

A More Pixelated Union: A Look at the Path to Unionization in the Video Game Industry under Trump's National Labor Relations Board

William C. Selfridge
University of Miami School of Law

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A More Pixelated Union: A Look at the Path to Unionization in the Video Game Industry under Trump's National Labor Relations Board

William C. Selfridge¹

In the past twenty years, the video game industry has become one of the largest entertainment industries not only in the United States but in the entire world. Yet as video game sales continue to increase at massive rates, it seems the conditions for those making the games have not improved with it, at least according to some in the know. While other entertainment industries have moved to unionize, those in the video game industry have yet to take that leap. To make matters worse, during the administration of President Donald J. Trump, the National Labor Relations Board (“NLRB”) shifted labor law against employees and unions by making decisions that were more employer friendly, and by all accounts, it seems this conservative pivot in labor law will continue long after President Trump leaves the White House. Given the current attitudes on unions and the recent decisions by Trump’s NLRB, what would it even take for video game developers to unionize? This comment will discuss the barriers to unionization in the video game industry based on recent NLRB decisions and the overall process of unionizing itself.

¹ By William C. Selfridge, Senior Notes and Comments Editor, *University of Miami Business Law Review*. Special thanks to Maureen Selfridge, Adriana Craver, and all my friends for helping me along the way.

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I. INTRODUCTION

In the 2020 video game *Ghosts of Tsushima*, players take on the role of Jin Sakai, a young samurai who is tasked with saving his island from the Mongolian Army invading his home island. Players lead Jin through a story of honor and revenge, exploring the island's shrines and towns, collecting new outfits and weapons for Jin to use on his journey, and assisting the townsfolk in the defense of their home. While millions of video game players have experienced medieval Japan through Jin's eyes,² most players would hardly consider how 16th Century Tsushima was created; the writers who carefully crafted Jin's story, the artists and animators who created the world, the programmers who developed the canvas for the writers and artists to use, the marketers who helped bring the game to the collective conscience of gamers across the world. Moreover, most gamers would not realize the extent of the developers' labor struggles.

In 2018, the video game industry generated over 43 billion dollars in revenue, the majority of which coming from software sales.³ Some business analysts believe industry revenues could grow to as much as 300

² See Paul Tassi, '*Ghosts of Tsushima*' Shatters PS4 New IP Sales Records with 2.4 Million Units in 3 Days, FORBES (Jul. 24, 2020), <https://www.forbes.com/sites/paultassi/2020/07/24/ghost-of-tsushima-shatters-ps4-new-ip-sales-records-with-24-million-units-in-3-days/#28d4c6711a3f>

³ U.S. Video Game Sales Reach Record-Breaking \$43.4 Billion in 2018, ENTERTAINMENT SOFTWARE ASSOCIATION (Jan. 22, 2019), <https://www.theesa.com/press-releases/u-s-video-game-sales-reach-record-breaking-43-4-billion-in-2018/>.

billion dollars in the next five years.⁴ However, even as profits rise and payouts to employees increase,⁵ the amount of jobs in the industry has decreased in recent years.⁶ With new video game consoles coming out at the end of 2020⁷ and the industry slowly shifting to new models of software distribution,⁸ some are questioning whether video game developers should form unions to protect their interests.⁹

Over the past year many video game journalists have covered mistreatment among video game developers,¹⁰ with hyper focus on long, unpaid hours,¹¹ and sudden unannounced layoffs.¹² At the same time many other online industries are seeing calls for unionization both from the outside and from within. As a side bar to video game development, esports has been the latest industry to hear the call, with both industry professionals¹³ and legal scholars¹⁴ opining on the difficulties of esports

⁴ Liz Lainer, *Video Games Could Be a \$300 Billion Industry by 2025 (Report)*, VARIETY (May 1, 2019), <https://variety.com/2019/gaming/news/video-games-300-billion-industry-2025-report-1203202672/>.

⁵ James Batchelor, *Analyst Expects Houser Brothers to Receive Huge Red Dead Royalties*, GAMESINDUSTRY.BIZ (Oct. 26, 2018), <https://www.gamesindustry.biz/articles/2018-10-26-houser-brothers-expected-to-receive-bulk-of-usd538m-red-dead-royalties>.

⁶ Indeed Editorial Team, *Are Game Developers in Demand? A Look at Video Game Jobs*, INDEED: INDEED BLOG (Jan. 10, 2017), <http://blog.indeed.com/2017/01/10/video-game-labor-snapshot/>.

⁷ See *Project Scarlett*, XBOX (Last visited Aug. 13, 2020), <https://www.xbox.com/en-US/project-scarlett>, see also Jim Ryan, *An Update on Next Gen: PlayStation 5 Launched Holiday 2020*, PLAYSTATION BLOG (Oct. 8, 2019), <https://blog.us.playstation.com/2019/10/08/an-update-on-next-gen-playstation-5-launches-holiday-2020/>.

⁸ James Batchelor, *Xbox Game Pass Users are Playing 40% More Games – Including Outside Game Pass*, GAMESINDUSTRY.BIZ (Oct. 18, 2019), <https://www.gamesindustry.biz/articles/2019-10-18-xbox-game-pass-users-are-playing-40-percent-more-games-including-outside-game-pass>.

⁹ Ariel Bogle, *Video Games are a Multi-Billion-Dollar Industry: Do its Workers Need a Union?*, ABC NEWS (Oct. 25 2018), <https://www.abc.net.au/news/science/2018-10-26/rockstar-red-dead-redemption-overtime-game-workers-union/10419706>.

¹⁰ In the video game industry, people often refer to video game developers as “developers” or “studios.” For the sake of this comment, all terms will be used.

¹¹ Jason Schreier, *‘We were Working 100 Hour Weeks,’ Red Dead Redemption 2 Head Writer Says, Then Clarifies*, KOTAKU (Oct. 15, 2018), <https://kotaku.com/we-were-working-100-hour-weeks-red-dead-redemption-2-h-1829758281>.

¹² Ethan Gach, *Telltale Employees Left Stunned by Company Closure, No Severance*, KOTAKU (Sep. 24, 2018), <https://kotaku.com/telltale-employees-left-stunned-by-company-closure-no-1829272139>.

¹³ See Maddy Myers, *Pro Gamers are Getting Serious About Unionizing*, KOTAKU (Mar. 14, 2018), <https://compete.kotaku.com/pro-gamers-are-getting-serious-about-unionizing-1823770452>.

¹⁴ See Uriah Tagle, *As North American Esports Levels Up, Its Players Lag Behind*, 19 TX. R. ENTERTAINMENT & SPORTS L. 81 (2019).

athletes unionizing.¹⁵ Calls for unionization have also been heard for other industries such as college athletes,¹⁶ online companies such as Kickstarter,¹⁷ and even WWE athletes and performers.¹⁸

However, while many have expressed interest in unionization, there remains the question of why not yet? Some would point to the current sentiments about labor unions among Americans in a world dominated by President Donald J. Trump, especially among many conservatives and even more so among most conservative lawmakers. During his time in office, the Trump Administration pushed to restrict unions in federal agencies, and while those workers resisted the efforts of that administration, it was an uphill battle.¹⁹

The National Labor Relations Board (“NLRB” or “the Board”) has been making decisions that could have major repercussions for employees and labor unions for years to come.²⁰ Despite 2020 seeing the highest support for labor unions among Americans in nearly fifty years and the election of Joe Biden in the 2020 election, the conservative wave in labor law has made unionization an arduous task for nearly all workers across the country.²¹ Even with a Democrat in the White House, the effort to rebalance the law in favor of employees and unions will take time and effort, especially since the NLRB raced to make changes to labor law under the belief that President Trump would not be reelected to a second term.²²

¹⁵ See also Timothy Heggem, *It's Complicated: Analyzing the Potential for Esports Players' Unions*, 6 ARIZ. ST. SPORTS & ENT. L. J. 447 (2017)

¹⁶ See George J. Bivens, Comment, *NCAA Student Athlete Unionization: NLRB Punts on Northwestern University Football Team*, 121 PENN ST. L. REV. 949 (2017).

¹⁷ See Nathan Robinson, *Kickstarter's Employees Want a Union. Will the Company Continue to Oppose Them?*, THE GUARDIAN (Oct. 21, 2019), <https://www.theguardian.com/commentisfree/2019/oct/21/kickstarter-employees-union-will-the-company-continue-to-oppose-them>.

¹⁸ See Geoff Estes, *New Bargaining Order: How and Why Professional Wrestlers in the WWE Should Unionize Under the National Labor Relations Act*, 29 MARQ. SPORTS L. REV. 137 (2018).

¹⁹ See Eric Yoder, *Trump Administration tells Agencies to Restrict Unions in the Workplace*, THE WASH. POST (Oct. 7, 2019), https://www.washingtonpost.com/politics/trump-administration-tells-agencies-to-restrict-unions-in-the-workplace/2019/10/07/39a0b3e8-e928-11e9-85c0-85a098e47b37_story.html.

²⁰ See Andrew Strom, *This May be the Worst Trump NLRB Decision Yet*, ON LABOR (Aug. 28, 2019), <https://onlabor.org/this-may-be-the-worst-trump-nlrp-decision-yet/>.

²¹ See Jeffrey M. Jones, *As Labor Day Turn 125, Union Approval Near 50-Year High*, GALLUP (Aug. 28, 2019), <https://news.gallup.com/poll/265916/labor-day-turns-125-union-approval-near-year-high.aspx> (nearly 64 percent of Americans support unions in a recent poll conducted in August of 2019).

