Chapter 46
Finding the money

As the profit-sharing case brought against the Columbia Falls Aluminum Co.'s owners proceeded through the courts of opinion and law, unlikely players joined with the usual suspects in the high drama. Once the owners decided to cut off profit-sharing entirely, they lost the support of most employees and Flathead County residents. As the union's labor contract came up for renegotiation, the owners turned to the carrot and stick – first offering a dime-on-the-dollar settlement offer and then bringing in a security force from Appalachian coal country. In an unusual twist, one of CFAC's tolling customers tipped off the lawsuit's plaintiffs and the media about a shell company used by the owners to hide transactions. The owners and their loyal plant managers responded with public criticism and a counter-suit. The labor contract proposed by the owners in 1995 officially wiped out the profit-sharing agreement for the hourly workers, but when the union members voted the proposal down, top government officials stepped in and successfully persuaded the workers that keeping the smelter running was more important than employee bonuses. Some of these top government officials had earlier played a role in helping Brack Duker and Jerome Broussard get CFAC started in the first place – with a 50-50 profit-split as part of the package.

Roberta Gilmore's 1993 lawsuit against CFAC owners Duker and Broussard was handled by the Kalispell law firm McGarvey, Heberling, Sullivan & McGarvey. As the case grew in size and complexity, according to one account, the partners eventually "mortgaged everything they owned" to borrow the $850,000 needed for projected legal costs. The law firm located an "empty" company in the Cayman Islands where they believed Duker and Broussard were funneling the workers' shares of the profits. Duker responded by offering the workers $12 million to settle the case. Later the lawyers learned of offshore bank accounts on the Isle of Mann and Gibraltar where the owners were holding the workers' money. Duker responded again with a settlement offer of $50 million.

More time dragged on and finally, five days before Christmas 1997, Duker offered the workers $97 million. Many employees felt they were not getting all their money, but they were persuaded by the lawyers that it made sense to take the money and forget about a lengthy trial. The workers voted 4 to 1 to accept the offer. Of the total offered in the settlement, $65 million went to hourly workers, well below the $100 million they believed Duker and Broussard owed them. The salaried workers received $32 million, about two-thirds of what they claimed was theirs. The lawyers, who had worked for six years on the case without pay, took home $6 million for the salaried employees' case and $6.5 million for the hourly employees' case. Then as the story was winding down, an attorney from Polson who worked for CFAC's owners, went to court claiming Duker owed him $3 million for keeping the settlement under $100 million. [1]

'Distributable profits'

The first gatekeeper in the profit-sharing case was Leif Bart Erickson, the federal magistrate judge in Missoula. U.S. magistrate judges exercise jurisdiction over matters assigned by statute as well as those delegated by U.S. district judges, which varies considerably from court to court. Magistrate judges may preside over most phases of federal proceedings, except for criminal felony trials. While district judges are nominated by the President and confirmed by the U.S. Senate for lifetime tenure, magistrate judges are appointed by a majority vote of the federal district judges of a particular district. They serve terms of eight years if full-time or four years if part-time and may be reappointed. After graduating from law school at the University of Montana, Erickson entered private practice in Helena before serving as deputy district attorney for Lewis and Clark County. He was re-elected in 1988. Erickson was appointed a Montana state judge for the 11th Judicial District in Kalispell in December 1985, and he was appointed a federal magistrate judge in 1992. His father, Leif Erickson, served on the Montana Supreme Court in the 1930s. [2]

The second gatekeeper in the profit-sharing case was Jack D. Shanstrom. Born in Hewitt, Minn. in 1932, Shanstrom received his bachelor's of arts degree from the University of Montana in 1956, a bachelor's of science degree from the University of Montana in 1957 and a law degree from the University of Montana's School of Law in

1957. He served as a U.S. Air Force first lieutenant in the Judge Advocate General's Corps from 1957 to 1960, set up private practice in Livingston, Mont., from 1960 to 1964, served as Park County Attorney from 1960 to 1965, and was the state district court judge for Park County from 1965 to 1982. Shanstrom served as a prosecutor in Livingston's wilder days and was appointed the Park County judge by Gov. Tim Babcock when he was only 30. During his 18 years on the state bench, Shanstrom ran a 110-trap line from Gardiner to Livingston, filled his elk tags with bulls each fall, fished the Yellowstone River and raised a family. Later in life, his fishing companions "became the A list's A list." Shanstrom became a federal magistrate judge in Billings in 1982, where he made his name as a mediator. Soon after he had cleaned up the federal docket in Montana, Shanstrom started receiving calls from the Ninth Circuit and traveled up and down the West Coast settling cases. According to one estimate, Shanstrom mediated more than 1,000 cases and saved litigants on average about $25,000 in attorneys' fees and costs – about $25 million altogether. Shanstrom served as Chief Judge in Montana from 1996 to 2001, assumed senior status in January 2001 and retired from the federal bench on Sept. 15, 2013. [3]

By summer 1993, as the profit-sharing lawsuit began to make progress in the courts and make waves in the media, CFAC's owners decided to take steps to cut off profit-sharing entirely. CFAC General Manager John Cook held a series of meetings with company employees in July explaining the impact of the profit-sharing lawsuits on the company's business. Cook explained that aluminum plants needed to borrow money from time to time to get them through tough times. "CFAC's ability to borrow cash, however, is restricted by the natural reluctance of lending institutions to loan money to a company enmeshed in lawsuits," he told the employees. Cook explained to media that he had tried to avoid dealing with the profit-sharing issue in order to concentrate on running the plant. He pointed out that with continuing low aluminum prices and higher electrical power rates in fall 1993, the company could be operating in the red by October and out of cash reserves by spring 1994. [4] Cook added that the plant had been productive so far in 1993 despite running at 75% capacity, and he pointed to numerous projects that were underway to improve the

efficiency of the aluminum reduction pots and to reduce service costs. [5]

On Dec. 8, Cook issued a plant-wide memo with a simple statement: “Due to the forecast financial position of the company in 1994, the Board of Directors has determined that there will be no distributable profits for the year 1993.” [6] Later in December, Cook explained that the company’s board of directors, composed simply of Duker and Broussard, had decided no profit-sharing checks would be issued for 1993. Although the plant had operated in the black for most the year, CFAC ran at a loss during November and December, which suggested the company could be in trouble for 1994. Cook explained that the company wanted to keep more cash in reserve for potential difficulties in 1994. The losses for November and December 1993 were not unexpected, but the outlook for 1994 was bleak, he said. CFAC had cut its workforce by 124 jobs in 1993 from a previous workforce of 700, and Cook had initiated a serious restructuring effort to trim costs. [7] CFAC Vice President Lee Smith confirmed that the plant had operated in the red during November and December 1993. Aluminum prices fell from about 50 cents a pound to 47 to 48 cents during fall 1993, he said. CFAC management was keeping a close eye on negotiations between the Clinton administration and the former Soviet Union over the flood of cheap aluminum that caused world prices to plummet. [8] Smith repeated his grim forecast a month later in January 1994. Two factors could make things worse for 1994, he said – continuing low metal prices along with electrical shortages and rate increases. [9]

Aluminum Workers Trades Council President Lowell Eckelberry responded to Cook’s announcement on Dec. 9. Eckelberry acknowledged that the company faced difficult times, with high electrical power costs and low metal prices, but AWTC officials didn’t have access to the company’s books and couldn’t ascertain the overall situation, he said. “While we understand the importance of having sufficient cash flow for the year 1994, we do not know if there is a need to retain profit in reserve accounts at this time,” he said. Eckelberry also acknowledged that the union’s profit-sharing agreement gave the company’s board of directors the discretion to reasonably choose not to distribute profits for the year, but “this right does not confer on the Board of Directors a right to distribute profit to

the owners of CFAC while withholding from the employees their entitlement to share in fifty (50%) percent of distributed profits." He also noted that because CFAC had taken the position that the profit-sharing dispute could not be addressed by the union's grievance process, "no grievance will be filed as it would be futile to do so." In any event, he added, the matter was already in court. [10]

C.J. Giroir, a Little Rock, Ark., attorney representing CFAC in the profit-sharing case, responded in a letter to Eckelberry on Jan. 10, 1994. "First, I wish to correct a misstatement contained in the first paragraph of your letter," Giroir said. "The Board of Directors did not decide 'not to have a profit-sharing distribution for the year 1993.' What the Board did was determine that there were no distributable profits in 1993." [11] As the newly elected president of the labor council that represented the 11 production and craft unions, Eckelberry had to play catch-up in the profit-sharing case – first comprehend that the owners had cheated the workers on such a grand scale, next find a legal strategy to reclaim the workers' lost money, and then lead the workers in hostile negotiations for a new labor contract in 1995. Born in Kalispell in 1946, Eckelberry attended school in Columbia Falls until he was 17, when he joined the U.S. Navy. He served a tour in Vietnam and left the Navy after four years in 1967. Eckelberry worked for a short time at Plum Creek until he landed a job with the Anaconda Aluminum Co. in 1968. Over the next four decades, he held various AWTC offices and served as president of Aluminum Workers of America Local 320, the union for production workers. An avid hunter and fisherman, Eckelberry retired in 2008. [12]

In mid-April 1994, the Hungry Horse News reported that the class-action profit-sharing lawsuit was "entangled" in federal courts but moving closer to "a settlement by next month." Gilmore and CFAC's owners had entered motions for summary judgment which were scheduled for a hearing in May by Judge Erickson. He had ruled in March 1994 that the lawsuit must be tried as a class-action, but that ruling was headed for review by Judge Shanstrom. [13] On Sept. 16, the Aluminum Workers Trades Council filed a motion for partial summary judgment. The motion requested a ruling by the court that CFAC employees were entitled to 50% of the actual profits distributed by CFAC. A specific dollar amount was not stated. [14] In a counterclaim to

the plaintiffs' brief, attorneys representing Duker and Broussard addressed the issue of Attachment B to the 1985 labor contract, which stated the existence of a profit-sharing agreement between the union and the owners. The counterclaim offered a meaning for "distributable profits." "Distributable profits were generally defined as the net operating income at the plant less a provision for income taxes and operating needs of the company, such as capital expenditures and working capital requirements," the counterclaim said. "Over the years, the directors developed a methodology for determining distributable profits. They would look at the estimated net income, deduct 50% for taxes, 5% for capital improvements and an amount for working (capital) and contingencies with the remainder being distributable profits." Based on that formulation, CFAC's attorneys estimated that more than $90 million was paid out in profit-sharing through 1992. CFAC's attorneys went on to point out that the existence of an agreement with the hourly workers to share profit-sharing was "not in dispute. Attachment B provides that. Both Duker and Broussard have testified that is CFAC's obligation." [15]

