Chapter 47

An historical settlement

On Nov. 23, 1995, the Hungry Horse News listed seven lawsuits filed against the Columbia Falls Aluminum Co. and its owners, Brack Duker and Jerome Broussard – 1) a case filed in 1990 by Revo Somersille for profit-sharing he claimed he lost after he was unjustly fired; 2) a wrongful discharge case filed by CFAC accountant Bobbie Gilmore, which additionally claimed that the company interfered in her job in order to prevent her from finding out what had happened to the employees' missing profit-sharing money; 3) a class-action lawsuit filed by Gilmore and joined by the salaried employees at CFAC, which was still in the discovery stage after a federal judge had ruled that profit-sharing language had existed in each salaried employee's contract; 4) another lawsuit filed by Gilmore which asked that the courts force CFAC to live up to a contract signed by CFAC and the Atlantic Richfield Co., in which CFAC promised ARCO that it would pay its employees 50% of CFAC's profits; 5) a class-action lawsuit filed by the Aluminum Workers Trades Council, which joined lawsuits number three and four with the difference that the salaried workers had profit-sharing language in each individual contract, falling under state jurisdiction, while the union depended upon a collective-bargaining agreement, falling under federal jurisdiction; 6) a lawsuit filed by CFAC against its insurance company in hopes the insurance company would pick up some of the legal costs of the company's numerous lawsuits; and 7) a lawsuit filed by CFAC against Norsk-Hydro, a tolling customer, for interfering in CFAC's business operations. [1]

The hourly union workers had signed a new labor contract that eliminated profit-sharing after a tense Halloween weekend stand-off in 1995. The plant managers and employees went back to the business of smelting alumina for tolling customers, while attorneys and judges wrestled with the ongoing profit-sharing lawsuits. On March 4, 1996, Gov. Marc Racicot and his Republican running mate Judy Martz traveled through a winter blizzard to announce his re-election campaign during a whistle stop at the CFAC plant. Workers and management applauded Racicot, who had intervened during the faltering labor contract

negotiations in October, and endorsed his re-election bid. Racicot said he chose Columbia Falls to make his announcement because of the workers' strong commitment to community and hard work. He acknowledged the ongoing profit-sharing dispute, but noted otherwise "this has been a success story of good Montanans." [2] Racicot's visit marked a continuing trend of top government officials using the aluminum plant's reported successes and failures for campaigning and other political purposes.

Briefs, motions and rulings

On April 15, 1996, CFAC's attorneys filed a motion for summary judgment in the profit-sharing case. One of the arguments was that salaried employees at CFAC were "at will" employees who didn't have a contract for employment for any set period of time. The defendants' attorneys argued that "at will" employees did not have a fixed contract as a result, and so the profit-sharing plan could be changed or modified at the company's discretion. The attorneys also argued that purported statements such as "one dollar for me, one dollar for you" were not valid or enforceable contracts since they lacked essential contract terms, lacked the requisite meeting of the minds and were "violative" of the statute of frauds. The plaintiffs' attorneys responded by pointing out that although some differences existed among the oral representations, they were all consistent with the understanding of a 50/50 split. About a year later, U.S. Chief Judge Jack Shanstrom ruled on July 23, 1997, that the "at will" status of salaried employees was irrelevant to the profit-sharing claim. He also ruled that the court would allow oral representations in order to address the issue of the intent of the parties when interpreting ambiguities in the meaning of terms such as "distributable profits" before a jury. [3]

Attorneys for the hourly workers filed a motion for a partial summary judgment also on April 15, 1996. Most of their arguments had been addressed previously, but there were additional arguments. The hourly workers contended that the actions of Duker and Broussard justified "piercing the corporate veil and holding them personally liable." According to Montana law as interpreted by Judge Shanstrom, to justify piercing the corporate veil the "finder" of fact was required to conclude that the defendant was "either the alter ego, the instrumentality or agent of the corporation" and find "evidence that the corporate entity

was used as a subterfuge to defeat public convenience, justify wrong or perpetrate fraud." Judge Shanstrom later ruled on July 23, 1997, that "genuine issues of material fact exist to preclude summary judgment on this claim." [4]