²² See Andrew Strom, *The Trump NLRB is in a Hurry to Rewrite Labor Law*, ON LABOR (Sep. 17, 2019), <https://onlabor.org/the-trump-nlrp-is-in-a-hurry-to-rewrite-labor-law/>.

This comment will discuss the challenges to unionization in the video game industry with an eye to labor law under the Trump Administration. Part II will discuss a general structure of video game developers in terms of the types of positions and work that is performed in the average game studio. Part II will also look at current attitudes among developers on unionization and reasons for unionizing. Part III will look at the process of unionization and recent decisions by the NLRB under President Trump. Part IV will analyze different methods for unionizing in the video game industry and how recent labor law cases could either hurt or help developers should they ever choose to unionize.

II. BACKGROUND ON VIDEO GAME DEVELOPMENT IN THE 21ST CENTURY

Today, the most successful video games are created by large studios geared towards software development. While more and more commercially successful games are being created by small studios,²³ the vast majority of the revenue in the industry is earned by large developers²⁴ that make games that sometimes take thousands of employees and multiple studios to start and finish.²⁵ However, most of those top grossing developers are owned by publishers who fund the games and manage the games' marketing and release.²⁶ Despite some developers having foregone the traditional model of software release and chosen instead to publish their own games,²⁷ most developers do not have the financial resources to handle the various costs of publishing a game, including licensing and marketing, which can be upwards of millions of dollars per game.²⁸ And

²³ In fact, many popular games today are created by one person "studios." See James Batchelor, *Flying Solo: Surviving as a One-Person Indie*, GAMESINDUSTRY.BIZ (Nov. 16, 2016), <https://www.gamesindustry.biz/articles/2016-11-16-flying-solo-surviving-as-a-one-person-indie>.

²⁴ See Chris Kolmar, *These are the 10 Biggest Video Game Companies in America*, ZIPPPIA, <https://www.zippia.com/advice/biggest-video-game-companies-in-america/>.

²⁵ See, e.g., Cian Maher, *Over 2000 People and 14 Studios Worked on The Last of Us Part II*, VG247 (Jul. 27, 2020), <https://www.vg247.com/2020/07/27/the-last-of-us-part-2-cast-crew/>.

²⁶ See e.g., *Worldwide Studios*, ELECTRONIC ARTS (Last visited Aug. 8, 2020), <https://www.ea.com/studios>.

²⁷ See Jon Fingas, *Bungie will Self-Publish 'Destiny' in Split with Activision*, ENGADGET (Jan. 10, 2019), <https://www.engadget.com/2019/01/10/bungie-takes-control-of-publishing-destiny/>.

²⁸ See Ralph Edwards, *The Economics of Game Publishing*, IGN (Jun. 16, 2012), <https://www.ign.com/articles/2006/05/06/the-economics-of-game-publishing>.

as technology advances and consumer desires increase, those development and publishing costs will continue to increase.²⁹

A. *The General Structure of Video Game Developers in 2020*

Generally, every job in the video game industry has a name with unique duties and responsibilities so everyone knows what piece of the development puzzle they are responsible for, though this can vary from developer to developer.³⁰ While every developer (and publisher) has its own structure, there is a general framework that most studios follow because at the end of the day all studios must get the same things done for the game to be made.³¹

Leading off the development process, producers help to oversee the entire team and ensure certain milestones are hit throughout the development process.³² The lead producers are often an equivalent of a movie director. Directors, also known as project leads, are the captains of the ship and many times become the face of the studio up to the release of the game.³³ Often times in publisher-owned studios, there is an external producer, an employee of the publisher who serves as a mediator of sorts between the developer and the publisher, making sure the publisher's money is being well spent and reducing friction both within and between the developer and publisher.³⁴ There may also be an internal producer who typically works more closely with the team and helps keep track of the resources as they stand.³⁵ Additional assistants or associate producers help manage the team as well.³⁶

Under the producers is the design team that “establishes the game’s original blueprint” by working to create everything from storyboards and cutscenes to dialogue and level designs.³⁷ Writers can be full or part-time employees or contract employees hired for the initial creation of the game’s story.³⁸ The programmers handle the technical aspects of the development process, making sure the technology is up to date and helping to bring to life the creative vision of the producers.³⁹ A vital job of the

²⁹ See Superannuation, *How Much Does it Cost to Make a Big Video Game?*, KOTAKU (Jan. 15, 2014), <https://kotaku.com/how-much-does-it-cost-to-make-a-big-video-game-1501413649>.

³⁰ See BOB BATES, *GAME DESIGN* 151 (Heather Talbot et al. eds., 2d ed. 2004).

³¹ *Id.*

³² *Id.* at 153.

³³ See *Id.* at 153-54.

³⁴ *Id.* at 154-56.

³⁵ *Id.* at 156-58.

³⁶ *Id.* at 158-59.

³⁷ *Id.* at 159.

³⁸ *Id.* at 164-65.

³⁹ *Id.* at 165-171.

programmers is to ensure the game has the best possible game engine, the building block of the game.⁴⁰

Some studios choose to create their own engine while others must use an existing engine, made and managed by a third party.⁴¹ For the latter, it is the job of the programmers to ensure the team is not only using the most updated version of the engine but also that they have a legal copy of the engine in use.⁴² Along with the programming team is the art team that is responsible for the look of the game, from concept to final design.⁴³ The art team may be contract workers but typically are full-time employees who help with various art designs throughout development.⁴⁴

Finally, there is the testing team which ensures the game actually works; they play the game at various points during development to test for bugs and report any errors to be corrected.⁴⁵ They also give feedback on how the game plays and where an average gamer might get stuck or lost.⁴⁶ While the testing team, or quality assurance (“QA”) team, may be made up of internal employees of the developer, most QA teams are made up of testers who work on “temporary contracts or for outsourcing companies” that the development studio deals with directly.⁴⁷

Apart from the main team are the external resources. Because many studios are not big enough to employ workers for every job for every problem, those studios look to outside workers to help fill the gaps that their internal team cannot cover.⁴⁸ These positions cover everything from voice actors (who now double as motion capture actors more and more),⁴⁹ composers,⁵⁰ sound effect engineers,⁵¹ and localization teams.⁵² External

⁴⁰ *Id.* A video game engine is equivalent to a word processor; it is the platform that developers make their game in.

⁴¹ See OXM Staff, *The Most Crucial Part of Video-Game Development Explained—And how it Powered Fortnite’s Runaway Success*, GAMESRADAR (Dec. 23, 2018), <https://www.gamesradar.com/what-is-a-game-engine-and-what-does-it-do/>.

⁴² Bates, *supra* note 30, at 166.

⁴³ *Id.* at 171-76.

⁴⁴ *Id.*

⁴⁵ *Id.* at 176-80.

⁴⁶ *Id.*

⁴⁷ Jason Schreier, *Quality Assured: What It’s Really Like to Test Games for a Living*, KOTAKU (Jan. 18, 2017), <https://kotaku.com/quality-assured-what-it-s-really-like-to-play-games-fo-1720053842>.

⁴⁸ Bates, *supra* note 30, at 183.

⁴⁹ *Id.* at 185-88, 194-95.

⁵⁰ *Id.* at 188-91.

⁵¹ *Id.* at 191-93.

⁵² *Id.* at 195-98. (Localization is the process of making a game accessible to other languages and regions by not only doing translations of scripts but also ensuring the “localized” version of the game fits to the existing culture of the intended language or region. An example of this is ensuring jokes and idioms make sense to the region. Another

assistance may also include administrative employees and marketers⁵³ as well as legal assistance.⁵⁴ For publisher-owned developers, many of these positions and responsibilities may be handled by the publisher itself, while other smaller developers have to settle by hiring for these positions on an as needed basis.

It should be noted that not every video game developer is alike nor follows this model. Studios change and morph to the demands of the games they make, with some studios focusing on one single game while others are divided into smaller parcels that develop multiple games at once.⁵⁵ Moreover, studios may have multiple offices across the country (or world) and sometimes may be subject to consolidation, if they are owned by a publisher.⁵⁶

There is also an employment model known as the “Cabal Approach,” where studios assign groups of employees to perform various tasks instead of focusing and specializing on one cog in the machine.⁵⁷ Simply put, this method of development has a studio working together on a game all at once, blurring the more traditional lines of game development.⁵⁸ However, this method could slow the development process; leaving things to groups of individuals could lead to inaction rather than proactive growth.⁵⁹

There are some studios that completely avoid the traditional structure in its entirety. French developer Motion Twin describes itself as a “anarcho-syndical workers cooperative;” the studio operates completely under employee control with every employee of the studio being an owner of the studio as well as a worker.⁶⁰ Additionally, every employee/owner at Motion Twin earns the same amount as everyone else, despite how much work they perform or how much the studio’s games make.⁶¹ While this is

example could include changing the amount of blood seen in the game as “other countries, like Brazil, have tough standards concerning violence and bloodshed”).

⁵³ *Id.* at 183-85.

⁵⁴ *Id.* at 199-200.

⁵⁵ Matthew Forde, *From Apex Legends to Star Wars: Respawn’s Redefining Year in Games*, TECHRADAR (Dec. 20, 2019), <https://www.techradar.com/news/from-apex-legends-to-star-wars-respawns-redefining-year-in-games>. Video game developer Respawn Entertainment released two different video games in 2019 and is rumored to have three teams developing three different games at once as of writing.