On Sept. 22, 1994, union attorneys Tom Powers and Mike LaBelle wrote to active and retired hourly employees informing them of developments in the case, including the motion for partial summary judgment. The claim to 50% of the company's profits would be based on five major theories: 1) the profit-sharing benefit existed in the 1985-1995 collective bargaining agreements; 2) CFAC employees could enforce the profit-sharing provision in the third-party agreement between ARCO and the Montana Aluminum Investors Corporation, the corporation that was created in 1985 to buy the smelter plant from ARCO; 3) CFAC employees could enforce the Employee Retirement Income Security Act (ERISA) plan that incorporated the 50% profit-sharing promise; 4) CFAC employees could prove that ERISA fiduciary duties were violated by CFAC, Duker and Broussard; and 5) CFAC employees could prove that Duker and Broussard were personally responsible for all the money they received from CFAC in excess of 50% of the profits. Powers and LaBelle also explained how long the case could take. There was no time limit on the judge's deliberations after written and oral arguments were completed. CFAC's earlier motion for summary judgment, for example, had remained undecided for a year, and Gilmore's motions argued in April 1994 and her motion

for summary judgment argued in June were still awaiting decision. Powers and LaBelle felt that, after reviewing a great deal of the company's financial records with accountants, CFAC would have a profitable year in 1994. They cautioned that if CFAC's owners chose not to provide any profit-sharing money to the employees for 1994, "anger over that decision be directed properly and legally, by pursuing this lawsuit." [16]

Attorneys for CFAC, Duker and Broussard filed a motion for summary judgment on Jan. 25, 1995, arguing that the profit-sharing plan was governed by ERISA, that the plan gave CFAC sole discretion to determine the meaning of distributable profits, and that the union and the salaried employees' claims under state law were pre-empted by ERISA. The three arguments were denied by Judge Shanstrom on July 23, 1997. The defendants' attorneys also argued that AWTC had waived its claim to profit-sharing because of statements contained in a letter written by AWTC President Larry Craft on Dec. 28, 1990. Judge Shanstrom, however, agreed with an earlier decision by Judge Erickson that a waiver required a "voluntary and intentional relinquishment of a known right," and that if AWTC believed the profit-sharing plan was being administered correctly when in fact it was not, Craft's statement would not constitute an intentional relinquishment of a known right. The defendants' attorneys also argued that AWTC's claim for breach of the labor contract was barred by the labor contract's 10-day grievance period. In an affidavit, Craft claimed that AWTC became aware of the underlying breach of the labor contract on Jan. 31, 1992 and filed a grievance within 10 working days of obtaining this information. On July 23, 1997, Shanstrom ruled that Craft's affidavit was sufficient to preclude summary judgment on this point. [17]

Rallying for justice

While the plaintiffs' attorneys filed motions and hunted for evidence, the hourly workers united under a rallying call with multiple meanings. In 1995, Jack Rogers, a potroom ironworker and union officer, gathered money from other workers at the plant to pay for construction of a neon sign with the letters EFP formed into a circular logo. Rogers had the sign erected on his mother's property near the corner of Aluminum Drive and the North Fork Road. Money was periodically collected to pay for the sign on a voluntary basis. Over time, the letters EFP were

scrawled in chalk, paint or magic marker on walls and equipment all over the plant, and a T-shirt was available at a Kalispell shop with the words “Neon Warrior” surrounding the logo. [18] Depending on the source, the acronym stood for “Every Fine Penny,” “Every Filched Penny” or “Every Fucking Penny.” When attorneys working on the case found missing money hidden in offshore banks, workers told reporters that EFP could stand for “Every Foreign Penny.” At one point, CFAC sued to get the sign taken down, arguing that it was inflammatory and, under some interpretation, vulgar. An attorney for the workers argued it was protected speech. [19]

As late as August 1999, evidence of low worker morale still was visible around the smelter. Bumper stickers and other kinds of professionally printed material were seen attached to hardhats and vehicles. Graffiti could be found on walls in restrooms and shops, on the sides of vehicles and on the concrete columns and walls in the basements beneath the reduction pots. Some markings were small and indecent, while others were long and drawn out poems or cries for attention. Most were attacks on Duker and Broussard. The acronym EFP could be seen written all around the plant. The logo on a John Deere forklift was modified with some green paint to read “John EFP.” One worker said EFP bumper stickers were made on a printer in the plant laboratory or at a local sign shop. Other computer printers in the plant were used to make EFP labels small enough to fit across the front of hardhats. The letters EFP were scrawled in Magic Marker or chalk all over the basements in the potlines. But as the profit-sharing case drew to an end, and it became apparent the workers were never going to get “every fucking penny,” a new acronym appeared right next to EFP to account for the change. OBO, short for “Or Best Offer,” was a standard phrase used in the local Mountain Trader, a free weekly classified advertiser often brought to the plant by the workers. For the workers, it was like a shrug of the shoulders, as if the workers were laughing a little and saying to themselves, “Well, what did you expect?” or “Life goes on.” [20]

With all the anger and frustration generated by the profit-sharing case, attorneys, plant workers and local residents were quite surprised to hear on Sept. 18, 1995, that Colleen Allison, a Columbia Falls city councilor and former mayor, reportedly had been assaulted at her

home on Martha Road. The Hungry Horse News suggested in the lead paragraph that “the fight over the future of the Columbia Falls Aluminum Company apparently spilled over onto her front stoop.” The newspaper reported that the 67-year-old, 4-foot 11-inch city official reportedly was assaulted by a “very large man” who also vandalized her home. According to Allison’s report, she had returned home from a city council meeting about 11 p.m. and was taking the garbage to her apartment building’s storage area when a tall middle-aged man wearing dark clothes and a red T-shirt attacked her from behind and slammed her into the wall of the storage building. She said her head hit the building and she fell back against her car. The assailant fled, leaving her bruised and aching, and she went inside and called police. [21]

When the police arrived, they discovered a message spray-painted on the side of the storage building that read, “Don’t Save the Plant.” The message was believed to be connected to the profit-sharing lawsuit at the aluminum plant. In 1985, as mayor of Columbia Falls, Allison was active in a grassroots effort to prevent the plant from closing which organized under the slogan “Save the Plant.” Residents had rallied around the slogan and “turned out in droves” at Bonneville Power Administration hearings for proposed high electrical power rate increases. Allison told the police she was no longer actively involved with the aluminum plant’s affairs. “I’m certain it was an isolated incident, and I would hope that it wouldn’t happen again,” she said. CFAC had recently brought in 18 security guards from a Virginia firm in response to alleged threats toward the company’s management and owners, but CFAC management would not elaborate on the nature of those threats. Allison said CFAC offered to provide her with security guards, and they were present at her apartment the next day, but she questioned the necessity of having two guards at her home. “I’m feeling a little bit silly,” she said. “I can’t believe this isn’t isolated and I can’t believe this town isn’t safe.” [22]

Eleven days later, Allison reported to city police that she had received a threatening phone call in which the caller mentioned the aluminum plant. [23] On Sept. 29, the Daily Inter Lake published a large advertisement in which CFAC offered a $10,000 reward for “information leading to the arrest & conviction of the person who

attacked Colleen Allison outside her home in Columbia Falls and wrote the words: ‘Don’t save the plant’ on her carport wall.” The ad was “paid for by CFAC, Tom Hodson, President.” The ad explained, “We at CFAC are shocked and outraged by this cowardly attack on a citizen of our community.” [24] The mysterious caller had told her she “couldn’t get far enough away” to be safe, and a letter received in the mail made of clipped-and-pasted words warned her to beware at night. The letter was turned over to the Columbia Falls city police, and Allison reviewed photographs of workers at the CFAC plant in an attempt to identify her assailant. By mid-October, Allison continued to be guarded at her home in Columbia Falls. [25]

On Feb. 24, 1996, Allison called police and reported that two men wearing ski masks had assaulted her at her home. This marked the second assault she had reported in six months. Allison said she had returned home from a dinner with relatives and was escorted into her apartment by a bodyguard. After making sure the place was secure, the bodyguard left and Allison set the security alarm. Minutes later, at 8:30 p.m., she heard a knock at the door. Not tall enough to look through the peep hole, she asked the person to identify himself. The man called out a familiar name and she opened the door. Allison said she fought the two men off as they tried to drag her to a pickup truck parked in the street while her tiny dog Button barked frantically. Eventually the assailants dropped Allison in a rock garden and fled the scene, she told police. Since the first attack in September 1995, Allison said, she had received an increasing amount of mail from the person police believed was behind both attacks. The letters referred to Allison’s ongoing support of economic development, including the timber industry and CFAC. Columbia Falls Assistant Police Chief Dave Perry said the only evidence in the case were the letters sent in the mail. “We have no witnesses in the attacks, and we have no suspects,” he said. “The circumstances in this case are strange.” Perry added that the political connection indicated the case was not a “stalker situation.” [26] Hungry Horse News publisher Brian Kennedy called threatening Allison “sheer craziness” in a Feb. 29 editorial. “None of this makes sense,” Kennedy said. “Allison was voted out of city office and is no threat to anyone. The aluminum plant business that keeps coming up in this case seems like a smokescreen for something else.”

Kennedy said he hoped the police “catch this nut and put an end to this craziness.” [27]

The assault case took an unusual turn on March 7, 1996, when Assistant Chief Perry revealed for the first time that Allison was being investigated for the possibility of fabricating reports about the two assaults and the threatening letters she said she had received. Police refused to describe what made them suspect Allison. Evidence in the case so far had included a psychological profile that Allison paid for herself, eyewitness testimony from two CFAC security guards who were present when she received two threatening phone calls, and the threatening letters which were made on Allison’s own stationary. [28] Allison responded by saying she understood why Perry made his announcement. “This is how the process should work,” she said. “They are doing their jobs.” Perry said Allison would be asked to take a polygraph test and provide a sample of her handwriting and fingerprints. With no solid evidence and no witnesses, Perry said police were investigating every angle, including whether any of the reported incidents ever happened. Allison said she was innocent of inventing the events. She also noted that the ever-present security measures were making her life “a living hell.” “Why would anyone do this to themselves?” she asked. “I no longer have the freedom that I have always enjoyed. I want this to be over so I can get on with my life.” [29]

In May 1996, Allison turned over another unopened card to Perry, who by then was the Columbia Falls acting police chief. The card was marked with the same blocky handwriting used in the other threatening letters. Flathead County Attorney Tom Esch said he asked Allison to submit another handwriting sample for analysis. This time, she was asked to give a rendering similar to the blocky writing. By early July, Allison decided to give up her high-profile lifestyle and leave the Flathead for several months. Allison said she would move into a safer apartment with a drive-in garage. A longtime civic leader, she also decided to step down as the coordinator for the CARE drug awareness program at Columbia Falls schools. [30] By September 1996, Esch said his office was still gathering evidence and had five years in which to charge Allison. Allison by then was living in Idaho. “I think a person is entitled to be cleared publicly,” she said. “I think seven months is a bit long to keep me in limbo.” [31]