The Aluminum Workers Trades Council's attorneys also asked the court to define the terms "profits" and "distributable profits." Judge Shanstrom explained in his ruling that if a provision in a labor contract was ambiguous, then its interpretation depended on the intent of the parties who signed the contract. In the area of labor contracts, the finder of fact was allowed a greater liberality in considering extrinsic evidence to determine the intent of the parties, he said, including such things as conduct and statements made both during contract negotiations and after a labor contract was signed. Judge Shanstrom cited a Montana Supreme Court decision regarding ambiguity in contracts which said that, in general rule of law, the interpretation of contracts was a question of law for the court to decide, but where the question of intent was ambiguous or obscure, the decision would have to be left to a jury to decide. With that citation, Judge Shanstrom refused to determine the meaning of the term "distributable profits." The AWTC attorneys also asked for an order to set interest rates on the allegedly missing profit-sharing money, require equitable accounting, require an annual independent audit and require Duker and Broussard to immediately pay restitution. [5]

Attorneys for the salaried workers filed a motion for summary judgment also on April 15, 1996. Their first argument was based on a third-party agreement between ARCO and the Montana Aluminum Investors Corporation, which reportedly paid ARCO one dollar for the Columbia Falls aluminum plant. Unlike the hourly employees, the salaried employees' claim was not preempted by the federal Labor Management Relations Act or superseded by a labor contract. Judge Shanstrom previously had determined that a third-party agreement existed between CFAC and the salaried employees. The attorneys also asked for a declaratory ruling that the term "profits" as used in the profit-sharing case would have its usual and ordinary meaning – the gross business revenues of CFAC minus ordinary, reasonable and necessary business expenses from business operations. Judge Shanstrom cited the Montana Supreme Court precedent used in the AWTC pleading and refused to

determine the meaning of the terms “distributable profits” on the same grounds cited with the hourly workers. [6]

The attorneys for the salaried employees also asked for a declaratory ruling stating that certain benefits obtained by CFAC owners Duker and Broussard be deemed part of the profit-sharing distribution, such as 1) salaries, bonuses or fees in excess of reasonable or ordinary business operations; 2) interest-free or below-market-rate loans; 3) payments of attorneys fees, litigation expenses, indemnification, consultant fees and other expenses tied to the CFAC owners’ defense in the profit-sharing case; 4) S-Corporation tax payments otherwise reported as profit; and 5) any other transaction that would divert profits away from the corporation to Duker and Broussard. The attorneys also argued that based on the defendants’ books alone, CFAC’s profits from 1985 through 1994 were $356,464,000 and that in 1995 alone, CFAC’s profits were $50,008,000. Attorneys for the salaried employees also asked for an order entitling salaried workers to a simple interest rate of 10% on missing profit-sharing money, and that a statutory penalty of 110% be attached to missing profit-sharing money. The attorneys also asked for an annual independent audit and an order for receivership into which Duker and Broussard should immediately pay restitution and earnings. [7]

In May 1996, CFAC’s attorneys filed a brief which complained that employees had taken words and phrases out of context. In reference to the third-party ARCO letter, which stated that the employees “have a claim against at least 50 percent of the profits earned in each year,” CFAC’s attorneys stated that “Webster’s dictionary makes it clear that a ‘claim’ is just a claim and not a right.” The attorneys also said statements reputed to be made by Duker to the employees, such as “a dollar for me, a dollar for you,” should be described as “the alleged statements by Brack Duker.” One of CFAC’s attorneys, Mark Shipow, also explained to the court why Duker created a shell company based in the Cayman Islands called Eural in 1995. Eural was created to handle money exchanged between CFAC and its tolling companies, he said. Shipow claimed Eural was needed “because, given all the instability at the company, potential customers were not willing to take the risk of dealing with the company… They wanted to deal with the shareholders. It was done, we think, above board.” [8] CFAC had only two shareholders – Duker and Broussard.

U.S. Magistrate Judge Bart Erickson also issued findings and recommendations that spring. On March 6, 1996, he ordered Duker and Broussard to produce personal financial information, including all personal financial records that would reflect a receipt of wages and salaries, cash, loans, dividends or other distributions or payments in any form from CFAC or MAIC; and all personal tax returns for the years 1985 to the present, along with notes or documents used in preparing the tax returns, redacting only items in income or expense from sources other than CFAC or MAIC. [9] On May 30, Judge Erickson issued a finding that the hourly workers had a legal profit-sharing contract with the plant's owners, similar to the contract for the salaried workers. As a result, the hourly workers could expect to receive settlement money if it was established that Duker and Broussard had withheld profits from the company's employees. A similar finding in September 1995 had established that a legal profit-sharing contract existed between CFAC's owners and the salaried workers. [10]