⁵⁶ As with many industries, video game publishers will sometimes close studios down that are not performing well and will restructure their other studios to distribute some of the workers from the closed studio into the remaining open ones.

⁵⁷ Bates, *supra* note 30, at 180.

⁵⁸ *Id.*

⁵⁹ *See id.* at 180-182.

⁶⁰ Nathan Grayson, *Game Studio with No Bosses Pays Everyone the Same*, KOTAKU (Jul. 25, 2018), <https://kotaku.com/game-studio-with-no-bosses-pays-everyone-the-same-1827872972>.

⁶¹ *Id.*

in no way the norm in the industry, it does show that studios come in all shapes and sizes with their structures typically based on how the owners and managers think their games as best made.

B. *Treatment of Workers in the Video Game Industry*

There is the question of why video game developers should unionize; more specifically the question is why there is such a significant movement among video games journalists urging developers to unionize. Many in the industry believe that unionization is a necessary step to protect employees from their employers. Layoffs, often in mass numbers, are an unfortunate recurring event in the video game industry, especially around the launch of new hardware and software.⁶² The industry has also seen sudden studio closures with consequences such as the sudden loss of health care and other benefits.⁶³ Some employees and contractors have even complained of not being paid, leaving both software and hardware projects in jeopardy, as well as their own livelihoods.⁶⁴ Yet, most video game developers have been generally silent on these subjects, only expressing thoughts and sympathies when these events occur.

On the other side of the coin is the growing concern for developers' mental health as the requirements and demands of employers (and video game players) increase. Some employers have met their employees' concerns by choosing to delay major game releases to avoid the so called "crunch."⁶⁵ However, others in the industry do not believe in crunch and are more demanding of employees, requiring as much as twelve-hour work days.⁶⁶ There are also many developers, as well as those who cover video game news, that believe crunch is not a result of management forcing employees to work long hours but rather an example of creatives spending

⁶² See Rebekah Valentine, *Sony Interactive Entertainment EU Reportedly Lays off 'Dozens' Amid Restructuring*, GAMESINDUSTRY.BIZ (Oct. 9, 2019), <https://www.gamesindustry.biz/articles/2019-10-09-sony-interactive-entertainment-eu-reportedly-lays-off-dozens-amid-restructuring>.

⁶³ See Ethan Gach, *Telltale Employees Left Stunned by Company Closure, No Severance*, KOTAKU (Sept. 24, 2018), <https://kotaku.com/telltale-employees-left-stunned-by-company-closure-no-1829272139>.

⁶⁴ See Kieren McCarthy, *Game Over: Atari VCS Architect Quits Project, Claims he hasn't been paid for Six Months*, THE REGISTER (Oct. 8, 2019), https://www.theregister.co.uk/2019/10/08/atari_architect_quits/.

⁶⁵ See Alex Kane, *Nintendo Delayed 'Animal Crossing' to Maintain 'Good Work-Life Balance'*, VARIETY (June 12, 2019), <https://variety.com/2019/gaming/news/nintendo-delayed-animal-crossing-to-maintain-good-work-life-balance-1203240626/>. (explaining that crunch is "the harmful but widespread software-industry practice of working extreme amounts of overtime near a project's deadline.")

⁶⁶ See Jack Ma Defends the 'Blessing' of a 12-Hour Working Day, BBC (Apr. 15, 2019), <https://www.bbc.com/news/business-47934513>.

time idling away at projects to ensure the most perfect end result possible.⁶⁷ Still, although the conversation has been going on for at least the past fifteen years,⁶⁸ little has been resolved and the debate continues as larger and longer games come out each passing year.⁶⁹

Additionally, as the new video game consoles enter the market, some in the industry believe that games are becoming too big to manage at the current development levels and that change will come either in the form of shorter and smaller games or increased video game prices.⁷⁰ While this discussion is largely relegated to a discussion of game price or size, it also highlights the tension being imposed on game developers, and whether they are being forced to work long hours or simply choose to work until they achieve perfection, it does reveal the possible necessity for oversight of developers, with one possibility being unionization.

Developers have fought back against their employers when necessary and applicable to combat claims including undue severance⁷¹ and alleged harassment and discrimination.⁷² Yet, employers also are not afraid to use litigation to their own advantage, especially against contract workers who violate non-disclosure agreements.⁷³

Another issue developers are facing is backlash from fans, not only for decisions over in-game material,⁷⁴ but also for decisions made by their

⁶⁷ See, e.g., Dennis Patrick, *Video Game Developer Veteran Believes Crunch is a Good Thing*, GAMERANX (Sept. 2, 2019), <https://gameranx.com/updates/id/179943/article/video-game-developer-veteran-believes-crunch-is-a-good-thing/>.

⁶⁸ See Ben Gilbert, *Grueling, 100 Hour Work Weeks and 'Crunch Culture' are Pushing the Video Game Industry to a Breaking Point. Here's What's Going On*, BUSINESS INSIDER (May 9, 2019), <https://www.businessinsider.com/video-game-development-problems-crunch-culture-ea-rockstar-epic-explained-2019-5#the-decades-long-problems-in-video-game-development-first-became-public-nearly-15-years-ago-in-november-2004-with-a-letter-from-ea-spouse-1>.

⁶⁹ Jason Schreier, *As Naughty Dog Crunches on The Last of Us II, Developers Wonder How Much Longer This Approach Can Last*, KOTAKU (Mar. 12, 2020), <https://kotaku.com/as-naughty-dog-crunches-on-the-last-of-us-ii-developer-1842289962>.

⁷⁰ See Matthew Handrahan, *Shawn Layden: "I Would Welcome a Return to the 12 to 15 Hour AAA Game."*, GAMESINDUSTRY.BIZ (June 23, 2020), <https://www.gamesindustry.biz/articles/2020-06-23-shawn-layden-gamelab>.

⁷¹ See Gach, *supra* note 63.

⁷² See Sam Dean, *Riot Games Settles Class-Action Suit by Female Employees Who Allege Harassment and Discrimination*, LOS ANGELES TIMES (Aug. 22, 2019), <https://www.latimes.com/business/story/2019-08-22/riot-games-settles-class-action-suit-women-employees-harassment>.

⁷³ See Nicole Carpenter, *Epic Games Suing Fortnite Tester who Leaked Chapter 2*, POLYGON (Oct. 25, 2019), <https://www.polygon.com/fortnite/2019/10/25/20932658/epic-games-fortnite-lawsuit-chapter-2-leak>.

⁷⁴ See Eli Becht, *Apex Legends Dev Faces Backlash Following Update to Iron Crown Monetization*, DEXERTO (Aug. 17, 2019), <https://www.dexerto.com/apex-legends/apex-legends-dev-faces-major-fan-backlash-following-update-to-iron-crown-monetization-923783>.

employers.⁷⁵ The video game industry, among others in and outside of entertainment, are dealing with the Me Too Movement⁷⁶ and front and center is the lack of action by video game publishers and developers to handle accounts of sexual harassment and abuse.⁷⁷ Some companies are however finally acting; video game publisher Ubisoft placed several employees, including two executives, on administrative leave after allegations of misconduct were made and reported on social media sites. Yet many in the industry are skeptical of what will come of these investigations with some even losing trust in their employers all together.⁷⁸

In addition, some critics worry about Chinese influence in video game development, particularly as Chinese companies like Tencent continue to invest millions of dollars into a plethora of video game publishers and developers.⁷⁹ As these concerns increase, developers must attempt to field criticisms for the decisions employers, which at times have at least has resulted in employees losing faith in their employers and at worst resulted in death threats both online and in person.⁸⁰

With the turn of the new decade, the push for unionization among video game developers continues to steam forward. Recently, the Communications Workers of America (“CWA”), the largest labor union representing communications and media employees, initiated a new campaign to unionize employees in technology companies, including video game developers.⁸¹ CWA has become involved in unionization efforts among other technology companies and recently filed charges with the NLRB on behalf of several Google employees.⁸²

⁷⁵ See Jessie Yeung, *Blizzard Targeted with Boycott After it Banned a Hong Kong Player*, CNN BUSINESS (Oct. 11, 2019), <https://www.cnn.com/2019/10/09/tech/blizzard-gaming-backlash-hong-kong-intl-hnk-scli/index.html>.

⁷⁶ “Tarana Burke, *History and Inception*, ME TOO MOVEMENT, <https://metoomvmt.org/get-to-know-us/history-inception/> (explaining that the ‘me too’ movement was founded in 2006 to help survivors of sexual violence).

⁷⁷ See Jason Schreier, *Ubisoft Places Two Executives on Leave Following Misconduct Allegations*, BLOOMBERG (June 26, 2020), <https://www.bloomberg.com/news/articles/2020-06-26/metoo-in-gaming-two-ubisoft-executives-placed-on-leave>.

⁷⁸ *Id.*

⁷⁹ See Steven Messner, *Every Game Company that Tencent has Invested In*, PC GAMER (Oct. 4, 2019), <https://www.pcgamer.com/every-game-company-that-tencent-has-invested-in/>.

⁸⁰ See Luke Winkie, *What it’s like to Manage a Gaming Community on Fire*, PC GAMER (Sept. 21, 2016), <https://www.pcgamer.com/what-its-like-to-manage-a-gaming-community-on-fire/>.

⁸¹ Sam Dean, *Major Union Launches Campaign to Organize Video Game and Tech Workers*, LOS ANGELES TIMES (Jan. 7, 2020), <https://www.latimes.com/business/technology/story/2020-01-07/major-union-launches-campaign-to-organize-video-game-and-tech-workers>.