The magistrate's findings

While a police drama unfolded in Columbia Falls, most of the action in the profit-sharing case was taking place in attorneys' offices and court rooms. On Feb. 27, 1995, Judge Erickson issued a number of key findings and recommendations in Gilmore vs. CFAC, Duker and Broussard. Gilmore had sued Duker and Broussard in her individual capacity and as a representative of all present and past salaried employees of CFAC as a combined cause. She sued for breach of contract, wrongful denial of contract, tortious breach of fiduciary's duty to disclose, fraud, constructive fraud and bad faith, and the defendants sought a summary judgment. In general legal terms, a summary judgment could be granted under the Federal Rules of Civil Procedure if "the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The initial burden fell on the party seeking summary judgment to demonstrate the absence of a genuine issue of material fact. [32]

Among Judge Erickson's Feb. 27 findings were: 1) the plaintiffs had made a prima facie case showing that a compensation agreement existed prior to the establishment of an ERISA plan at CFAC; 2) the terms of this agreement were disputed; 3) bonus payments by CFAC were not systematically deferred to the ERISA plan; 4) bonus payments by CFAC were made in cash unless the employee deferred them to an ERISA plan; 5) the bonus payments provided current income to CFAC employees, not retirement income; 6) the plaintiffs' ERISA claims fell under the jurisdiction of the federal court; and 7) the plaintiffs' claims based on a prior compensation agreement were governed by state law, but the federal court retained pendent jurisdiction. The federal court adopted these findings with some modifications by orders filed Sept. 18, 1995 and Jan. 16, 1996 – including the finding that any terms or conditions in CFAC's ERISA plan that conflicted with the finding that the employees were entitled to 50% of the company's profits would be considered void and unenforceable. [33]

Judge Erickson found that the plaintiffs had provided substantial evidence that a contract existed between the defendants and CFAC's salaried workers that provided for compensation, not benefits, and that therefore profit-sharing claims fell outside the scope of ERISA. A

contract could be governed by ERISA if it was an employee welfare or pension benefit plan that fell within the scope of the federal ERISA statute, or if the contract was sufficiently related to an ERISA plan, he found. The Employee Retirement Income Security Act of 1974 was passed by Congress as a remedial statute designed to protect the interests of employees in pension and welfare plans as well as to protect employers from conflicting and inconsistent state and local regulation of such plans. Therefore, ERISA pre-empted “any and all state laws insofar as they… relate to any employee benefit plan,” Judge Erickson said. According to the statute, ERISA provided for civil actions by participants or beneficiaries of a plan “to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” Over the years, courts had ruled that certain kinds of employee compensation did not fall under ERISA regulations, such as lump-sum severance benefits, Judge Erickson said. For employee compensation to fall under ERISA regulation, the compensation had to fall within the scope of a plan. “The regulations construing ERISA explicitly exclude wages from the definition of ‘employee benefit plan,’” Judge Erickson said. “ERISA does not cover compensation even when that compensation is given in a unique form.” [34]

Judge Erickson also pointed out that ERISA regulations stated that a covered pension plan “shall not include payments made by an employer to some or all of its employees as bonuses for work performed, unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees.” He also explained that ERISA did not cover “current income” as contrasted to retirement income, as ruled in the Fifth Circuit. In the CFAC profit-sharing case, substantial evidence existed to show that a compensation contract existed between the defendants and CFAC’s salaried employees prior to the creation of a 401(k) plan. Furthermore, the amount of money provided in the profit-sharing contract “provides far more money than can be handled by a 401(k) plan,” he noted. U.S. Internal Revenue Service regulations limited the amount of income that could be deferred from taxing and deposited into a pension plan like a 401(k) to no more than 25%. [35]

The plaintiffs also had presented evidence that salaried employees had received their profit-sharing checks directly from CFAC, and that the payments were never handled by the trustee or administrator of the 401(k) plan. When the profit-sharing agreement was made between the Montana Aluminum Investors Corporation and ARCO in 1985, it did not contemplate a specific plan or method for fulfilling the obligation, Judge Erickson noted. As the plaintiffs had argued and the defendants had admitted, the agreement was a promise to pay CFAC's salaried workers a "substantial portion" of profits in return for a wage cut. "An agreement to pay a bonus based on profits in consideration for the employee agreeing to take a reduction in regular pay constitutes a labor contract completely independent of any employee benefit plan as defined in ERISA," Judge Erickson found. The fact that the 401(k) plan, as later amended, referred back to the initial profit-sharing promise did not implicate the initial agreement with the subsequent plan, Judge Erickson said. However, a 1990 plan amendment related back to the 1986 plan document by defendant's own admission, and this meant that the plaintiff had standing to bring a civil action under ERISA for any remaining ERISA claims. [36]

Another major issue covered in Judge Erickson's Feb. 27 findings and recommendations was whether Duker and Broussard had any duty to the plaintiffs as fiduciaries under the 401(k) plan. Judge Erickson referred to a recent U.S. Supreme Court ruling that stated that ERISA "provides that not only the persons named as fiduciaries by a benefit plan… but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets… is an ERISA 'fiduciary.'" According to Judge Erickson, if "Duker or Broussard improperly withheld the deposit of such funds, but rather diverted them to their own use, then they have exercised discretionary control or authority over the plan's assets thus constituting them fiduciaries." Erickson ruled against the defendants' request for a summary judgment, saying a genuine issue of material fact existed concerning the role Duker and Broussard had played in relation to the 401(k) plan, particularly with regard to funding the plan. "Regardless of whether Duker and Broussard are ERISA fiduciaries, if they have received profits that rightfully belong to all plan participants and beneficiaries, they are constructive trustees of those profits and, as such, are properly named defendants," Judge Erickson said. [37] In a

March 6, 1995 update to CFAC's salaried employees, Allan McGarvey and Roger Sullivan explained that a constructive trustee was "a person who, by operation of law, holds money which belongs to someone else and who must return it to its true owner." [38]

In another key decision, Judge Erickson found on March 9, 1995, that Duker and Broussard had an obligation to pay 50% of the company's distributable profits to its employees. The case would head next to Judge Shanstrom in Billings. According to Roger Sullivan, the employees had received $84.2 million through 1991 while the owners took $231 million – the employees claimed that Duker and Broussard improperly withheld about $100,000 on average per worker over that time period. Judge Erickson upheld the plaintiffs' theories that a contract existed between the salaried employees and the owners, Sullivan said, but what constituted "distributable profits" was yet to be determined. [39] CFAC's attorneys had argued that claims by employees under state law were pre-empted by federal law, and that the employees had no claims under federal law. The employees' attorneys claimed that the owners' promise to pay 50% of the profits was enforceable under either law. In a related matter, CFAC's attorneys said Duker and Broussard sought to remove their names from the case, saying CFAC was the sole defendant. Judge Erickson, however, found that the two owners were "constructive trustees" and should remain defendants. [40]

Reactions and claims

The reaction to Judge Erickson's findings was swift and not unexpected. On March 11, 1995, Stuart Schneck, general counsel for CFAC, sent a message to CFAC employees from his office in Oakland, Calif., informing them of the company's position on Judge Erickson's advisory ruling that CFAC employees were entitled to 50% of the company's distributable profits. "We are prepared to stick with this case as long as it takes," Schneck said. He also warned the employees about lengthy litigation. "It is unreasonable to expect any kind of final decision by the end of 1996, even if it goes to trial then," he said. [41] "Unfortunately, what you were told is not exactly what happened," Schneck told CFAC employees. Schneck went on to characterize Judge Erickson's statements regarding motions for summary judgment as recommendations only, noting that Erickson's recommendations would

be reviewed by Judge Shanstrom. Schneck added that “we feel it is more important to concentrate on the more immediate issue of keeping our business going along with the many jobs that we provide and we urge CFAC employees to do the same.” [42] Meanwhile, Tom Powers wrote to Lowell Eckelberry on April 17 explaining Judge Erickson’s findings and recommendations to the union leader. [43]

In an April 26 letter to the Hungry Horse News, CFAC employee Gary Johnson was sharply critical of the promises made by Duker in 1985. “I remember standing in a big fan room in the rectifier station with a bunch of other employees, and Brack Duker, looking like a politician, was barking, ‘We gotta hit three home runs if you want this plant to survive. Number 1, we need labor concessions. Number 2, we need a reduction in transportation costs, and 3, we need a substantial power rate reduction coupled with a tax break. If we hit these three home runs, I will split the profits with you 50/50. I make a buck, you make a buck.’ The employees, with state and local help, hit the three home runs, and for a few years the new company prospered.” Johnson said the wage and benefit cuts CFAC workers took in 1985 returned their base wage back to 1977 levels, and profit-sharing became a variable wage. “Soon after the lawsuits were filed, the profit sharing stopped entirely,” Johnson said. “The 600-plus employees of CFAC feel cheated, taken advantage of, disgusted and helpless. All they can do is watch and wait.” Johnson said the company attorneys’ stall tactics were hurting families and causing workers to lose their homes. “I can’t speak for all the employees, but I personally am willing to make whatever sacrifice is necessary to see Mr. Duker brought to justice,” Johnson said. “The greed he possesses is unequaled. The aluminum plant was virtually given to him by ARCO. The employees of the aluminum plant have made him a multi-millionaire. He shows his gratitude by not sharing profits the way he led us all to believe, and then by not sharing at all.” [44]

In early May 1995, AWTC’s attorneys withdrew their request to place CFAC in receivership, which they had filed after learning in December 1993 that CFAC’s owners possibly sold the plant to the Danielson Holding Co. The union had filed a motion on Dec. 10, 1993, for a writ of attachment to seize enough assets to settle the lawsuits, so if the plant was sold a portion of the money would go toward settling the profit-

sharing lawsuit. CFAC had argued that being in receivership put the company at risk, with the result that at least one tolling customer terminated its contract. Placing CFAC in receivership created “a risk to not only the defendant CFAC but also the claimants,” CFAC President Tom Hodson told media. The plaintiffs agreed with that point. “The employees don’t want a receivership that will interfere with operations of the plant,” Allan McGarvey explained about the decision to withdraw the receivership request. “But they want assurance that the plant won’t be sold and the money will still be there.” [45] Hodson also noted that the profit-sharing litigation could drag on into the year 2000, and the class-action case would not go to trial until late in 1996. [46]

In a May 22 letter to the Hungry Horse News, Eckelberry criticized news stories on why the union wanted to drop the receivership motion. Noting that some quoted material had come from confidential documents filed under seal with the U.S. District Court, Eckelberry also said the news stories failed to report that the Aluminum Workers Trades Council had not dropped its efforts to legally protect and preserve the assets of the company, including restricting the right of Duker and Broussard to take any money out of the company. “I cannot go into this subject in more detail because, unlike CFAC, I wish to honor to the fullest extent a protective order governing the parties in this case,” Eckelberry said. “Tom Hodson improperly quoted from this ‘sealed’ document and takes one phrase from our legal brief out of context.” CFAC’s owners apparently wanted to litigate the case in the press, he said – even after they had sought a protective order. [47]

