brown v. Pro Football, Inc.*, 518 U.S. 231, 248 (1996)).

139. *See* Shipowners Ass’n of the Pac. Coast, 7 N.L.R.B. 1002 (1938).

140. *Id.* at 1022, 1024–25. The Board stated that the bargaining history was “completely persuasive of the fact that a unit including all the workers employed at longshore labor in the Pacific Coast ports . . . is the one

Accordingly, in the case of the OWL, the existence of the league itself is indicative of a history of joint bargaining—at least on the part of the team owners. Moreover, since the existence of the League depends on uniform rules that govern all the players and teams, smaller bargaining units would be ineffective and unworkable. Because the Board cannot certify a multiemployer unit without all the employers' consent,<sup>141</sup> team owners, if they want to continue receiving the revenue their players bring in and avoid conflicting rules that would render the future of the League unfeasible, would have to consent to the multiemployer unit.

### CONCLUSION

As this comment demonstrated, under the NLRB's common-law agency test, OWL players are likely to transcend independent contractor status and be classified as employees. If this conclusion were reached, under the NLRA, OWL players would be able to organize, form, and join a Gamers Union that, as the players' exclusive bargaining representative, would collectively bargain for them. The increasing popularity of Esports—and thus the increasing revenue it derives—necessitates arm's length bargaining and the protection of OWL players' rights. This collective bargaining agreement would effectuate the purposes of the NLRA by remedying the "inequality of bargaining power" and protecting OWL players' "full freedom 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>142</sup>

Since this comment was written, some changes have occurred that could plausibly affect the above analysis and the future of the OWL, and are therefore deserving of mention. Most importantly, Microsoft purchased Activision Blizzard for \$69 billion.<sup>143</sup> This was Microsoft's largest acquisition ever, and

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that will insure to employees the full benefit of their right to self-organization and to collective bargaining." *Id.*

141. "The Board has long adhered to the rule that in order to bind an employer to multiemployer bargaining in the first instance, there must be evidence of that employer's unequivocal intent to be bound by the actions of the multiemployer bargaining representative." *Road Sprinkler Fitters Local Union No. 669*, 318 N.L.R.B. 347, 348 n.14 (1995). "[M]utual consent of the union and employers involved is a basic ingredient supporting the appropriateness of a multiemployer bargaining unit . . ." *Retail Assocs., Inc.*, 120 N.L.R.B. 388, 393 (1958).

142. National Labor Relations Act, 29 U.S.C. § 151 (2023).

143. Kevin Dowd, *Microsoft's Biggest Acquisition Ever is a \$69 Billion Bet on the Future of Video Games*, FORBES (Jan. 19, 2022, 12:23 PM), <https://www.forbes.com/sites/kevindowd/2022/01/19/microsofts-biggest-acquisition-ever-is-a-69-billion-bet-on-the-future-of-video-games/?sh=1d1f031e2d0c>.

the largest acquisition in the history of video games.<sup>144</sup> While Microsoft could modify the structure and mechanics of the OWL, season five of the OWL—the first season with Microsoft at the helm—predominately maintained the status quo from previous seasons. The most material change for season five was wholly unrelated to Microsoft’s acquisition. Rather, it was the fact that *Overwatch*’s sequel, *Overwatch 2*, was released<sup>145</sup> and supplanted the original *Overwatch*.<sup>146</sup> Accordingly, with the original *Overwatch* no longer playable, subsequent OWL seasons will necessarily be played on *Overwatch 2*.

Nevertheless, season six of the OWL will see more “sweeping” changes.<sup>147</sup> For one, two teams relocated, one of which completely rebranded.<sup>148</sup> The Paris Eternal relocated to Las Vegas, becoming the Vegas Eternal, and the Philadelphia Fusion rebranded in Seoul, becoming the Seoul Infernal.<sup>149</sup> Additionally, *Overwatch* Contenders teams—the “baseball farm system” for the OWL comprised of amateur players<sup>150</sup>—will have the opportunity to compete against OWL teams in a pro-am tournament beginning on March 23, 2023, prior to the season’s official beginning on April 28, 2023.<sup>151</sup> While the OWL teams in the West division will only compete against *Overwatch* Contenders teams in the opening pro-am tournament, in the East division, “the League will be expanded to permit Contenders teams to play against OWL teams all year long.”<sup>152</sup>

One commentator hopes that these “season 6 changes lead to a more equitable and sustainable League . . . .”<sup>153</sup> Thus, both fans and OWL players themselves desire a more equitable and sustainable League, and this shared desire only becomes more attainable if the players are granted a seat at the bargaining table.

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144. *Id.*

145. Dalton Cooper, *Overwatch 2 Launch Time Confirmed*, GAME RANT (Sept. 28, 2022), <https://game-rant.com/overwatch-2-release-date-time-when/>.

146. Scott Duwe, *Overwatch 1 is Officially Dead Now and Not Even Mercy Can Resurrect it*, DOT ESPORTS (Oct. 3, 2022, 11:25 AM), <https://dotsports.com/overwatch/news/overwatch-1-is-officially-dead-now-and-not-even-mercy-can-resurrect-it>. (“The hero FPS that launched in 2016 is gone as we know it. The servers for *Overwatch 1* went down this afternoon in preparation for the launch of *Overwatch 2* tomorrow. OW1 is no longer playable.”).

147. Ash Parrish, *Overwatch League Season 6 is Bringing Massive Changes*, VERGE (Feb. 8, 2023, 3:01 PM), <https://www.theverge.com/2023/2/8/23591147/overwatch-league-2023-season-6>.

148. *Id.*

149. *Id.*

150. *See supra* note 104 and accompanying text.

151. Parrish, *supra* note 147; *About the Overwatch League*, *supra* note 31.

152. Parrish, *supra* note 147.

153. *Id.*