⁸² *Id.*

III. UNIONIZING AND THE NLRB UNDER PRESIDENT TRUMP

The organizing of American workers is governed by the National Labor Relations Act (“NLRA” or “the Act”) and is enforced by the NLRB, which also makes decisions on a wide swath of labor related issues.⁸³ The NLRB is an independent federal agency that is made up of five board members appointed by the President and approved by the Senate for five-year terms.⁸⁴ As of this writing, the board has three members with the fourth and fifth seats vacant.⁸⁵

A. *The Unionization Process under the NLRA*

Under the NLRA, an employee may file a grievance with the NLRB by first alleging “unfair labor practices” as defined under the NLRA with a regional office, which triggers an investigation by the office.⁸⁶ From there the claim will either be withdrawn by the regional director or will lead to a complaint and answer, which will eventually result in a hearing before an administrative law judge (“ALJ”).⁸⁷ Even if the claim goes before an ALJ, it is still a lengthy process that may take years to adjudicate, leaving employees to seek other methods to ensure their rights are sufficiently protected to avoid litigation, either at the agency or judicial level.

The first step in the unionization process is a determination as to whether the employees are “employees” under the NLRA, which encompasses “any employee . . . not . . . limited to the employees of a particular employer.”⁸⁸ This is a broad definition, although it does have significant exclusions. The three most notable exclusions are independent contractors, supervisors and managers, and professional employees.

The definition of “employee” under the Act expressly excludes “any individual having the status of an independent contractor,” however, the term “independent contractor” is not explicitly defined.⁸⁹ To determine

⁸³ See *About NLRB*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/about-nlr>.

⁸⁴ *The Board*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/about-nlr/who-we-are/board>. The idea of the five-year terms is to have three board members come from the party of the incumbent president and the remaining two from the party of the previous president.

⁸⁵ The three current board members were appointed and confirmed under President Trump. There was a fourth board member, Lauren McFerran, who was appointed under President Obama, however her term expired at the end of 2019, leaving two seats vacant on the Board as of writing.

⁸⁶ See *Investigate Charges*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/about-nlr/what-we-do/nlr-process>.

⁸⁷ *Id.*

⁸⁸ 29 U.S.C. § 152(3).

⁸⁹ *Id.*

whether a worker is an “independent contractor” under the Act, the Board has looked to a series of common law factors, with no one factor being determinative to the conclusion.⁹⁰

With respect to supervisors, courts have looked at three questions to determine whether an employee is a supervisor and therefore not an “employee” under the Act: first, does the employee have authority to engage in any of the activities listed in section 2(11); second, does the exercise of that authority require independent judgement; and third, does the employee hold authority and exercise judgement in the interest of management.⁹¹ As for managers, the Board has defined a manager under the Act as:

[T]hose who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer’s established policy [M]anagerial status is not conferred upon rank and file workers, or upon those who perform routinely, but rather it is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management.⁹²

The final express group of workers who are normally excluded from bargaining units are professional employees when the bargaining unit in question consists predominately of non-professionals.⁹³ They can coexist within the same bargaining unit, however, they must stipulate with the employer and the Board to determine the cohesiveness of the unit.⁹⁴

Once workers are found to be employees under the Act, they are guaranteed certain rights under the Act. Section seven of the Act states that, “employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining.”⁹⁵ However, employees are not forced to engage in any of those guaranteed rights, so long as it is not part of “an

⁹⁰ Dial-a-Mattress Operating Corp., 326 N.L.R.B. 884, 891 (1998). One factor that weighs in favor of a worker being an independent contractor is whether the worker has a significant entrepreneurial opportunity for gain or loss and another factor is the level of separateness between the worker and the employer. *Id.*

⁹¹ § 152(11).

⁹² Bell Aerospace, 219 N.L.R.B. 384, 385-86 (1975).

⁹³ § 159(b).

⁹⁴ *Id.*

⁹⁵ § 157.

agreement requiring membership in a labor organization [or] as a condition of employment.”⁹⁶

Typically, unionization occurs with the assistance of a pre-established union, usually in the same industry as the workplace seeking organization.⁹⁷ The existing union would help to inform the pro-union workers about the process and help establish the group of workers that wish to form a union.⁹⁸ If enough workers express a desire to unionize, the Board calls for an election, where a simple majority of workers are required to agree to unionize.⁹⁹ Proposed unions must be made up of a group of employees that share a common community of interests, that includes whether the group shares a common supervisor and if the workers share a common job function.¹⁰⁰ If the election results in an affirmation of organizing and there are no challenges to the bargaining unit’s makeup, a union is established, which then becomes the sole and exclusive representative of that specific class of workers,¹⁰¹ and the employer is compelled to collectively bargain with the newly formed union.¹⁰²

Employers cannot interfere with the employee’s rights as defined in section seven, and furthermore, under the provisions of the Act, “it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157.”¹⁰³ Section 8(a) also prevents employers from discriminating against any employee with membership in a labor organization and prohibits them from interfering with the “formation or administration of any labor organization or contribute financial or other support to it.”¹⁰⁴

Employers do have some legal methods of discouraging union membership or formation; for instance, employers are allowed to hold mandatory meetings for employees where management may explain their arguments for not joining a union, so long as the employer complies with

⁹⁶ *Id.*

⁹⁷ LANCE COMPA, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS, HUMAN RIGHTS WATCH, 71-72 (Cynthia Brown eds., 2000), <https://www.hrw.org/reports/pdfs/u/us/uslbr008.pdf>.

⁹⁸ *Id.* at 72.

⁹⁹ *Id.* at 73 (noting that there are times where an election can be bypassed but only if there is a supermajority of workers that wish to organize).

¹⁰⁰ Cedar Valley Corp. v. NLRB, 977 F.2d 1211, 1217 (8th Cir. 1992) (holding the Board is charged with determining the bargaining unit’s community of interest under section 9(a) of the Act).

¹⁰¹ Compa, *supra* note 97, at 73. Note there can be multiple unions for different classes of workers within one workplace, however each class may only have one union represent them under the Act. 29 U.S.C. §§ 151-169.

¹⁰² Compa, *supra* note 97.

¹⁰³ 29 U.S.C. § 158(a)(1).

¹⁰⁴ 29 U.S.C. § 158(a)(2)-(3).

the restrictions the Act and the courts have set out.¹⁰⁵ Courts have also largely protected employers' rights to restrict the use of the workplace in ways that may tend to discourage organization, so long as the restrictions are not discriminatory and do not unreasonably restrict the employees' rights under section seven of the Act.¹⁰⁶

In sum, the NLRA guarantees broad rights to employees in unionizing and to employee union members but with certain conditions. However, employers have fought against this broad mandate in many different ways, and, over the years, the NLRB has swayed back and forth between an emphasis on protections for the employees and labor organizations and backing for the employers.

B. *The NLRB in the Trump Administration*

Currently the NLRB consists of three members appointed by President Trump and as such the Board now leans heavily towards conservative values and an employer first mentality. As an example, last year the Board reversed a regional director's certification of a bargaining unit holding that the unit included employees that had a separate group identity and did not "share an overwhelming community of interest with the bargaining unit employees."¹⁰⁷ In its decision, the Board focused on the fact that the additional employees performed a new job function that was unlike the existing jobs and that they received different benefits as well.¹⁰⁸ Although the Board admitted that the group did have some shared community of interest with the bargaining unit, it nevertheless reversed the regional director asserting the group did not share an "overwhelming community of interest" with the bargaining unit.¹⁰⁹

The year 2019 ended with the Trump-era Board deciding a case that allowed employers to restrict employees' use of employer-owned-email systems, specifically those used for union-related or organizing activity.¹¹⁰ Back in 2014 in *Purple Communications*, the Board, then consisting of Obama appointees, had held in a narrow decision that employees had a right under Section 7 of the Act to use an employer-owned email for communication for union organizing.¹¹¹ While the Obama-era Board's decision held that employers could restrict non-work communications

¹⁰⁵ *Compa*, *supra* note 97, at 74. For instance, employers cannot hold such a meeting within twenty-four hours of a vote to unionize. *Id.* at 28.

¹⁰⁶ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

¹⁰⁷ *Recology Hay Road*, 367 N.L.R.B. No. 32 (2019).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ *See* *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 N.L.R.B. No. 143 (2019).

¹¹¹ *Purple Communications, Inc.*, 361 NLRB No. 126 (2014).

during non-work hours with the decision being limited to employees only; it did, however, stand for a right of employees to safely use their work emails to organize.¹¹²

In overruling *Purple Communications*, the Board in *Caesar's Entertainment* gave higher preference to the property rights of the employers in the employer-owned email system than the employee's right to organize under Section 7 of the NLRA.¹¹³ The Board cited to past NLRB case law highlighting "that not all restrictions on Section 7 activity in the workplace" are illegal and opined that the Obama Board went too far in their extension of Section 7 protections.¹¹⁴ And while the Board there did not foreclose all restrictions on employee emails, it does appear to be another brick in the wall favoring employers that the Trump Board seems determined to continue to build up.