Schneck responded to Eckelberry in the media a week later, disagreeing with Eckelberry about whether the documents the union wanted to see were sealed. Schneck said the documents were unsealed when the union’s attorneys asked to see them and CFAC complied. [48] On June 22, Eckelberry and Craft, by then the union treasurer, met with Powers and LaBelle and Jimmy Noe, a CPA for the Aluminum, Brick and Glass Workers International Union. The entire day was spent preparing questions for CFAC’s attorneys. The next day, the group met with the defendants’ attorneys and accountants to discuss the case. “I wish I could say that settlement talks took place, but they did not,” Craft reported. The union’s lawyers “now have a better grasp

of the financial relationship between MAIC and CFAC and the way the books are now being kept," he added. [49]

As a July hearing approached for ERISA arguments before Judge Shanstrom in Billings, U.S. Labor Secretary Robert Reich filed a brief in support of a finding by Judge Erickson on Feb. 27, 1995, that was favorable toward employees. Erickson's recommendation would have reduced the tax burden on employees, but CFAC's attorneys disagreed and filed objections to Erickson's advisory ruling. According to CFAC's attorneys, payments to the employees should be considered taxable income. [50] At the July hearing, CFAC attorney Ray Marshall noted that based on Judge Erickson's finding, the profit-sharing money would no longer be part of a retirement income savings account, and employees would be forced to pay back taxes, interest and penalties if they won their case. [51]

Claims that the profit-sharing case was intruding on CFAC business also continued. On Aug. 8, Tom Hodson sent a letter to CFAC employees claiming that Allan McGarvey was interfering in the company's day-to-day operations. According to Hodson, McGarvey's letter to CFAC's salaried employees criticized a new compensation plan that had been recently awarded to the salaried employees. "The fact is I'm no longer shocked. I'm mad," Hodson said. "Mr. McGarvey has absolutely no right – I repeat absolutely no right – to interfere with the day-to-day management of this company with actions that he knows has no role whatsoever in his legal cases against this company. Unlike Mr. McGarvey, who seems to be trying everything to shut CFAC down, we have been working hard to protect CFAC's future and the 600 jobs and millions of dollars in revenue that we provide the Flathead Valley." [52]

The profit-sharing story stepped up a notch by late summer 1995 as the union took steps toward signing a new labor contract at the plant. On Aug. 15, the Aluminum Workers Trades Council notified the company of its request to open negotiations for a new collective bargaining agreement. The expiration date of the plant's labor contract was Oct. 19. Union leaders were concerned that no profit-sharing checks had been distributed for several years. They were also concerned that the company had told the union no salaried employees would receive pay raises that might adversely affect profit-sharing for

hourly workers. On July 24, however, the company provided pay raises for all salaried employees that averaged nearly 38%, an action that represented a “blatant contract violation,” Eckelberry said. The pay raises for salaried employees were unfair, he said, because the union contract stipulated that any future raises would be provided across the board for hourly and salaried employees. Since the termination of profit-sharing, hourly workers were essentially working at 1985 pay levels. “The hatchet men hired by management to negotiate a contract and to run this company have no ties to Montana,” Eckelberry told local media. “They don’t care about Montana. They don’t care about the Flathead Valley. They don’t care about Columbia Falls. They don’t care about the workers at CFAC. All they care about is making a big paycheck.” He added that the hourly workers had more of a vested interest in keeping the company healthy and profitable over the long haul because they were mostly long-time residents of the area. “All we want to do is live here and make a living and pay our taxes and enjoy northwestern Montana,” Eckelberry said. [53]

CFAC counsel Stuart Schneck said he was surprised the union was upset about the pay raises for salaried employees, which were intended to improve the quality of the plant’s workforce. “We believe that there’s no basis for them to file a grievance,” he told the media. “We’re perfectly within our rights to give these raises.” Schneck also commented on the public discourse. “It’s unfortunate that all the rhetoric has to be out there and all the fighting has to be out there rather than sitting down and talking constructively,” he said. [54] But by September as contract negotiations approached, CFAC’s owners began to take a tougher stance against the union. First, they threatened to close the plant, and second, they hired a private security force that had worked for coal companies during violent strikes in Appalachia in the 1980s. The 18 guards wore uniforms and berets and carried surveillance cameras. “If we went out on strike, it was going to be hardball,” union leader Terry Smith recalled later. Duker also offered to reinstate the wage scale prior to 1985 in exchange for eliminating future profit-sharing. Facing the prospect of a long strike, the workers agreed to his terms. [55]

A private army

In early September 1995, Tom Hodson issued a notice to all CFAC employees that the company had contracted with an out-of-state company to provide additional security at the plant “because of intensified security concerns.” He added, “They’re here for your protection and the protection of our company.” [56] Eighteen security guards from the Asset Protection Division of Vance Security, a security firm based in Oakton, Va., first appeared at the plant on Sept. 8. Craft called the move “intimidating” in light of upcoming contract negotiations between the union and CFAC. Ordinarily the plant operated with only one guard per shift. “These guys are arm breakers,” an employee told local media. “It’s the intimidation factor, it’s frightening, it’s like something out of the movies. If they lock us out, it will be very hard for us to continue with the (profit-sharing) lawsuit.” Craft said he was told by CFAC managers that the security force would remain at the plant until Oct. 19 – the day the labor contract was set to expire. Craft noted that the security guards were armed only with still cameras and video cameras, which they used to document workers and potential misbehavior. Hodson told reporters that he brought in the additional security guards because of death threats received by CFAC’s owners. Union representatives were unconvinced by Hodson’s explanation. “No one at the plant is personally concerned about their own safety,” Craft said. “This is obviously to protect CFAC, not the employees.” [57]

The security guards were at work on Sept. 11. Plant workers had been notified of the change in a bulletin board notice. “We have become aware of growing hostilities and security concerns, involving not only the plant but the safety of the owners,” Hodson told media. Duker, of Los Angeles, and Broussard, of Whitefish, were no longer actively involved in running the plant’s business, since they were both defendants in the profit-sharing lawsuits brought by employees. Hodson said “several incidents” had occurred which had convinced management of the need for the security force but declined to provide details about the incidents. He blamed “a small fringe element – not the majority of our employees.” Hodson also said the hiring of the security force had nothing to do with upcoming union contract negotiations, which were expected to begin on Sept. 19. [58]

AWTC leaders expressed puzzlement over the need for security guards. Craft said the company's explanation that death threats were made against CFAC's owners didn't account for the fact that neither owner had set foot in the plant for two years. Craft said the 18 guards from Vance Security appeared at the plant dressed in Green Beret-type uniforms – combat boots, baggy pants, blue shirts and berets. They carried surveillance cameras but no weapons. Vance Security guards had worked for two coal companies during two long violent strikes in the Appalachian coal fields during 1984 and 1988, and a board member of the United Mine Workers union accused Vance Security guards of inciting violence at that time. Hodson denied any connections between the new guards and upcoming union contract negotiations. [59]

According to the corporate website for Vance International Inc. in 1999, Chuck Vance, chairman and CEO, was a former special agent for the U.S. Secret Service who had protected presidents and vice presidents through four administrations over a 14-year career. The firm was founded in 1984 and since then had provided security services to 1,300 clients, some of whom belonged to Fortune 500 companies. Sales had grown from $3 million in 1984 to more than $85 million and company personnel had reached 2,300. [60] But Montana was not Appalachia, and Montana's modern constitution contained language left over from the Copper Kings era regarding personal armies. The provision in the 1972 Montana Constitution prohibited bringing in "armed" persons but didn't define what it meant to be "armed." According to Article II, Declaration of Rights, Section 33, "No armed person or persons or armed body of men shall be brought into this state for the preservation of the peace, or the suppression of domestic violence, except upon the application of the legislature, or of the governor when the legislature cannot be convened." [61]

The Sept. 27, 1995 Missoula Independent featured a full-size cartoon on its cover showing hard-hatted workers lined up to enter a barbed-wire gate under the watchful gaze of a security guard with his camouflage pants tucked into his high leather boots. In the background, a corporate executive sauntered off with a briefcase of money spilling out onto the ground. The accompanying article compared hiring the security guards to "the heyday of Montana's

copper kings” and the strong-arm tactics of Anaconda’s “copper collar.” According to the article, Vance Security was run by the son-in-law of former President Gerald Ford and had “a reputation that rivals that of the copper-era Pinkertons” in its union-busting actions. In the mid-1980s the Vance Asset Protection Team was hired by the A.T. Massey Co. during its 15-month fight with the United Mine Workers Union. Wearing dark blue T-shirts that read “Tough Times Don’t Last, Tough People Do” and wearing military-style pants tucked into combat boots, the Vance Security guards had made a strong impression on the CFAC workers. The guards cruised the plant’s fence line in pickup trucks and patrolled the plant with surveillance cameras. [62]

Flathead County Sheriff Jim Dupont disagreed with Tom Hodson’s claim that threats had been made at the plant, the Missoula Independent reported. “They’ve alleged several threats on the officials who run the plant,” he said. “But I’ve never seen any violence from an employee group in the valley. To tell the truth, I’m not sure why they did this. I wouldn’t have done it.” The union expressed concerns about contract negotiations. “This appears to us to be a strong-arm tactic,” Craft said. “It’s always a tense atmosphere when you’re going into negotiations. Everything is up for grabs. There could be a lock-out. If that happens, we expect the guards will be kept on.” Another union member remarked wryly, “We’re not getting excited about this. It’s just another way they’re spending our share of the profits.” [63] One story repeated by some workers at the plant in 1998 was that a disgruntled employee had swerved his vehicle toward Duker while he was jogging on Aluminum Drive, but Duker hadn’t been near the plant since January 1993. [64]

On Sept. 18, 1995, Rep. Pat Williams wrote to Duker expressing concerns about the tense labor negotiations at CFAC. Media accounts and conversations with constituents had led him to believe that “a potentially volatile situation may be developing” at the plant. Williams referred back to earlier meetings between the two. “I recall a time several years ago when you and I first talked about the possibility of the employee buyout at the plant,” he said. “Our conversation touched on the excellent relationships that CFAC had built with its workers. There hadn’t been any strikes, productivity was high, wages and benefits were good. You and I were both convinced that a reliable and

skilled workforce was one of the keys to the company's continued prosperity. Now things seem to be coming apart, Brack, and I'm concerned that we're getting to a point where those good relationships – both inside and outside the plant – may be irretrievable. I'm convinced that there must be a way to restore harmony at CFAC without the introduction of an outside security force. I'm urging you to do whatever you can to try to bring back a sense of well-being at the plant." [65]