Judge Erickson also issued an advisory ruling on May 30 dealing with filings by the hourly workers. He granted AWTC's request for a partial summary judgment in the matter of the collective bargaining agreement made between CFAC and AWTC in November 1985. Attorneys for the hourly workers had argued that the labor contract entitled the hourly workers to 50% of the company's distributable profits, and Erickson agreed. However, Erickson recommended denial of the union's request for partial summary judgment in the matter of the third-party beneficiary claim. Evidence showed that Duker, representing CFAC in September 1985, had agreed with ARCO to share half the company's profits with CFAC's workers, but Erickson agreed with CFAC's attorneys that the third-party agreement between AWTC and ARCO was extinguished by the collective bargaining agreement signed by union members in November 1985. Erickson also recommended denial of the union's request for partial summary judgment based on ERISA claims. He did recommend granting the union's request for a partial summary judgment under ERISA with respect to the relationship between any unpaid profit-sharing money and the company's owners. Erickson also found that Duker and Broussard were the constructive trustees of any profits they held that rightfully belonged to AWTC members. [11]

Judge Erickson summarized these findings and recommendations on Dec. 3, 1996: 1) the September 1985 letter from MAIC to ARCO constituted a third-party agreement for the benefit of CFAC employees; 2) counter-claim defendant CFAC had made a prima facie case that the third-party beneficiary contract was extinguished by novation with the signing of the labor contract between CFAC and the AWTC on November 1985; 3) the November 1985 labor contract, including Attachment B, entitled hourly workers to 50% of CFAC's distributable profits as determined by CFAC; 4) payments to employees under the agreement provided current income, not retirement income; 5) Attachment B of the November 1985 labor contract was not an ERISA plan; 6) the 401(k) plan established by CFAC in 1986 was an ERISA-qualified plan; 7) the November 1985 labor contract, including Attachment B, preceded the 1986 ERISA plan and thereby superseded the plan; 8) the 1990 amendment of the 1986 ERISA plan related back to the 1986 ERISA plan; 9) the 1986 ERISA plan required that 50% of the distributable profits be distributed to the salaried and hourly employees on a pro rata basis, but this language in the ERISA document did not mean that a claim arising under that language was an ERISA claim, nor did it mean that the ERISA plan constituted a modification of the November 1985 labor contract; and 10) counterclaim defendants Duker and Broussard were constructive trustees of any profits that they received that rightfully belonged to the AWTC member employees. [12]

Smelting as usual

While profit-sharing reports splashed across the front pages of state newspapers, smelting for tolling customers continued at the Columbia Falls plant. CFAC had brought in Larry Tate to head up the smelter in July 1995 to replace John Cook, who had died, and Lee Smith, who had come out of retirement to oversee the plant. By September 1996, CFAC had 600 employees and had returned to full capacity. "We are an old plant, no doubt about that," Tate said, adding that even with the older aluminum reduction technology, CFAC was at 100% capacity while other smelters were not. "To protect this plant, we need to decrease the variability in the things we do daily," he said. Tate was making a concerted effort to protect the plant's future by making the smelter more competitive and efficient. "We are spending more money this year on our equipment and process improvement than any other year since

the inception of CFAC," he said. This included a $400,000 repair to the plant's alumina unloading and storage facility in Everett, Wash., purchasing new hot metal trucks and expanding the plant's production of sheet ingot beyond the current 20% of total production. [13]

Overall, the company had long-term contracts on three fronts that provided stability for the near future. A five-year power contract with the Bonneville Power Administration provided guaranteed steady rates with a 12% cost reduction. CFAC's power bill reached as high as $65 million a year. "As long as power is available to us, I see no situation in which we would reduce our capacity," Tate said. CFAC also had secured two long-term tolling contracts with Pechiney and Glencore that lasted until Dec. 31, 2000. "They are good folks to work with," Tate explained. "They are supporting us and we are fulfilling their needs." If they didn't re-sign, other tolling customers existed, Tate said. The hourly workers had recently signed a four-year labor contract that would expire in October 1999, but the profit-sharing lawsuits continued to affect the company. "I understand that there are feelings surrounding the lawsuits and I cannot begin to put myself in their shoes," Tate said. "Every individual is going to have to deal with it as they see fit. My challenge is to try to make this plant competitive to enable it to be here providing these people with jobs." [14]

Near the end of September 1996, Judge Erickson handed down findings and recommendations on about 20 motions filed by CFAC's employees and owners. Two of the more significant rulings favored employees. Erickson recommended that various complaints would be consolidated into one trial, thwarting Duker and Broussard's attempt to split the complaints into separate cases. Erickson also recommended that Duker and Broussard be required to release personal finance records to the plaintiff's attorneys. His recommendations moved the case "that much closer to trial," said Allan McGarvey, the attorney for the salaried employees. Consolidation would make it easier for the plaintiffs to paint a broader picture of the case in a courtroom rather than argue individual points on a case-by-case basis, and requiring the owners to release their financial records opened the door for the plaintiffs to chase down the missing profits – including in off-shore banks. Erickson had ruled in September 1995 that the salaried employees had a contract that guaranteed them 50% of the plant's profits, but he still would not

agree to provide a definition for distributable profits. “Fifty percent of distributable profits may mean half of the amount of profits that were earned and distributed, or it may mean half of the profits that CFAC determined were available for distribution,” he wrote. [15]