Board Member McFerran dissented in *Caesar's Entertainment*, holding the majority was too quick to overrule the Obama Board. In response to the majority's opinion that the prior Board went too far in *Purple Communications*, McFerran pointed out that the overruled decision had a more detailed analytical framework that presumed an employer ban was unlawful unless the employer showed "special circumstances [that] made the rule necessary to maintain production or discipline."¹¹⁵ McFerran was also quick to point out the Board's abandonment of "nuanced and well-reasoned" decisions with an opinion that was insufficient and full of errors.¹¹⁶

Most notably, the Trump-era Board added another hurdle to unionization in *Boeing Company*.¹¹⁷ This recent decision clarified a previously issued decision¹¹⁸ and appears to make it harder for small groups of employees to organize in larger work places.¹¹⁹ The case concerned a group of employees at a Boeing manufacturer in South Carolina; the entire South Carolina facility was compromised of approximately 2700 employees who initially tried and failed to organize together; later two groups of technicians came together into a unit of 178 employees.¹²⁰ That unit went through the organization process and the

¹¹² *See Id.*

¹¹³ *Caesars Entertainment*, 368 NLRB No. 143 (2019).

¹¹⁴ *Id.*

¹¹⁵ *Id.* (McFerran, dissenting) (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804 at n.10).

¹¹⁶ *Id.* (McFerran, dissenting).

¹¹⁷ *See Boeing Co.*, 368 N.L.R.B. No. 67 (2019).

¹¹⁸ *See generally PCC Structural, Inc.*, 365 N.L.R.B. No. 160 (2017).

¹¹⁹ *See Boeing Co.*, 368 N.L.R.B. No. 67 (2019).

¹²⁰ *Id.*

NLRB's regional director issued a certification, which was challenged by Boeing.¹²¹

In the decision, the Board clarified the three-part test from *PCC Structurals* to determine an appropriate bargaining unit:

First, the proposed unit must share an internal community of interest. Second, the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board's decisions on appropriate units in the particular industry involved.¹²²

At first glance, it would appear that the factors would weigh in favor of the unit in question; however, the Board found that the unit failed on the first two parts of the test, with the final factor being null.¹²³ The Board held that the two groups of employees had interests that were too disparate to form a sufficient community of interest, and that they only differed in about fourteen percent of their work.¹²⁴ Essentially, the Board punished the smaller organized unit for not being large enough to include the rest of the company.

Once again, Board Member McFerran dissented, calling the test, specifically the second step, statutorily impermissible and a "departure from [the] traditional community of interest principles."¹²⁵ All in all, McFerran believed that this case departed from past precedent in issuing a new test that makes it harder for groups to unionize unless they were able to organize the entire work place under one uniform vision.

Moreover, the decision in *Boeing Company* is yet another red flag for union supporters. The Attorney General of South Carolina had filed an amicus brief in support of decertification asserting the certification of the Boeing unit threatened the state's economy, fearing the decision would lead to "an onslaught of fragmented micro-unit petitions" that would clog up the state's economy.¹²⁶ Additionally, South Carolina's governor, along with the Republican governors of three other states, also submitted briefs

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* (stating "[n]o industry-specific guidelines" were applicable to test and instead focused on first two parts of test).

¹²⁴ *Id.*

¹²⁵ *Id.* at 8.

¹²⁶ Amicus Brief of The State of South Carolina, Ex Rel. Alan Wilson, Attorney General, In Support of the Boeing Company's Request for Review of The Regional Director's Decision and Direction of Election at 2, Boeing Co., 368 NLRB No. 67 (2019) (NLRB Case No. 10-RC-215878).

supporting declassification as they feared that letting the unit stand would “stunt growth and sow discord in an otherwise unified and stable workforce, thriving in [a] right-to-work state.”¹²⁷ These briefs advocating for the decertification of the unit highlight the anti-union sentiments within the modern Republican party.

These decisions were rendered while the Board still had one voice from the Obama era, and although the Obama-era Board Member was a dissenting one, as in *Caesars Entertainment*, there still was the guarantee that the Board as a whole had to consider the liberal and pro-employee arguments during their deliberations. Many labor law commentators fear that the Trump dominated NLRB was rushing to twist the law ever more to the side of the employers.¹²⁸ Even though President Trump lost his chance at a second term in 2020, he certainly has had the opportunity to solidify the Board’s conservative slant for years to come, potentially causing further barriers to employees unionizing, including video game developers.

It is important to note that the Board’s decisions do not become binding precedent until they are confirmed by a federal circuit court, which sometimes results in circuit splits on labor issues.¹²⁹ However, the Board’s decisions under the Trump Administration are still important to see the conservative shift of the law over the past several years, especially since current case law gives agencies wide discretion when it comes to matters of ambiguous statutory law¹³⁰ and an agency’s own ambiguous regulations.¹³¹ Furthermore while some of the issues have flipped back and forth over the years,¹³² the general shift of labor law has recently been towards the rights of the employers, not the employee.

¹²⁷ Amicus Brief on Behalf of the Governors of South Carolina, Maine, Kentucky, and Mississippi, at 7, *Boeing Co.*, 368 NLRB No. 67 (2019) (Case No. 10-RC-215878).

¹²⁸ See, e.g., Andrew Strom, *The Trump NLRB is in a Hurry to Rewrite Labor Law*, ON LABOR (Sep. 17, 2019), <https://onlabor.org/the-trump-nlrbs-is-in-a-hurry-to-rewrite-labor-law/>.

¹²⁹ See, e.g., Christopher C. Murray, *Sixth Circuit Adopts NLRB’s D.R. Horton Rule and Deepens Circuit Split on Class Action Waivers*, OGLETREE DEAKINS (Jun. 6, 2017), <https://ogletree.com/insights/2017-06-06/sixth-circuit-adopts-nlrbs-d-r-horton-rule-and-deepens-circuit-split-on-class-action-waivers/> (describing a split between the Sixth and Fifth Circuits over class action waivers that was settled in *Epic Systems Corp. v. Lewis*).

¹³⁰ See generally *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding courts must give agency decisions deference if the statute is ambiguous and the agency’s interpretation is reasonable).

¹³¹ See generally *Auer v. Robbins*, 519 U.S. 452 (1997) (holding an agency’s interpretation of its own regulation must be given controlling weight unless the interpretation is inconsistent with the regulation or clearly incorrect).

¹³² For example, the issue of employer versus employee rights in digital systems owned by the employer has gone back and forth several times before *Purple Communications* and

Furthermore, there is the matter of the Supreme Court, which has shifted to a firm conservative majority since President Trump took office, with the appointments of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. While the three new justices have not necessarily followed in lock step as may have been expected,¹³³ the fear of a six to three conservative slant has many concerned about how the nation's highest court may rule, including on labor law.¹³⁴ Before Justice Kavanaugh was appointed, the Court decided a landmark case dealing with public sector unions holding government workers who were not members of the union could not be forced to help pay for the union's collective bargaining or union dues.¹³⁵ While this case is not binding on private sector unions per se, it does signal where the Court may be headed. Dissenting, Justice Kagan stated that she feared that the Court was making decisions "with so little regard for the usual principles of stare decisis" and that "judicial disruption does not get any greater than what the Court did" here.¹³⁶ If the Court continues on this path, it could forecast trouble for public as well as private sector union, which would mean the organization of video game developers could face unforeseen barriers in the future.

C. *Independent Contractor Laws and the Gig Economy*

Finally, many states have been moving to pass laws to protect a broad umbrella of workers classified as "independent contractors" by their employer (and more broadly by the public at large). Most notable is California, which recently enacted a law aimed at extending employment rights to Uber and Lyft drivers.¹³⁷ The bill aims to correct the "Gig Economy," the practice of many Silicon Valley companies, such as Uber and Postmates, that rely on cheap workers working part-time which is done by classifying them as independent contractors.¹³⁸

Caesars Entertainment. While the pendulum is currently swinging to the right, it is highly possible for the Board to shift back and restore the holding from *Purple Communications* if the Democrats take back the White House (and the Board).

¹³³ Tucker Higgins, *Trump's two Supreme Court Justices Kavanaugh and Gorsuch Split in First Term Together*, CNBC (Jun. 29, 2019), <https://www.cnn.com/2019/06/28/trumps-two-supreme-court-justices-kavanaugh-and-gorsuch-diverge.html>.

¹³⁴ See, e.g., Jeff Stein, *From Arbitration to Discrimination: 3 Ways Trump's Supreme Court Pick Could Transform U.S. Labor Law*, Chicago Tribune (July 10, 2018), <https://www.chicagotribune.com/business/ct-biz-brett-kavanaugh-labor-law-20180710-story.html>.

¹³⁵ *Janus v. Am. Fed'n of St., Cty, and Mun. Emp.*, 138 U.S. 2448, 2456 (2018).

¹³⁶ *Id.* at 2487 (Kagan, J. dissenting).

¹³⁷ See Alexia Fernandez Campbell, *California Just Passed a Landmark Law to Regulate Uber and Lyft*, Vox (Sep. 18, 2019), <https://www.vox.com/2019/9/11/20850878/california-passes-ab5-bill-uber-lyft>.

¹³⁸ See *id.*

The California bill would change this and aim to reclassify these gig workers as employees, giving them benefits ordinarily provided to regular employees as well as higher wages.¹³⁹ While the bill has been challenged by Uber and other companies, such as Postmates, in federal court,¹⁴⁰ many other Democrat-led states, including New York and Illinois, are considering bills similar to California's.¹⁴¹ While federal law still trumps state laws, including the recent independent contractor bills, the movement by the states show that they are unafraid to push back against the employer-dominated regime of the current NLRB and ensure workers get the necessary protections they deserve.

IV. ANALYSIS:

As referenced above, many in the industry have discussed the need for video game developers to unionize, yet there has been little discussion concerning the potential barriers to organizing. Whether it is the structure the union takes or the legal barriers the employees will face, no one in the video game industry has had the deep conversation necessary to understand the process that will be required for games workers to form a union.