CFAC management agreed to immediately remove the new security force on Sept. 20. Labor contract negotiations were scheduled to start that week, and an attorney representing the employees in the profit-sharing lawsuit called the guard force a threatening presence. [66] That same day, attorneys representing the parties in the profit-sharing case signed a commitment to intimidation-free litigation, acknowledging that the case "is an emotionally charged controversy which has major effect, economically and personally, on the lives of all parties involved." The parties agreed that the "profit-sharing controversy should be resolved in the courts and in the courts alone… rather than outside Court using the vehicle of public opinion." They also agreed that communication between the parties or to the press and public should be "accurate, non-inflammatory and fair" and that the attorneys "should monitor their clients to ensure compliance." To this end the parties "must be informed not to threaten the life, property or well-being of any other party" or attempt to intimidate the others. Upon execution of the agreement, without waiting for a signature by the judge, the Vance Security guards would be removed. [67] A story repeated by some plant workers in 1998 was that a fleet of Montana Highway Patrol cars appeared at the plant on the day the Vance Security guards flew out of the Flathead, but the story could not be confirmed by official sources. According to the story, the governor had ordered the Highway Patrol to go to the plant because CFAC had brought a private army into the state. [68]

Early settlement offer

The other half of the new strategy by CFAC owners in advance of labor negotiations was a settlement offer. On Sept. 15, CFAC offered $12.1 million to the company's salaried and hourly employees to settle the profit-sharing case. The offer included $11.1 million for the employees

and $1 million for their attorneys. Hodson called the settlement offer “a fair and equitable offer which will benefit the employees.” Craft responded that an offer of 10 cents on the dollar was not “equitable” and there was no chance the offer would be accepted. Lawsuits had been filed by salaried and by hourly employees claiming nearly $120 million in missing profit sharing payouts. Allan McGarvey said he believed the offer was encouraging because it opened the door for negotiations. [69] “We have to resolve this litigation and get on with the business of running our company,” Hodson told media. The employees were given until Oct. 2 to respond to the offer. Chris Finberg, a salaried employee closely involved with the lawsuits, said he was surprised to hear about the offer. “Hopefully, that’s a starting point,” he said. “I’m glad to hear they’re making an effort to get it settled.” [70] Contract negotiations for the hourly employees were scheduled to begin in the week of Sept. 18. “This is the first offer of settlement the class of salaried employees have received,” Roger Sullivan said. [71]

CFAC took out a full-page ad in the Sept. 20, 1995, Daily Inter Lake signed by Hodson that explained the company’s position on the recent settlement offer. “We think this is a fair offer,” Hodson said in the advertisement. He described efforts by the company to protect its future, including obtaining new smelting contracts good for five years, forming a new power-marketing company to obtain electricity at competitive rates, locating and contracting for power with two private utilities, increasing pay and benefits for salaried employees, and hiring Larry Tate as the new plant manager “after a worldwide search.” He said he wanted the residents of Flathead Valley to be aware of the company’s settlement offer, how the profit-sharing lawsuits threatened CFAC’s future, and the positive economic impact of the company on the valley’s residents. “The mere existence of the lawsuits interferes with the day-to-day decision making at the plant,” he said. [72] The full-page ad angered plant employees. As a result, the court issued strict orders governing future settlement negotiations that limited public disclosure by participants. [73]

In the middle of labor contract negotiations, a major ruling that favored CFAC’s employees was made by Judge Shanstrom on Sept. 18, 1995. In a partial summary judgment, Shanstrom ruled that CFAC’s owners had agreed in 1985 to provide the employees with 50% of the company’s

profits, and that an employee retirement plan later set up by the owners did not replace the profit-sharing agreement. Judge Shanstrom's ruling settled the issue of liability in the profit-sharing case, and the case would move on to determining damages. The 900 past and present employees in the case claimed they were entitled to at least $100 million. [74] In ruling that a valid profit-sharing contract existed, Judge Shanstrom cited a letter between Duker and ARCO that described a profit-sharing arrangement, and a memo from Duker stating that the employees obtained a profit-sharing entitlement in exchange for wage and benefit reductions of 31% effective Jan. 1, 1986. CFAC's attorneys had argued that the hourly workers had a written contract promising profit-sharing, but the salaried employees did not. CFAC's attorneys also had argued that the profit-sharing issue should not be considered a contractual dispute but rather a federal issue revolving around ERISA statutes. Shanstrom denied the two arguments and instead ruled that a contract existed prior to the establishment of an ERISA plan. [75]

In his Sept. 18 ruling, Judge Shanstrom affirmed and expanded earlier findings by Judge Erickson. The claim by CFAC's lawyers that the ERISA plan superseded and incorporated the profit-sharing agreement was flatly denied by Judge Shanstrom. The owners had paid profit-sharing for several years and then replaced it with an ERISA retirement plan. Judge Shanstrom ruled that CFAC's owners had a contractual obligation to distribute 50% of the company's profits to its employees and could not replace those profits with a retirement plan. The court record contained "voluminous evidence" showing that a contract existed, Judge Shanstrom said, and he cited three letters to prove his point. [76] Judge Shanstrom began by addressing the findings and recommendations issued by Judge Erickson on Feb. 27, 1995. Shanstrom found that as a matter of law, Erickson's finding fell short that "Plaintiff has made a prima facie showing of a compensation agreement that precedes the ERISA plan." The compensation agreement was a contract that entitled the employees to 50% of the company's profits, Shanstrom said. He referred to Montana state law regarding the existence of an implied contract, which required that "the parties are capable of contracting, they consent to the contract, the object of the contract is lawful, and the contract has a sufficient

cause or consideration." Shanstrom used three key documents to show that a compensation agreement existed. [77]

The first key document was a letter between Duker and former ARCO vice-president Claude O. Goldsmith dated Sept. 10, 1985, in which Duker explained how the Montana Aluminum Investors Corp. would provide a profit-sharing plan for the employees. The second document was a memo from Duker to Lee Smith, a CFAC manager, which provided the history of the CFAC profit-sharing agreement. Duker was responding to a request to increase the base wage of CFAC's salaried employees by 6%, and he used the history of the company's profit-sharing arrangement to deny the request. Shanstrom said the memo to Smith "contains classic contract principles. Duker admits the employees 'accepted' lower wages as part of an 'exchange' and the Company 'agreed' to share profits… Both parties have 'accepted,' 'agreed,' and consented to the exchange, and both parties have enjoyed the benefits of the exchange." The third document was a July 28, 1986, memo from Duker to Peter Prowitt, a staff member for Sen. Max Baucus, which referred to the existence of a profit-sharing agreement. Shanstrom said that "by using the agreement to enlist the Senator's aid, Duker has accepted again the benefits of the agreement." [78]

In his Sept. 18 ruling, Judge Shanstrom disagreed with the defendant's argument that an ERISA plan created by CFAC incorporated and superseded the previous profit-sharing agreement. "The law does not give employers the broad authority to load ERISA plans with previous contracts and then manipulate the contracts by claiming preemption," he said. "To do so would permit employers to preempt any previous contract by simply including the contract in the ERISA plan… Congress did not intend for employers to avoid state law simply by referring to that law in an ERISA plan." Shanstrom also noted that because the profit-sharing money was "current income, not retirement income," it did not relate to the ERISA plan. Shanstrom next addressed the defendant's argument that the profit-sharing agreement was void because "it lacks essential terms." Citing Montana law, Shanstrom explained that "by their performance, the parties have ratified the terms of the contract. Through the years, CFAC has distributed profits. This case is about one term, the percentage of profits due the

employees. The Court finds the past performance of the contract forbids CFAC from now claiming the contract is void due to lack of terms." Finally, Shanstrom addressed the defendant's objection to Judge Erickson's finding that a constructive trust existed. CFAC's attorneys had argued that under ERISA law, the Ninth Circuit no longer recognized the constructive trust doctrine. First, Shanstrom noted, the case cited by the defendants did not address the constructive trust doctrine. Second, since the profit-sharing agreement preceded the ERISA plan, it fell under Montana law, and "Montana recognizes the constructive trust doctrine." Shanstrom ruled that "defendants Jerome Broussard and Brack Duker hold a constructive trust of the excess amount of profit sharing, if any, that may have been distributed to them." [79]

The plaintiffs relayed the good news to local media. "This is a great decision," AWTC Secretary Jack Rogers said about Judge Shanstrom's ruling. "It supports what we've been saying all along." Roger Sullivan said Judge Shanstrom's decision settled the issue of liability – the next step would be to determine how much money CFAC earned and how much damages his clients were entitled to claim. Sullivan predicted a trial could take place in about a year. Duker and Broussard were ordered to appear in court on Sept. 21 and produce documents at a hearing requested by the plaintiffs. The plaintiffs were concerned about making sure any profits owed to the workers were secure. [80] Sullivan told media that the hearing would seek interim relief to secure any undistributed profits. Between then and a trial date in a year's time, Sullivan wanted "to try to fashion an equitable form of relief" that would secure assets while assuring that CFAC "continues to be a profitable enterprise." Sullivan added, "An obvious asset that comes to mind would be shares of CFAC stock." [81]

Attorneys for both parties met on Sept. 20 and agreed that Duker and Broussard did not have to testify in court the next day. [82] Hodson expressed his disappointment in Judge Shanstrom's Sept. 18 ruling. "In recent months, we have worked hard to protect CFAC's future and the 600 jobs we provide in the Flathead Valley," he said. "Obviously, I'm disappointed that Judge Shanstrom's decision comes at this critical time, but the fact is, it doesn't change anything. If this has to be resolved in the courts, it will take years with the appellate process." He

pointed out that a settlement offer was on the table that was fair and deserved serious consideration. He also listed all the achievements the company had made to strengthen the plant, including bringing the plant back to full capacity, thereby creating 56 new jobs, negotiating new tolling contracts for five more years, increasing pay and benefits for salaried workers, and obtaining power contracts through a new power-marketing firm. [83]

Overseas cloak and dagger

As plant managers and workers, Flathead residents, government officials and attorneys dealt with the notoriety of the profit-sharing case and the scandal of security guards intimidating union workers days before labor negotiations were set to begin, another twist in the story appeared in local newspapers. The back story was that in April 1995, Harald Odegaard, the chief metals trader for Norsk Hydro, based in Oslo, Norway, had sent an internal company memo to Norsk Hydro's subsidiary in Louisville, Ky., notifying them why Norsk-Hydro would not renew its tolling contract with CFAC. According to the memo, Norsk Hydro was concerned about a new company named Eural based in the Cayman Islands that would act as the middleman between CFAC and its tolling customers. The memo detailed several concerns, including CFAC's dispute with its employees over a profit-sharing lawsuit and overall plant operational capabilities. Norsk Hydro had offered to renew its tolling contract with CFAC if it received a back-up guarantee with CFAC and if the dispute between the owners and employees was settled before the new contract took effect, but those terms were not accepted by CFAC. [84]

Michael Jamison, a reporter for the Hungry Horse News, was shown the Norsk Hydro memo in September 1995. Another customer, Shell Mining Co., had also chosen not to renew its tolling contract with CFAC. According to the memo, Norsk-Hydro had expressed ethical concerns over how profits from tolling contracts were handled in light of the profit-sharing lawsuits underway at CFAC. According to Jamison's story, Norsk-Hydro "was concerned that CFAC owners had orchestrated a scheme that could potentially redirect CFAC tolling profits into an 'empty' business in the Cayman Islands, effectively eliminating any potential profit sharing for employees at the Columbia Falls plant." The "empty" company mentioned in the memo was named Eural and was

created to serve as the middleman between CFAC and its new tolling customers, Glencore and Pechiney. CFAC managers and lawyers claimed they didn't know who owned Eural or where Eural was based despite the fact that the plant had signed a five-year contract with the company. Furthermore, Eural was not registered with the Montana Secretary of State's business licensing office in Helena. [85]