Roger Sullivan joined his partner McGarvey in stating that Judge Erickson had “cleared the decks” on most of the pre-trial motions. “We’re pleased with the court’s rulings,” Sullivan said. The case now seemed focused on the meaning of the phrase “distributable profits,” which was why Erickson ordered the defendants to provide financial information, the attorneys said. “When, where and how defendants have directed the profits of CFAC is potentially relevant to this case,” Erickson wrote. This included information on Eural, the offshore shell company created to handle CFAC’s tolling contracts. Erickson also ordered the defendants to pay the plaintiffs’ attorney fees and other expenses incurred while trying to obtain information the court had already ordered the defendants to provide. “Despite the efforts of the court and its appointed case manager in this case, defendants have not been consistently forthcoming pursuant to the discovery rules,” Erickson wrote. He cited one instance in which Duker had directed his accountant in an April 1994 memo not to provide financial statements because “he did not want them to be discoverable in the ongoing litigation involving the company.” Erickson also ordered disclosure of a letter Duker wrote in 1986 that referred to the profit-sharing agreement. [16]

Judge Erickson issued his findings and recommendations regarding the motions made by both sides for partial summary judgment on Dec. 3, 1996. He restated 10 court findings from May 30 and recommended denial of the motions. Regarding the motion by the hourly workers to “pierce the corporate veil,” Erickson referred to a two-part test used in Montana law to establish the propriety of piercing the corporate veil. Citing precedent, he explained that the claimants had to convince the court that Duker and Broussard acted as the “alter ego, instrumentality, or agent of the corporation” and also that they used CFAC as a “subterfuge to defeat public convenience, justify wrong, or perpetrate fraud.” He found that the claimants had not shown “for purposes of summary adjudication that Duker and Broussard ignored the corporate structure of CFAC in furtherance of undue personal gain.” Regarding the

motions to have the court decide the meaning of the terms "profits," "distributable profits" and "distributions of profit," he concluded that these terms "may have had different meanings in different contexts at different times in relation to the profit sharing plan." Because the meaning of these ambiguous terms was crucial to the case, Erickson recommended denial of the motion for summary judgment and left the meaning of these terms to the finder of fact. [17]

Judge Erickson issued the last in a series of findings and recommendations on Jan. 3, 1997, by recommending denial of summary judgment requests by the plaintiffs and the defendants. "We were delighted with all of his decisions, with the exception of his denying our request for summary judgment," McGarvey commented later. The magistrate judge's findings and recommendations would be forwarded to Judge Shanstrom, who was expected to rule on Erickson's conclusions during a March 13 hearing in Missoula. "After Judge Shanstrom rules on these final motions, there's essentially nothing to do but go to trial," McGarvey said. "It's possible that the judge could still grant a summary judgment; however, that's always difficult. There's a strong burden to meet, but we think he should grant us summary judgment. We have a very strong motion, and they have a motion that isn't worth beans. In our mind, there's nothing that needs to be tried by a jury." [18]

The case shapes up

By 1997, after years of frustration and even a contempt citation directed against Duker, attorneys for the employees finally had in their possession most of the personal financial records they needed to pursue the profit-sharing case. One of the first things the plaintiffs' attorneys discovered was that much of the money earned by CFAC had been transferred out of the U.S. to Duker's and Broussard's personal accounts on the Isle of Man and Gibraltar. Duker's lawyer, Mark Shipow, later explained in 1998 that the offshore accounts were set up as trusts for the two owners' families "as part of estate planning." The cost of fighting the legal battle against Duker and Broussard proved difficult for McGarvey, Heberling, Sullivan & McGarvey, and the small law firm in Kalispell was forced to take out an $850,000 loan. Among the well-known and powerful attorneys they faced were attorneys from the Rose Law Firm in Little Rock, Ark. [19] Rose Law Firm was the third oldest law firm in the U.S. Hillary Rodham became the firm's first female associate

and its first female partner during the time her husband Bill Clinton was the Arkansas attorney general and later governor. [20]