A. *Supervisors and Managers in the Studio*

At the outset of the unionization process, video game workers must familiarize themselves with the intricate innerworkings of the NLRA, specifically who can and cannot organize. While the text of the Act is fairly clear, trying to discern whether certain classes or types of workers are covered by the Act can be quite difficult and has been a hotly litigated question since the Act was passed in the early 20th Century. Plainly put, "employees" can organize, supervisors or managers cannot. Ordinarily, there is not an issue as to who is an employee, but the question with regard to whether the duties and responsibilities of certain workers would render them supervisors and managers is not clear cut. Video game studios are comprised of complex teams and the larger the studio, the more checks and balances it needs. Additionally, many large studios work on multiple

¹³⁹ *See id.*

¹⁴⁰ *See* Edvard Pettersson, *California Says Gig-Worker Law Doesn't Target Uber, Postmates*, BLOOMBERG (Jan. 17, 2020), <https://www.bloomberg.com/news/articles/2020-01-18/california-says-gig-worker-law-doesn-t-target-uber-postmates>.

¹⁴¹ *See* Eli Rosenberg, *Gig economy bills move forward in other blue states, after California clears the way*, THE WASHINGTON POST (Jan. 17, 2020), <https://www.washingtonpost.com/business/2020/01/17/gig-economy-bills-move-forward-other-blue-states-after-california-clears-way/>.

projects at once, with different teams assigned to work on different games for years at a time.

This can result in the first barrier to the unionization process for game workers. Under the Act's definitions of supervisors and managers, it is possible that a broad swath of employees at video game studios could be lumped into either of these definitions and thus would be statutorily barred from organizing. Many video game studios operate on their own, choosing not to follow the traditional employee/supervisor or manager model. These employers entrust a sufficient amount of independence in their employees, with the producers being the ones to ensure development hits the necessary milestones. In such cases, there is potentially a large number of employees that could fall within the definitions of supervisors or managers.

For larger studios, this might not be a point of concern, as there would be enough workers meeting the Act's definition of "employees" eligible to organize, with those excluded potentially able to advocate for the movement through social media. Yet for smaller studios, this corporate structure could dampen the union movement. For many studios, large and small, a small number of workers tend to become the face of the video game to the public and if those outward facing voices are statutorily barred from organizing, it could discourage others from coming together or sway those interested in organizing to go through the "faces" of the studio to secure their rights rather than the official unionization process as laid out in the Act.

There is also the threshold question of professional versus non-professional employees in a bargaining unit; however, given the typical makeup of video game developers, it is unlikely that this threshold question would be a significant barrier to entry. Most positions at the average video game developer are highly specialized, and it would be unlikely for non-professional employees to be involved in the developer's organization.¹⁴² This could possibly exclude certain departments in a video game studio, such as the marketing department. However, it is unclear whether such departments would even seek to organize along with the employees who actually develop the games, and this in and of itself would bring about its own issues.¹⁴³

Finally, there is the concern of independent contractors in video game developers, as contractors are another group of workers that are expressly excluded from the definition of "employees," however, with more states

¹⁴² Should the developer be large enough that they have a significant class of non-professional employees, they would be better off organizing amongst themselves. *See, e.g.*, Justine Coleman, *More than 2,000 Google Cafeteria Workers have Unionized: report*, THE HILL (Dec. 31, 2019), <https://thehill.com/policy/technology/476367-about-2300-google-cafeteria-workers-have-unionized-report>.

¹⁴³ *See infra* Part IV B.

passing and enforcing laws that seek to protect independent contractors, this issue is one that warrants a deeper discussion.¹⁴⁴

B. *Structure of a Video Game Developer Union*

Once the manager/supervisor issue is answered, the \$64,000 question is *how* video game developers will unionize; most of the current campaigns to unionize developers appear to focus on bringing together employees for the common cause of securing their desired employment rights and benefits. However, once the decision to unionize is made, the exact structure of how they would officially proceed to organize is the first question that must be answered. There are two different models for video game developers to follow, the industrial union model or the “Hollywood” model.¹⁴⁵

The CWA follows the industrial union model “which organizes entire companies at once rather than splitting workers who perform different jobs into specialized unions.”¹⁴⁶ If video game developers see the advantage of an all-in-one unit, they would follow in the CWA’s footsteps and proceed under the industrial union model. This method has the advantage of bringing together the entire team and maximizing the potential union support within the workplace, instead of splintering support among several different units.

However, this method of unionization may not be the best fit for developers. Most video game developers work in complex work environments made up of wholly different teams performing various functions and with potentially different needs and desires; employees organized in one unit could lead to individual employees having diverse or potentially conflicting desires.¹⁴⁷ Additionally, not all studios have the same structures; some are hundred person monoliths while others are made up of small single digit crews focused on small scale independent games. As such, the same organization process may not best suit the employees of every studio. For instance, studios following the Cabal Approach, like Valve,¹⁴⁸ could have an easier time organizing under this model as having employees working together on a vast majority of the game could provide

¹⁴⁴ See *infra* Part IV C.

¹⁴⁵ While not an official phrase to describe union models, this comment will continue to reference the Hollywood model to help conceptualize the model for unionization predominately used in the film and television industries.

¹⁴⁶ Sam Dean, *major union launches campaign to organize video game and tech workers*, LOS ANGELES TIMES (Jan. 7, 2020), <https://www.latimes.com/business/technology/story/2020-01-07/major-union-launches-campaign-to-organize-video-game-and-tech-workers>.

¹⁴⁷ See *supra* Part III B.

¹⁴⁸ See Bates, *supra* note 30 at 180-182.

for more unified goals and visions for organizing than had they been separated into teams focusing on single objectives at a time. In addition, some studios have multiple offices that stretch across state lines and it would seem difficult to reconcile having different studios, especially ones in different states or countries under one uniform union.¹⁴⁹

Furthermore, if workers attempt to organize under the broad blanket of “video game developers,” they could face opposition if they are employees in a large publisher company, such as Electronic Arts or Activision. As discussed above, these large publishers often control every stage of a game’s development, from pre-planning to post-launch maintenance, and to do so, these companies must employ hundreds or even thousands of workers ranging from the artists and coders to marketers and lawyers. Should these developers want to organize with their colleagues in the marketing team, they would likely face opposition as the two classes of employees could potentially have vastly different goals, more so than the artists and the writers for instance. While this may be an extreme example, it nonetheless points to the issues that employees may face in attempting to unionize on a large scale, and the closer the employees are to each other across teams, the harder it could be to motivate the masses to organize.

In a similar vein, there are also unions made up of employees from multiple employers, which could be an option under this umbrella. With the cohesiveness of the video game industry, it could be a sensible decision to have one unified voice represent multiple studios all at once, especially when it comes to marketing and media coverage; having one representative speak for multiple studios could work in their favor to gain popular support amongst the public at large. However, this model may not be as feasible as it is in other industries. As noted above,¹⁵⁰ developers tend to have different structures reflecting their own individual needs and while many games workers have similar concerns, such as crunch, the extent of those concerns and the remedies to resolve them could vary drastically from developer to developer.

The industrial model is not the only method of organizing a workplace. In 2017, SAG-AFTRA, one of the largest unions representing television and radio artists, went on strike on behalf of voice and motion-capture artists against several video game developers including developers owned by Disney and Warner Brothers.¹⁵¹ SAG-AFTRA represents the unionized

¹⁴⁹ See Insomniac Games, <https://insomniac.games/> (last visited Jan. 19, 2019) (having a studio in Burbank, California, and one in Durham, North Carolina).

¹⁵⁰ See *supra* Part II A.

¹⁵¹ David Ng, *SAG-AFTRA reaches tentative deal to end strike against video game companies*, LOS ANGELES TIMES (Sep. 25, 2017, 5 AM),

structure of Hollywood; in short, there are unions for almost every position in film and television work, ranging from directors¹⁵² to stagehands.¹⁵³ In fact, the Writers Guild has represented video game writers in the past in various ways, such as providing sample contracts intended for video game writers.¹⁵⁴

The “Hollywood” model could potentially be a better fit for developer unionization, with developer employees forming unions with their immediate peers – a union for the artists, one for the programmers, and so on. Yet, even this structure which may appear more ideal for game developers could pose its own problems. In contrast with the CWA or industrial process, having one uniform organization that represents the broadest group of employees could make it easier for subsequent workplaces to join in. Given the wide range in developers, in terms of size and location, one single union might be easier to get the unionization efforts off the ground.

The Hollywood model does not come without its own faults. While this model of unionization has worked for the film industry, the process of making movies and television shows is fundamentally different from the process of creating a video game. It is common for movies to be made in different pieces, with writers sometimes having no direct relationship to the director and with other jobs only involved in specific parts of the production cycle. Video games, on the other hand, are often made as the result of a team effort; even if different employees are in separate offices working on different parts of the game, they are more likely working together under one roof, spending potentially years together to get the final product perfected. For these reasons, it is possible that the Hollywood Model may not be the best fit for video game developers as these workers could have more uniform goals and needs than the average movie crew comprised of so many different and divergent trades has.

Additionally, the Hollywood Model is not as compatible with the organization process since the Board’s decision in *Boeing Company*. As described in McFerran’s dissent, the NLRB has made it harder for small groups to organize in the face of a larger workplace. Applied to video game studios, the holding in *Boeing Company* could present an obstacle to certification of a small unit, the studio’s artists, for example, from organizing. While a studio’s artists share different job responsibilities, the

<https://www.latimes.com/business/hollywood/la-fi-ct-sag-aftra-video-games-strike20170925-story.html>.