The Norsk-Hydro memo mentioned five specific reasons for not renewing its five-year tolling contract: 1) a "legal structure (that) was less than attractive to Hydro as we were forced to enter into a contract with an 'empty' company in (the) Cayman Islands"; 2) insufficient guarantees of a backup contract signed directly with CFAC; 3) concerns that the new tolling contract "could weaken the plant's operational capabilities"; 4) concerns that CFAC's "owner could use Hydro in its conflict with the employees"; and 5) an overall concern "that the structure of this new contract was not in line with Hydro's legal and ethical standard." A court affidavit filed in August 1995 by attorneys representing Eural promised that Eural would "pass through all of the economic benefits of the Eural-Glencore and Eural-Pechiney contracts subject to reasonable fees and charges." Judge Shanstrom was scheduled to hear more details on what these "reasonable fees and charges" would be on Sept. 21. [86]

Concerned that the shell company Eural might siphon off all of CFAC's profits, attorneys for the plaintiffs asked Judge Shanstrom in September to place CFAC's assets in receivership. Employees were concerned that Eural might inflate the costs of raw materials, particularly alumina, effectively absorbing CFAC profits which were subject to the employees' profit-sharing lawsuit. Duker and Broussard agreed to the request, and all CFAC stock was put under jurisdiction of the federal court and all profit-sharing payments were suspended. [87] On Sept. 20, 1995, CFAC attorney Gary Graham wrote to McGarvey and LaBelle acknowledging that financial information about the company would be made available to the plaintiffs. Graham pointed out that the information was confidential commercial information, and if it became public the information could hurt the company's business. [88]

On Sept. 21, plaintiffs in the profit-sharing case won several large rulings in federal court that would protect the company's money and

assets pending the outcome of the case. The plaintiffs had requested that Duker's and Broussard's assets be placed in receivership. Instead, they settled for having company stocks, owned and controlled by Duker and Broussard, stamped to prevent their sale and safely stored away. Other stipulations included an order that CFAC's company structure remained intact, prohibiting mergers, splits and other restructuring models without a 30-day notice. The court also ordered that CFAC not make any changes in its tolling contracts without a 30-day notice, and that Duker and Broussard could not take any money out of the company except to pay taxes. [89] Spokesmen for the employees called the sweeping agreement a victory. "They pretty much gave us everything we asked for," McGarvey said. [90]

Under the agreement, $100 million would be secured to cover costs should the employees prevail in their profit-sharing lawsuit, and the owners were to provide assurances that CFAC's financial structure and cash flow would not be altered. According to the new agreement, the plaintiffs' attorneys would be provided copies of all contracts between CFAC and Eural and between Eural and CFAC's tolling customers. "CFAC will provide demonstration that the amount of payments to Eural under the smelting agreements is fair and reasonable in the industry," the agreement stated. Furthermore, Duker could not receive more than $240,000 in annual consulting fees from Eural or through tolling arrangements. [91] The owners also agreed that another new company, Hinson Power, would not add any additional charges to the electricity it brokered for CFAC. Hinson Power, owned by Duker, was created to help CFAC secure alternative power-supply sources to the BPA. The Federal Energy Regulatory Commission required that only wholesale power companies could arrange independent contracts for delivery of power over BPA transmission lines, so Duker was forced to create Hinson Power. Roger Sullivan told local media he was satisfied with the agreement's interim relief. [92]

On Sept. 27, 1995, McGarvey and Sullivan updated the salaried employee class members regarding "two major victories" in federal court. First, the plaintiffs had obtained a partial summary judgment ruling that the employees were "entitled to 50% of the profits" of CFAC, and that excessive distributions would be held by Duker and Broussard in a constructive trust for the employees. Second, the

plaintiffs had obtained a prejudgment court order protecting the future judgment, an order that addressed the plaintiffs' concern that the defendants might try to hide their money. According to the two attorneys, "if the defendants did not pay the judgment we seek in cash, we could take over the ownership of the aluminum company – including all of its facilities, contracts and cash." McGarvey and Sullivan estimated that the cash which had accumulated and would continue to accumulate in CFAC would "be on the order of tens of millions of dollars. As you know, the company has been very profitable in recent years." McGarvey and Sullivan also noted that the court had ordered that the parties to the case be committed to "intimidation-free litigation," which protected the plaintiffs from retaliation by the employer, but which also required that the employees refrain from any "action, statement, gesture, or conduct of any kind (even in jest)" that might be seen as intimidating or as causing acrimony. [93]

Broussard's attorney, Sherman V. Lohn, filed a memorandum on Oct. 4, 1995, requesting clarification and modification in Judge Shanstrom's Sept. 18 order. Lohn focused on the confusion and misinterpretation of the use of the words "distributable profits" in the order. He pointed out that the salaried defendants amounted to only 20% of the employees at CFAC and could not be owed 50% of the profits. Lohn's concern related to efforts by Duker and Broussard to settle the case, and the unclear and incorrect reports in the media concerning Shanstrom's order that might undermine efforts to reach a settlement. He specifically cited articles in the Missoula Independent, with "the most florid interpretation," the Missoulian, the Daily Inter Lake and the Billings Gazette, all which he claimed misinterpreted Shanstrom's order as a ruling that "settled the issue of liability" or "found the company's owners guilty of swindling" the employees. [94]

Lohn went on to provide his interpretation of the terms "distributable profits" as initially used in 1985 and in subsequent contracts with the employees. "The term 'distributable profits' was agreed to by the parties for a reason," Lohn said. "CFAC was in effect a start-up company. Its chances for survival in the volatile aluminum market were not promising. That is one reason why the salaried employees agreed to take a pay cut – they wanted the new company to succeed because if it did they would continue to have jobs. But the new

company would have to pay taxes on corporate income, would have to make capital expenditures, would have to set aside money for such contingencies as cyclical downturns in the aluminum market and environmental claims. Fifty percent of profits could not mean, for example, fifty percent of gross or pre-tax profits. This would have given fifty percent of profits to employees, and the balance of the profits to the taxing authorities, with nothing left over as reserves for contingencies and liabilities and nothing left over for the owners. The employees did not want that. It would have jeopardized CFAC's existence." Lohn suggested a simplified formula for determining the meaning of distributable profits. "In determining its distributable profits each year, CFAC would estimate what the net pre-tax profits would be for the year. From that figure, 50% would be deducted as an estimate of CFAC's tax liability and an additional 5% would be deducted as an estimate of CFAC's capital expenditures for the year. The remaining balance was denominated 'distributable profits.' CFAC's Board of Directors had sole discretion at the end of the year to determine whether there would be profit sharing. Profit sharing might not be paid or the amount which would ordinarily be paid might be reduced because of operational needs or contingencies for the present or for the future." [95]

While the attorneys debated the merits of different profit-sharing formulas, CFAC filed a federal lawsuit against Norsk-Hydro on Oct. 3, 1995, claiming the Norwegian aluminum company was conspiring with CFAC employees in an attempt to take over the company. [96] CFAC claimed Norsk-Hydro interfered with business operations at CFAC's aluminum plant, endangered contracts with new tolling customers, fomented unrest among CFAC's workers and conspired with some CFAC employees "in a plot to take over the company" by assisting "in the financing of an employee buy-out plan." The lawsuit, filed in California, was joined by Eural, the Cayman Island-based company which had been created to assist CFAC develop contracts with new tolling customers. After 10 years, Norsk-Hydro's tolling contract was set to expire at the end of 1995. [97]

"The actions of Hydro amount to no less than blatant interference with the ability of CFAC to do business," Hodson said about CFAC's lawsuit. "We feel they are conspiring to take over the company." Hodson cited

leaks of confidential information by Norsk-Hydro. “Memos between Hydro and our company have been given to the press, persons within the industry have told us of rumors that are being circulated, and we are aware of activities by a small minority of our employees.” CFAC’s lawsuit noted that actual and punitive damages could exceed $1 billion, but the amount would be established at trial. From Oslo, Norsk-Hydro denied the CFAC allegations and said it would defend itself in court. [98] CFAC’s lawsuit also alleged that Norsk-Hydro encouraged and incited a possible strike by union workers at the company’s aluminum plant. CFAC’s labor contract was set to expire on Oct. 19, 1995, and CFAC accused Norsk-Hydro of “promoting and circulating rumors within the industry of labor unrest and the instability of CFAC.” Allan McGarvey responded to the allegation that Norsk-Hydro was financing an employee effort to buy out CFAC. “No such offer was made to any of the salaried workers, to my knowledge,” he said. “(Hydro Aluminum) did not incite or conspire with the salaried employees in any fashion. To our knowledge, Hydro has always acted responsibly and ethically.” [99]

The Norsk-Hydro memo outlining its reasons for terminating its tolling contracts with CFAC had been subpoenaed by the plaintiffs’ attorneys. [100] Lars Narvestad, Norsk-Hydro’s general manager for North American operations, denied CFAC’s allegations. “Any talk of a conspiracy is absolutely false,” he told media. Norsk Hydro had held two consecutive tolling contracts with CFAC covering 10 years, he noted. Narvestad declined to comment on details of CFAC’s lawsuit and said Norsk-Hydro hoped the matter would be resolved quickly. He also commented on the lost tolling contract. “We’ve had a very good year,” Narvestad said. “Profits were strong in both the second and third quarters. In the overall scheme of things, our break with CFAC will not affect us much. Granted, it is a large part of the pie for this office.” Lowell Eckelberry also commented on CFAC’s allegations against Norsk-Hydro. “The suit is just a smokescreen,” he said. “It’s just something to keep the newspapers busy.” [101]

Eckelberry denied that the union had conspired with Norsk-Hydro. “We don’t make arrangements with overseas organizations,” Eckelberry said. “All we do is go to work.” The union had rejected a labor contract offer by CFAC on Oct. 4. “If anybody causes a strike out here, it will be

Brack Duker and the company," he said. [102] The idea of an international conspiracy between the union and Norsk-Hydro was absurd, Eckelberry told local media. "The Norsk Hydro suit has absolutely no merit," he said. "We're from Columbia Falls here. We have no international conspiracy connections. That's absurd. I live in Kalispell and have two cows and a dog but no subversive conspiracy connections in Norway." He added that the lawsuit was "garbage propaganda" which was intended to stir up the community. "If negotiations fail and there's a strike, it won't be due to an arrangement between Montana and Norway. It will be the owners and their negotiators who push us out. They should take responsibility for their own actions instead of finding someone to take the fall for them." [103]