¹⁵² See Directors Guild of America, <https://www.dga.org/> (last visited Jan. 19, 2019).

¹⁵³ See IATSE, <https://www.iatse.net/> (last visited Jan. 19, 2019).

¹⁵⁴ See *Interactive Program Contract for Videogames*, Writers Guild of America West, <https://www.wga.org/contracts/contracts/other-contracts/interactive-program-contract> (last visited Jan. 19, 2019).

NLRB could find that their interests are not meaningfully distinct from the rest of the studio's workers none of whom would be included in the unit.

In *Boeing Company*, the Board looked at different factors, such as wages and terms and conditions of employment, and these factors could balance either for or against the unit.¹⁵⁵ However, one of the more important factors that the Board focused on was degree of functional integration, something that seems to be more of a sniff test than an analytical exercise. In *Boeing Company*, the Board looked at how the unit in question included employees who shared supervisors with employees outside the unit, as well as having meaningful similarities in the job descriptions. With video game development, as with most tech companies, the employees likely have a high degree of cooperation, even if they do not share similar work tasks. Additionally, depending on how liberally the Board observes the process of making video games, it is possible that an uninformed Board Member could argue that every employee in a video game studio is supervised by the game's producers, since the buck stops at them, and given the recent decisions by the Board, it seems clear that the Board will likely lean to or even err on the side of the employer in its decision making, or at least until a Democrat-appointed Board could shift precedent back in favor of employees.

In the final analyses, it is difficult to determine what the best structure for unionizing video game developers would be. Each union model has its own pros and cons and it will be up to the developers to decide not only what is the best model to have their demands satisfied but what model is best suited for their company. On balance, it may be best for developers to follow in the footsteps of the CWA and organize under the industrial union model for two key reasons. First, video game developers do share enough commonalities to be one single bargaining unit by the Board, albeit subject to recent decisions of the NLRB. While those commonalities might not be cohesive enough to justify a union that represents multiple different studios all at once, it is most likely enough for the employees to share a common set of bargaining goals within one studio, despite having different job titles or classifications.

Second and finally, unionization is a daunting process, and with the CWA already in place in advocating for union organization, following their model might make for a less arduous process. Under current labor law, employers do have many rights to discourage unionization, even with methods that appear dishonest or even threatening. Considering a legitimate fear of reprisal from management and the shrinking jobs market among video game developers, many games workers may want to keep their head down and go with the flow. However, if the unionization

¹⁵⁵ *Boeing Co.*, *supra* note 117, at 2.

process did include the support of most of their colleagues and with the assistance of a large and politically powerful pre-existing union, the reservations of those employees on the fence could be allayed.¹⁵⁶

While this path might be the most convenient for developers, it does have significant barriers that would need to be addressed in light of recent Board decisions. The key for success under this method would be to focus on organizing at the developer level and not the publisher level to keep as tight and cohesive of a bargaining unit as possible. Regardless of the method of unionization, it is clear their efforts will face significant barriers in the NLRB, and potentially federal courts.¹⁵⁷

Clearly once the developers decide on a structure to organize, they will likely face scrutiny and potential opposition from their employer and the NLRB. While the movement for labor rights continues to grow among the general public in 2020, there is no doubt that the Republican Party clearly favors the rights of the employer over those of the employee and the union, and this can be seen in the way labor law shifted under President Trump. In fact, the Board's recent decisions appear to pose definitive obstacles to workers in a technology industry and specifically the video game industry to unionize.

One example of this can be seen in its recent *Recology* decision. Specifically, if one team of a studio organizes and wants to bring in other members of the organization, they could face opposition under *Recology*'s overwhelming standard requiring a community of interest with the larger unit. As discussed above,¹⁵⁸ the development process is composed of teams of workers performing different jobs with different responsibilities and potentially different interests and desires. A game studio that focuses on large story driven games might put additional focus on its writing team, where studios that produce multiple games at once might have higher preferences for programmers. As the studio's needs ebb and flow, so too will its teams, and if the studio is diversified enough, it could become difficult to unionize under one unified bargaining unit without establishing the overwhelming community of interest required under *Recology*.

The recent decision in *Caesars Entertainment* also exemplifies this conservative shift to employer rights that could hinder employee organization efforts. This restriction on employees' use of employer emails would be particularly problematic if enforced in video game studios

¹⁵⁶ See Dean, *supra* note 146 (explaining that CWA's supporting to game developers is still expanding).

¹⁵⁷ See Colby Itkowitz, *1 in every 4 Circuit Court Judges is now a Trump Appointee*, THE WASH. POST (Dec. 21, 2019), https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fa1e98-2336-11ea-bed5-880264cc91a9_story.html.

¹⁵⁸ See *supra* Part II A.

whose workplaces are immersed in technology and where emails may well be the sole means of communication.¹⁵⁹ It would reinforce the belief by employees in technology heavy workplaces that judges and other decisionmakers do not adequately comprehend the extent to which technology penetrates our everyday lives.¹⁶⁰

Technically, the Board was correct in *Caesars Entertainment* in that a work email is owned by the employer, but this harsh ruling aimed directly at employees' ability to communicate appears to be a thinly veiled attempt to muzzle workers in unionizing in their workplace. This is contrary to past case law, where the Supreme Court held in favor of employees in employer-owned workspaces holding that such restrictions by the employer unduly restricted employee's rights under section seven of the NLRA.¹⁶¹ For video game developers, this trend could spell disaster, as it shows that the current Board is willing to restrict worker rights to technology found in their workplace. If the Board is unwilling to extend worker rights to the work emails, then they are unlikely to extend protections to workers using other electronic systems such as Slack.

Another crucial aspect to developer organization is the fact that the video game industry is very much a global one. Of the major console manufacturers, two are owned by Japanese companies; some of the largest video game publishers are foreign entities; and a growing number of developers are being invested with Chinese money. All of this has created a vibrant marketplace that has given consumers some of the best video games in the history of the industry, however, that could in and of itself be a barrier to organizing. Not only does a substantial portion of video game developers and publishers come from overseas, many of these companies own subsidiaries throughout the world. Unlike the average Hollywood production company, many game companies are often required to juggle different jurisdictions' laws which could give them a reason to oppose organizing in the U.S. to keep workplaces consistent across the board. On

¹⁵⁹ See *Caesars Entertainment*, *supra* note 110 (noting in a post-COVID 19 world, many video game studios might pivot to working from home more or potentially full time. Should this become reality, the necessity for worker communications through electronic platforms may be integral for ensuring game development meets key milestones, and with it could be the necessity for stronger protections for workers' freedom of communication in those platforms).

¹⁶⁰ For a long period of time, the Supreme Court has been slow to understand the privacy rights in cellphones and as such have been slow to extend certain rights, such as Fourth Amendment Rights, to cellphones and other personal devices. See, e.g., *Riley v. California*, 573 U.S. 373, 373 (2014).

¹⁶¹ See *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793 (1945) (holding that employers could make *reasonable* rules to regulate employees' conduct on employer property but only so long as those rules were not unreasonably restricting the employees' rights under the NLRA and the First Amendment).

the other hand, should studios organize in the U.S., video game prices could rise to offset the additional costs to development, which may have a dangerous ripple effect if foreign companies are able to keep their prices lower.¹⁶² Furthermore, with the fear of tariffs on electronic goods coming out of China, game companies will want to protect their pricing by any means (legally) possible.¹⁶³ And, as publishers grow in size and continue to acquire studios, the barriers to unionization may become more and more difficult, especially as larger publishers have the money and resources to exercise their control over smaller studios in the industry.¹⁶⁴

At the end of the day, employers could end up being amenable to the idea of a union, since Hollywood is highly organized and has remained relatively successful over the years.¹⁶⁵ It all depends on the who, when, and where to determine just how difficult the process will be for developers.

C. *Issues with Independent Contractors*

A final point of contention in the developer organization discussion is the status of independent contractors. Much of the reported abuse to developer workers comes from the mistreatment of QA testers and other workers hired on an as-needed basis. One of the few exceptions to organizing employees under the NLRA is independent contractors.¹⁶⁶ Courts have traditionally used a series of tests to determine whether a particular worker is an independent contractor or a true bona fide employee, and have looked at factors ranging from the extent of control

¹⁶² This could be a separate topic in and of itself and is only being briefly mentioned to highlight another potential barrier to organization in the United States.

¹⁶³ One of President Trump's proposed tariffs was a 25% import tariff on video game consoles, which would have put video game console prices in limbo as more than 90% of consoles are developed in China. As of writing however, the United States and China recently agreed to a new trade deal that has put most of President Trump's tariffs on ice. See Haydn Taylor, *Console Tariff off the Table as Tensions ease between US and China*, GamesIndustry.Biz (Jan. 27, 2020), <https://www.gamesindustry.biz/articles/2020-01-27-console-tariff-off-the-table-as-tensions-ease-between-us-and-china>.

¹⁶⁴ See Jason Schreier, *Game Publisher Cancels Contract with Developer, Then Tries to Poach Its Entire Team*, BLOOMBERG (June 3, 2020), <https://www.bloomberg.com/news/articles/2020-06-03/kerbal-space-program-2-release-disrupted-by-corporate-strife>.