Politics and labor

While the employees were seeing positive outcomes in their lawsuit, labor talks were not going smoothly. On Oct. 4, 1995, CFAC's negotiators walked out on the talks after the union rejected a company wage offer. The two sides did not communicate again until Oct. 10, when the company asked for a week-and-a-half extension. The original deadline for the talks was Oct. 18 at 7 p.m., one day before the plant's labor contract expired. Eckelberry said the extension was agreed to after the company explained that one of its key negotiators needed to return to New Jersey for personal reasons. Both sides had rejected each others' proposals, and the company said it planned to shut down the smelter on Oct. 16 at 7 p.m., three days before the contract expired. With the extension, the planned shut-down was canceled. [104] Both sides agreed to extend negotiations to Oct. 27. Eckelberry said initially each side had exchanged economic offers that were quickly rejected, stalling the talks. "Their proposal was completely unacceptable to us," he said. "I told them it was unreasonable and to come back when they had a reasonable offer. They just got up, closed up their books and left." Eckelberry said he had expected to see CFAC representatives again on Oct. 9, but nobody showed up. Union negotiators found themselves sitting alone at the bargaining table on Oct. 9 waiting for CFAC to show up. "This extension is good for the plant and good for the community," he said. "We look forward to resuming talks." [105]

The labor talks were held in Whitefish, and Tom Hodson wrote to a Whitefish City Councilor on Oct. 13, 1995, in an attempt to straighten out “talk, speculation and misinformation” about the profit-sharing case. Hodson said the Sept. 18 ruling by Judge Shanstrom did not determine CFAC’s liability in the case, and “the $100 million figure that is so often quoted by the media” was never mentioned in the ruling. Hodson added that the $100 million figure had “no basis in reality” and had prompted the company to file a motion for reconsideration and clarification of the judge’s ruling. Hodson added that a request for receivership by the employees had been denied by the court on Sept. 21, and that the present owners and management of CFAC remained in control of the company. Hodson also referred to CFAC’s offer of $12.1 million made three weeks earlier to settle the dispute. “The employees rejected our good faith offer,” he said. “We are evaluating our options, but we are disappointed that a real attempt to settle this matter has been met with such a response.” Hodson then added, “We believe that one of our existing tolling customers is interfering with our business and we believe it has conspired with a few of our employees in an attempt to take over our company.” The company had filed a lawsuit against that customer on Oct. 3 “to try and stop this underhanded activity,” Hodson said. [106]

Concerned about the future of the tense labor negotiations between the union and CFAC, Sen. Baucus wrote to Duker at his business address in Los Angeles on Oct. 13. After praising Duker for taking the risks necessary to keep the aluminum plant operating through many lean years, and pointing out that as a U.S. senator he had “worked to guide federal policy” to help the plant, Baucus urged Duker to negotiate a contract that provided the hourly workers with a competitive wage equivalent to wages at other aluminum plants. “The men and women of CFAC are hard workers, and have made many sacrifices over the years in the name of keeping CFAC operable,” Baucus wrote. “Now that CFAC is in good shape, they deserve compensation equal to other aluminum workers in the Pacific Northwest. Furthermore, I ask that you work to see that the pending litigation with the CFAC workforce over profit sharing does not become entangled with these negotiations.” Noting that labor negotiations were “frequently tense undertakings,” Baucus asked Duker to “take whatever action is necessary to avoid even a temporary shutdown of

CFAC. The citizens of the Flathead Valley worked together to keep this plant going a decade ago, and to see their hard work jeopardized by a breakdown in labor negotiations would be devastating to this community. Everyone must go the extra mile to see that these negotiations are resolved amicably." [107]

Contract negotiations ended at 2 a.m. on Oct. 25 after two weeks of continuous round-the-clock bargaining, and union leaders announced they would present CFAC's contract offer to its members for a vote on Oct. 26 and 27. The union was represented by a team of 15 negotiators, while the company was represented by three negotiators. A rejection of the contract by the members would trigger an immediate strike, union leaders said. "They took our last offer, and we hope it will be accepted," Hodson said. According to Jack Rogers, the AWTC's secretary-treasurer, "We reached a point where we decided to call it quits and take the proposal we had back to the members. It was a tough negotiation." Rogers declined to describe elements of the new contract or speculate on how the vote might turn out, noting that union members were already under a lot of stress and should not face pressure from the community on which way to vote. [108]

"These people have a tough decision to make," Aluminum Workers of America Local 320 President Ron Loveall said about union members as they prepared to vote. "Everybody hopes for the best, but the employees have to do what they think is right." The plant's union workers would vote on an economic package and a labor agreement that specified working conditions. Eckelberry said CFAC forced the union's hand by refusing to continue offering profit-sharing. In response, the union asked for pay and benefits that were given up a decade ago when CFAC was established. Union negotiators said they were disappointed when they were unable to regain what was given up in 1985. As a result, the AWTC negotiating team was remaining neutral and not advising the members on how to vote. "My only recommendation is for people to not vote with their emotions," Eckelberry said. "They have to vote with common sense and an eye toward taking care of their families." [109]

On Oct. 27, with 94% of CFAC's 482 hourly workers voting, 92% of the union members rejected the proposed contract. The company's proposal asked the workers to give up profit-sharing but did not return

them to pre-1985 wages and benefits. In 1985, the plant's hourly workers had accepted a 15% cut in wages and a 16% cut in benefits in exchange for profit-sharing at a time when Duker was trying to keep the plant operating after ARCO announced it was getting out of the aluminum business. Eckelberry announced that a strike would begin that day at the plant at 7:01 p.m., when the plant's labor contract officially ended, unless CFAC management agreed to extend the current contract while negotiations continued. Labor difficulties were unusual at the aluminum plant, union leaders noted. "We aren't used to strikes here," Eckelberry told media. [110] Union members were upset with CFAC for several reasons. No profit-sharing checks had been paid out since 1991, resulting in a three-year old class-action lawsuit, and CFAC had brought back Vance Security guards after they had been ordered by the court to leave in September 1995. "They are an intimidating force to the membership," Eckelberry said. "We have no intention of violence." [111]

Union members had indicated by their vote that they were prepared to go on strike unless CFAC made compromises. Union leaders were not optimistic about progress. A strike or lockout at the plant might have ramifications in the profit-sharing case. A motion for receivership by the hourly workers in the profit-sharing case was made after Judge Shanstrom ruled that a profit-sharing agreement existed between CFAC's owners and the company's workers. The motion was dropped when both sides agreed that the company would provide a constructive trust in the form of company stock worth $100 million to provide security for any money owed to the workers. This agreement was approved by the court, but it contained language related to any strike or lockout that "may constitute an impairment of the security" of the constructive trust. In that event, the motion for receivership might be reactivated against the company and its owners. [112]

The strike was averted at the last minute on Oct. 27 after Gov. Marc Racicot declared that a strike "would take a devastating toll on some 600 valley workers, their families and the Flathead economy" and asked the workers to stay on the job. [113] Racicot had pleaded with workers and management during their meeting at the Rocky Mountain Lodge in Whitefish on Oct. 24 to hammer out a suitable agreement as soon as possible. "I am asking, I am encouraging, workers at the

aluminum company to stay on the job and avert any kind of a strike or work stoppage," he said in a statement to workers. Racicot also had offered to help mediate with union workers and management that same day during a meeting in Whitefish. "Once there's a shutdown, it's like trying to put the water back behind the dam," he said. "We ought to be able to find a solution to this before that point." Racicot asked workers to set aside hard feelings about profit sharing lawsuits. A federal mediator joined the negotiations on Nov. 1, 1995, at the request of both sides. "This is the last shot," Eckleberry told the Hungry Horse News. "The mediator's going to make both sides move. That's what he's there for." The main sticking point was profit-sharing, which CFAC managers did not include in their proposed contract. [114] Sen. Baucus said he had sent a letter to Duker encouraging him to "bargain fairly with the workers of CFAC and get this deal done." [115] Baucus also applauded the use of a federal mediator. He met with union workers in a Kalispell labor hall on Oct. 29 and spoke about unions in general and CFAC in particular. "Without the concern and help of everyone involved, we would be out on strike right now," Eckelberry said. [116]

Eckelberry told the Daily Inter Lake that the union had called off its strike out of concern for the Flathead Valley community and economy. Two hours before the strike was scheduled to begin, the union announced they were willing to resume negotiations. "It was never our desire to shut the aluminum plant down," he explained. "We just want a fair contract." That afternoon, Racicot and Baucus appealed to the workers and to Duker to return to negotiations. Racicot earlier warned that the emotional strain of a strike would be potentially "stark and dangerous." According to Eckelberry, union members had "a great respect" for Baucus, who was scheduled to meet with workers on Oct. 29, and Racicot, who was scheduled to meet with workers on Oct. 31. Eckelberry explained that union membership had rejected the latest contract offer because it eliminated future profit-sharing, which the workers felt they were entitled to after making large wage and benefit concessions in 1985. Columbia Falls Mayor Lyle Christman said a strike that shut down the aluminum plant would have rippling consequences throughout the local economy, including lost wages, lost tax revenue and lost power revenue for the Bonneville Power Administration. He pointed out that in the past, when local lumber mills shut down,

workers just moved on to other mills, but times had changed and that opportunity no longer existed. [117]

A barrage of letters to the Daily Inter Lake followed the union vote, especially after Darcy Riddle's Oct. 29, 1995 letter criticized the aluminum plant workers. Riddle believed "CFAC employees are compensated quite well for the work they do." Regarding the union's rejection of the company's proposed labor contract, Riddle wrote, "If the profit-sharing check is crucial to the CFAC employees' standard of living, perhaps they ought to examine their spending habits." Riddle described the difficulties Flathead Valley residents faced in finding good jobs. "If you're unhappy at the Columbia Falls Aluminum Company, I know plenty of men and women who would love to have your job," she said. [118] In response, Mrs. J. Taylor wrote that Riddle, like many in the Flathead Valley, had her facts wrong about CFAC workers. She pointed out that her husband, with 18 1/2 years at the CFAC plant, actually made less than their daughter, who had been working as a dryer feeder at Plum Creek Timber Co. for only six months. Taylor argued that CFAC workers gave up a lot in the past 10 years "to keep the doors of CFAC open, which puts them at poverty level according to national standards. It made the owners millionaires several times over." [119]

In her response to Riddle, Glenda Minnehan wrote that CFAC workers deserved the support of the community, and she described the treatment workers at the aluminum plant received by its owners. "This is the age-old story of rich businessmen pulling strings, telling half truths and getting richer and richer at the expense of our hard-working aluminum plant employees," she said. "You want to talk about money leaving this valley? OK, but you'd better look at the owners and not at CFAC employees that make their permanent homes here in the Flathead." Minnehan encouraged Flathead residents to get their facts "from the 600 to 900 CFAC employees. Not from the owners. They're not telling you the whole story!" Cindy Long also responded to Riddle by noting that her husband's income at CFAC did not make him "one of the best paid employees of the valley." CFAC workers did not get sick leave, and her husband often went to work when he was sick, she said. Long also listed shopping at Kmart, eating at McDonald's, vacationing

in a tent, a drippy kitchen faucet and the family's three-bedroom mobile home as proof that they did not live an extravagant lifestyle. [120]