¹⁶⁵ See, e.g., David Robb, *U.S. Film Industry Topped \$43 Billion in Revenue Last Year, Study Finds, But it's not all Good News*, DEADLINE (Jul. 13, 2018), <https://deadline.com/2018/07/film-industry-revenue-2017-ibisworld-report-gloomy-box-office-1202425692/> ("the American film industry generated \$43.4 billion in revenue [in 2017].").

¹⁶⁶ 29 U.S.C. §152(3) (1978).

the employer has over the worker to and the length of time the worker is employed for.¹⁶⁷

Under this traditional model, the contract workers at video game studios could be considered employees provided they get a friendly enough court. This would be despite not having a long duration in their employment, in recognition of the fact that the game studios do extend a heavy control over their work and their employment is a part of the employer's traditional business. Of course, there are factors that could weigh against the contract workers on this issue but on balance, the scale would seem to tip in favor of these workers being determined to be employees under the Act. Furthermore, the Board, despite its recent conservative slant, has maintained a factored analysis to determine whether a worker is an independent contractor, and has continuously held that the burden to prove one is an independent contractor is on the employer.¹⁶⁸

However, the recent independent contractor laws, such as California's, may change the analysis of independent contractor status under current NLRB law.¹⁶⁹ While the NLRA and binding case law take precedence, these independent contractor laws might be a glimpse at things to come. Many of the leading voices of the Democratic party, including Senator Elizabeth Warren, have stated support for these bills,¹⁷⁰ and with Joe Biden's victory in 2020, labor law could see a shift towards a more worker friendly reading of the independent contractor precedents. This could work in favor of developers—organizing can sometimes take a long time, and if the unionization of developers happens to take longer than expected, waiting for the a more union-friendly administration could be beneficial to developers, and all workers generally.

Yet, even if the NLRB does not move in the direction of California and other states, the state's independent contractor law could have repercussions on video game developers. More than 900 video game-based companies reside in California and while these companies would look primarily¹⁷¹ to federal law and the NLRA, they also must concern themselves with California's state law. Once the California independent

¹⁶⁷ See *Penn. Interscholastic Athletic Ass'n, Inc. v. N.L.R.B.*, 926 F.3d 837 (D.C. Cir. 2019).

¹⁶⁸ See, e.g., *Velox Express, Inc.*, 368 N.L.R.B. No. 61 (2019).

¹⁶⁹ See *supra* Part III C.

¹⁷⁰ See Alexia Fernandez Campbell, *How a Controversial Gig Economy Bill Became a Test for 2020 Candidates*, VOX (Aug. 27, 2019), <https://www.vox.com/2019/8/27/20833233/ab-5-california-bill-candidates-vote>.

¹⁷¹ See Patrick Shanley, *California's Video Game Industry Dominance May be in Jeopardy*, THE HOLLYWOOD REP. (Feb. 13, 2018), <https://www.hollywoodreporter.com/heat-vision/californias-video-game-industry-dominance-may-be-jeopardy-1084156>.

contractor law is in effect, pending litigation,¹⁷² video game developers and their management are faced with a peculiar question: do they conform to the new law or do they sue in federal court like Uber? Again, federal law takes precedence and, if properly challenged, it would seem that the NLRA's long standing precedent on independent contractors would prevail over the California law.¹⁷³

If, however, developers yield and comply with the California law, it could result in significant financial consequences. Employees are entitled to an assortment of benefits and rights that independent contractors are not, including workers compensation and paid sick and family leave. One potential side effect could be staff reductions and the elimination of any independent contractor positions on levels greater than those the industry has previously experienced. This could be especially true in larger studios which could spread the responsibilities of those lost positions around the studio to current employees. Smaller studios, or studios in positions unable to eliminate positions, could face severe fines and punishments.¹⁷⁴ The studios could potentially band together, or with other tech companies like Uber, contest the law; however, with the rising costs of litigation, game studios may decide to just sit back and let the current litigation play out.

V. CONCLUSION

In spite of the dark journey Jin must endure to save his home in Ghosts of Tsushima, he and his friends never give up hope that they will eventually defeat those who threaten them and their families. All in all, the present reality of labor law may seem bleak for workers and four more years of a Republican controlled White House could portend even more serious intrusions into the rights of workers and unions. However, just like Jin and the inhabitants of Tsushima in Ghosts of Tsushima, not all is lost; the tides are clearly turning among the general population and the Democratic Party is clearly showing what side they stand on.

¹⁷² See Chris Isidore and Rob McLean, *Uber and Postmates sue California to Block Gig Economy Law*, CNN BUS. (Dec. 31, 2019), <https://www.cnn.com/2019/12/31/tech/uber-postmates-sue-california-gig-worker-law/index.html>.

¹⁷³ This is clearly just speculation. At this point, it is unclear where the Uber lawsuit will go and whether it gets to the Ninth Circuit or even the Supreme Court is a question only time will tell as of writing.

¹⁷⁴ See Kimberly Culp, *California's New Law Changing the Rules for Contractors may mean Big Changes for Indie Video Game Studios*, CARR MCCLELLAN (Sept. 19, 2019), <http://www.carr-mcclellan.com/insights/californias-new-law-changing-the-rules-for-contractors-may-mean-big-changes-for-indie-video-game-studios/> (The new law "creates aggressive new enforcement mechanisms for violation of the law" including injunctive relief and prosecution by city attorneys or California's Attorney General.).

The American Labor Law system is highly complex with few definitive answers available to those who wish to unionize. The NLRA does codify many rights that workers have and other federal statutes protect their rights as employees, and if it were as simple as enforcing those individual rights then this topic would not be the hot button issue it is among video games journalists.¹⁷⁵ Yet this issue concerns rights that many feel are best obtained through employee organization, and whether or not that is the best way for developers to exercise and obtain those rights, video game developers do have a rugged path before them if they truly want to organize.

This comment is not meant to deter video game developers from organizing (nor any worker for that matter). Many in the industry have weighed in with their opinions on countless occasions, both for unionization and against it, while others still have longed for the two sides to realistically admit to the pros and cons of developers unionizing.¹⁷⁶ This comment is following in the light of the latter; it is meant to help shed light on a very treacherous area of the law for those in the industry and those who want to assist them through this complicated legal framework. Many video game players often use guides and walkthroughs to help them get through portions of games that they cannot figure out or get past, and this is what this comment is meant to accomplish more than anything else, to help describe the path, in spite of the fact that the path is ever changing.

From the structure of their union to what their union could face from the NLRB and federal courts, the journey certainly could be complicated and as shown unclear. With all the different variables at play, there is no concrete answer for those working in the games industry. They might face every challenge possible and have to maneuver their way through the federal labor law system to enforce their rights. After all, there are many people who insist that the labor law system has been full of bugs, even before Trump took office,¹⁷⁷ and that the system would be broken even without the Trump brand.¹⁷⁸ As such, it is also possible that these glitches continue into the Biden Administration, despite Biden being a seemingly more friendly voice to workers than Trump.

¹⁷⁵ Additionally, if this issue were that easy to resolve, this comment would not need to be more than five pages.

¹⁷⁶ See, e.g., Colin's Last Stand: Side Quest, *The Truth About Game Developer Unionization*, YOUTUBE (Feb. 11, 2019), <https://www.youtube.com/watch?v=DLELQLeIvpg>.

¹⁷⁷ See Michel Coutu et al., *Broken Paradigms: Labor Law in the Wake of Globalization and the Economic Crisis*, 34 CLLPJ 565 (2013). The authors begin their paper with a brief description of the "crisis of labor law" in the United States and Canada, before diving into their more specific topic.

¹⁷⁸ See Andrew Strom, *Even Without Trump, Labor Law is Still Broken*, ON LABOR (Mar. 23, 2018), <https://onlabor.org/even-without-trump-labor-law-is-still-broken/>.

There may however be a light at the end of the tunnel for workers, as successes in organizing could highlight the value of unionization for both sides. For example, a Swedish studio, Paradox Games, recently announced the “impending completion of a collective agreement” between management and their respective union, SACO.¹⁷⁹ While Paradox’s successful bargaining still remains an outlier in the video game industry (on top of the fact that Paradox is a Swedish studio), it does show that organizing is possible in the games sphere. More recently, employees at Blizzard, one of the largest and most fabled developers in the industry, are speaking out against the company’s treatment of workers and demanding various changes, including increase to employee salaries and vacation and sick time.¹⁸⁰

At the end of the day, however, the decision is ultimately in the hands of developers themselves; despite all the calls and campaigns, no one else can organize for them. They must be the ones to pick up the controller, press start, and jump into Level 1. If they truly feel they are being taken advantage of or that their working conditions are in desperate need of change and that their employer would not listen to their opinions on an individual level, then lawyers and advocates alike will be there to give them the run down on this complex and adversarial landscape. Like a video game, unionization has different levels and potentially even a boss fight or two at the end of the road, but if they decide to play the game, they will surely have some extra lives to help them along the way.

¹⁷⁹ *Paradox Interactive to Sign Collective Bargaining Agreement with Labor Unions*, PARADOX INTERACTIVE (Jun. 3, 2020), <https://www.paradoxinteractive.com/en/paradox-interactive-to-sign-collective-bargaining-agreement-with-labor-unions/>.

¹⁸⁰ Jason Schreier, *Blizzard Workers Organize on Company Slack Seeking Pay Increases*, BLOOMBERG (Aug. 5, 2020), <https://www.bloomberg.com/news/articles/2020-08-05/blizzard-workers-organize-on-company-slack-seeking-pay-increases>.