Dick Downen responded to Riddle by pointing out that CFAC's workers made good wages in the Flathead Valley, but not the best. "As for conditions, in the summer the aluminum plant potlines get up to 120-150 degrees," he said. "Darcy should come out and work for a while." He also noted that if workers got their fair share of the profit-sharing money, it would be spent in the Flathead Valley and not outside of Montana. [121] Susan Dahlgren questioned Riddle's knowledge of the facts. Dahlgren pointed out that CFAC's hourly workers did not get sick leave, their retirement package was weak, and the workers "have bent over backwards for the owners." The workers took major cuts in wages and benefits in 1985. "There has been no profit-sharing in three years and they now work for less than what they made in 1980. The promise has been broken!" Dahlgren pointed out that CFAC's owners made millions since they took over the plant. "When 'Greed Inc.' took over, that's when fairness went out the door!" she said. "Most of us are locked into payments. We do not live in mansions or go on cruises every year. We struggle to make ends meet like everyone else. Since the promise has been broken, some of us have taken another job to make those payments. We are smart people and know how to take care of ourselves and our spending habits. We don't need people like Darcy to tell us to examine our habits!" [122]

Forty-two wives and friends of CFAC hourly workers showed their support for plant workers in a joint letter to the Hungry Horse News on Nov. 2. "It pains us to read and hear slanderous statements against employees from people who don't know all the facts," the letter said. "It is our hope that people from around the valley lend their support to the CFAC workers. Nobody wants a strike to take place, but at the same time we want the workers to be treated fairly as they deserve to be." Regarding the profit-sharing case, the letter stated, "Promises were made to them that have not been kept. This is not only a matter of money, but of principles." [123]

A bittersweet deal

Forty union members met with Sen. Baucus in the Kalispell Labor Hall on Oct. 29, 1995. Baucus told the workers that he had written to and

spoken with Duker and urged him to work toward a settlement of the labor dispute. Gov. Racicot met with CFAC and union negotiators on Oct. 31 at 2 p.m. “I will continue my separate discussions with both labor and management and will do all I can to personally help push for a prompt resolution to this dispute,” he said. [124] Racicot reminded both sides that a contract resolution was of “grave, grave importance” to the residents and economy of the Flathead Valley. An hour later, union and CFAC negotiators agreed to meet with Jim Parmen, a Department of Labor mediator from Spokane, the next day at 11 a.m. [125] Eckelberry said union negotiators were prepared to return to the bargaining table with new options for the company to consider. CFAC negotiators claimed profit-sharing was negotiable, but union negotiators did not. Eckelberry said the two sides had agreed to give one another a 48-hour notice prior to a strike or a plant shutdown because of the volatility of the negotiations. [126]

Brian Kennedy commented on how this year’s labor negotiations differed so much from earlier ones in a Nov. 1 editorial. “Many knew for the past several years that contract negotiations in 1995 would be rough,” Kennedy said. “Worker morale began declining when the once-healthy profit sharing checks dwindled and then disappeared. The stage was set for rocky contract negotiations, however, when lawsuits filed two years ago accused CFAC owners of holding out on workers and not paying them their share of profits. Those shots weren’t made across a table between employee and employer – they were lawsuits now in federal court.” In light of all this, Kennedy said it wasn’t surprising that the union voted down the company’s contract offer, which Kennedy said was a 32% wage increase. “That threat by the largest unionized work force in Flathead County is a chilling thought,” he said. “We hope a federal mediator helps the situation this week and both sides continue to talk. Many, many have a stake in the outcome.” [127]

Parmen addressed 18 union representatives and three CFAC representatives before contract talks resumed at the Rocky Mountain Lodge in Whitefish on Nov. 1. He recalled a mill strike in his original hometown of Libby, Mont., and “the anxiety, the fear and the sense of despair” that labor disputes bring to a community. Racicot said it was ironic that CFAC was troubled by labor strife at a time when it was

faring better than it had in the past. “We’re 100 percent behind what the governor had to say,” CFAC negotiator Herb Grossman said, noting that a strike and shutdown would be disastrous to the local community. Eckelberry explained that the plant’s union members had voted down the company’s last offer by 92% because the workers were not willing to exchange wage increases for profit-sharing. “The employees want profit sharing,” Eckelberry said, adding that the company contract offers did not match what could be earned through profit-sharing. [128]

With the help of the federal mediator, union negotiators reached a tentative agreement for a new labor contract on Nov. 2. The agreement called for hourly workers to give up profit sharing in exchange for higher wages and benefits. Tom Powers said the agreement was worth “millions over the offer that was turned down” one week earlier. The labor attorney said union leaders would urge workers to approve the new agreement when it came to a vote. [129] Parmen helped eliminate hostility between the negotiating parties, as the two sides were physically separated and Parmen acted as the go-between. Eckelberry described the new proposal as reasonable. He said it offered “millions more than we had last Friday.” The hourly workers’ past profit-sharing claims, which were still in litigation, were untouched by the new agreement. The proposal had the unanimous recommendation of AWTC’s 15-member negotiating team, while the previous contract proposal had no recommendation from union negotiators. [130]

CFAC’s union workers began voting on the new four-year labor contract on Nov. 6. The vote was tallied by noon the next day. With 91% of AWTC members voting, the contract passed with a 71% yes vote and Eckelberry signed the new contract. Craft said union leaders were not certain how the members would vote. “We’re not 100-percent pleased with the package, but we got the best deal we’re going to get,” he said. The new contract did away with future profit-sharing in exchange for a 43% increase in wages and benefits. When judged over the past 10 years, the contract only amounted to an 8% to 9% increase because the hourly workers took a 35% cut in wages and benefits back in 1985 in exchange for profit-sharing. Craft explained that profit-sharing was the big issue, and the workers didn’t want to give it up.

The new contract also omitted a provision that would have allowed the company the right to combine jobs to increase efficiency. AWTC leaders felt the provision's language would give the company the power to lay off workers. [131]

The former four-year contract had expired on Oct. 17, 1995, and conditions of the new contract were retroactive to that date. The new contract included a signing bonus, an annual cost-of-living raise, increased company contributions to both the workers' medical insurance and pension plan, and an increase in the number of paid holidays from six to nine. Tom Hodson said the new contract did not provide for either profit-sharing or a bonus linked to the price of aluminum, as other companies had done with their unions. While some union leaders were critical of the new contract because it eliminated profit-sharing, others pointed out that the new contract was better since profit-sharing had ranged from a low of 11% to a high of 164% and had not been paid since 1991. [132]

Union negotiators said they were unable to bargain for a new profit-sharing contract, and the negotiating committee eventually came out in support of the company-proposed contract. "But we hadn't been paid our shares for the last two years," Eckelberry noted. "Fifty percent of nothing is still nothing. We needed a contract we could live on week to week." The new contract was worth millions more than the first offer and included an initial 32% wage increase, which hiked the average hourly pay by $3.46 per hour. The average wage would increase from $11 per hour to more than $15 per hour. After that, wages would increase 30 cents per hour each year for the remaining three years of the contract. The contract also provided a $2,500 lump-sum bonus to be paid each November for the next four years. The increases totaled approximately $41,000 per hourly employee over the four-year period of the contract. Hodson said the new labor contract was competitive with other aluminum plants. [133]

The Daily Inter Lake's Nov. 8 editorial applauded the labor contract resolution and referred to difficulties CFAC faced in a changing worldwide aluminum industry. "Other aluminum reduction plants in the Northwest have closed while this one has thrived, adapting to an ever-changing marketplace," the editorial said. "CFAC and its workers prospered, particularly in the new company's early years, by working

smarter and more efficiently." [134] The profit-sharing story, however, wasn't quite yet over. The union workers had been pressured into returning to the old days of labor contracts setting their pay and letting CFAC's owners continue to keep all the profits. The most they and the salary workers could expect from the aluminum company after the new contract was signed was a decent settlement in the profit-sharing case, and Duker and Broussard continued to make unsatisfactory offers. Nearly all the court rulings so far had been in favor of the employees, but the definition of "distributable profits" still needed to be determined, and the plaintiffs' attorneys were still concerned about offshore bank accounts set up by CFAC's owners. Gov. Racicot, Sen. Baucus and Rep. Rick Hill continued to comment on the case, and U.S. District Judge Donald Molloy, who was to be the settlement judge, made an appearance at Columbia Falls High School ahead of the settlement hearing. The historical settlement didn't resolve all profit-sharing issues – questions were raised by some workers and observers about how large the settlement actually was and how the settlement was reached. And while the settled employees became the subject of media stories and the target of local salesmen, politicians borrowed the story for their re-election campaigns.

[1] Michael Jamison, “Columbia Falls Aluminum Company,” Montana Business Quarterly, June 1998 [AL0351]
[2] Michael Kustudia , “Humor eases stress of Judge Bart Erickson’s job,” Hungry Horse News, June 24, 1987 [AL2723]
[3] For more information, see Biographical Directory of Federal Judges, an online publication of the Federal Judicial Center [AL5494] and Mark Parker, “Judge Shanstrom: A life well lived, in and out of the courtroom,” Montana Lawyer, September 2013, reprinted in Last Best News online, March 7, 2014 [AL5495]
[4] “CFAC brass braces workers for worst,” Hungry Horse News, July 29, 1993 [AL1846]
[5] Jackie Adams, “Aluminum plant says cash could run out by April or May,” Daily Inter Lake, July 29, 1993 [AL1847]
[6] John Cook, “1993 Distributable Profits,” Columbia Falls Aluminum Co. internal announcement, Dec. 8, 1993 [AL1755]
[7] Nancy Woodruff, “Tough times bash CFAC bonuses,” Daily Inter Lake, Dec. 30, 1993 [AL1856]
[8] Lynnette Hintze, “CFAC red ink nixes annual bonuses,” Hungry Horse News, Dec. 30, 1993 [AL1857]
[9] AP, “Aluminum plant says outlook grim,” Missoulian, Jan. 31, 1994 [AL0030]
[10] Letter from Lowell Eckelberry, Aluminum Workers Trades Council president, to John Cook, Columbia Falls Aluminum Co. plant manager, Dec. 9, 1993 [AL1754]
[11] Letter from C.J Giroir, attorney, to Lowell Eckelberry, Aluminum Workers Trades Council president, Jan. 10, 1994 [AL1752]
[12] Obituary for “Lowell ‘Eck’ Carter Eckelberry, 67,” Daily Inter Lake, Aug. 3, 2013
[13] Lynnette Hintze, “CFAC suit inches its way toward settlement,” Hungry Horse News, April 14, 1994 [AL3569]
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[15] U.S. District Judge Jack Shanstrom, In The United States District Court for the District of Montana, Missoula Division, In Re: Columbia Falls Aluminum Company Profit-Sharing Litigation, Cause Nos. CV 92-27-M-JDS, CV 92-41-M-JDS, Order, July 23, 1997 [AL1735]
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