Judge Shanstrom began to shape the case in 1997, beginning with a hearing on March 13 to hear objections by the plaintiffs and the defendants to Judge Erickson's findings and recommendations. The employees' attorneys claimed that from 1986 through 1995, CFAC's owners had taken about $113 million that was owed to the employees, and with interest that debt stood at about $154 million. The employees had received about 50% of the company's profits for the fiscal year ending in 1986, but plaintiffs argued the percentage declined ever since, and no profit-sharing was paid in 1993 and 1994. Defense attorney Harry Huge argued that the phrase "distributable profits" gave CFAC's owners sole discretion in determining what profits might be shared. Huge also pointed out that plummeting aluminum prices had made profit-sharing impossible in 1993 and 1994. [21]

McGarvey countered by noting that CFAC's owners took millions out of the company in 1993 and 1994, but the plaintiffs' attorneys lacked the financial information needed to determine more precise figures. "To this date, 5 1/2 years later, we still don't have our discovery," Sullivan said. Defense attorney Dana Christensen argued that the request for financial information went too far and infringed on Duker's and Broussard's privacy. "That kind of discovery should not occur and must not occur in this case," Christensen said. He also complained about the "troubling personal tone" of the case. "We don't need any more personal attacks," Christensen said. About 100 CFAC employees attended the hearing and disagreed with Christensen's statement. "You'd take it personally, too, if someone took your money and ran off with it," an employee told media. "They're ripping us off pure and simple, and that's why we're mad." [22]

Judge Shanstrom ruled on arguments made at the March 13, 1997, hearing eight days later. The hourly and salaried employees had moved to consolidate their cases for trial. In determining that the two cases should be consolidated, Judge Erickson earlier had determined: 1) that differences between the classes were insignificant in light of the overwhelming similarities; 2) there was a risk of inconsistent adjudications on the common facts and law; 3) the pretrial orders for both cases had indicated that there were far more identical items than different items; and 4) consolidating the two cases for trial would save

time and also "many thousands of dollars in litigation expense to the parties." Shanstrom agreed and made a preliminary ruling to accept Erickson's recommendation. CFAC's attorneys had stressed at the March 13 hearing that "fairness must be this Court's guiding principle" when determining whether two or more cases were to be consolidated at trial, but they failed to identify any specific reason why consolidation was unfair, Shanstrom said. [23] CFAC's attorneys argued that the two groups should be kept separate because the manner in which their profit-sharing agreements were reached was different. [24] Shanstrom, however, ruled that the cases should be consolidated because they were similar, to save court costs and because the defendants failed to identify any specific prejudice they would suffer if the cases were consolidated. [25]

Judge Shanstrom also addressed the defendants' motion to restructure the class of salaried employees into four categories: 1) employees who were not former employees of ARCO; 2) employees who did not experience a reduction in salary and benefits; 3) employees who did not claim that they accepted employment with CFAC at reduced wages in consideration for participation in profit-sharing; and 4) other members of the class whose claims were barred by the period of limitations. In response to the defendants' motion, the plaintiffs maintained that there was nothing in the record to impugn the following points: 1) a contractual obligation existed to provide employees with 50% of the distributable profits; 2) a contractual obligation to ARCO existed that employees receive 50% of the distributable profits; 3) obligations existed that were created by ERISA and the pension plan documents; and 4) there was a common understanding that a deal existed that meant profits would be split 50/50 between owners and employees. Judge Shanstrom agreed with Judge Erickson's recommendation to deny the defendants' motion to restructure the class because "CFAC has come forward with nothing new to cause the Court to reconsider its prior decision and restructure the class." [26] CFAC's attorneys had argued that some salaried employees did not qualify to be included in the class action because they had not worked for ARCO prior to working for CFAC, and some had not taken a reduction in pay in exchange for profit-sharing. [27] Judge Shanstrom disagreed. "Every plaintiff who was an employee of CFAC while the profit-sharing plan was in effect is entitled to remain in the action," he ruled. [28]

Judge Shanstrom also addressed whether Duker and Broussard had complied with an order to present personal financial information for use by the plaintiffs. The court had ordered the defendants to produce personal financial information on March 6, 1996. In arguing against the order, CFAC's attorneys claimed that the central issue in the case was the management of profit-sharing by CFAC, a corporate defendant. Judge Erickson had earlier disagreed with that argument, stating that the plaintiffs "are entitled to discover evidence, for example, relating to the 'S-Corp defense' and to the tracing of potential constructive trust (accounts), if any," and pointing out that the defendants' "choice of a business structure with 'pass-through' taxation" made the defendants' personal financial information relevant to the case. [29] Shanstrom agreed with Erickson and the plaintiffs' attorneys. He ordered Duker and Broussard to produce "all personal financial records that reflect receipt of wages and salaries, cash, loans, dividends or any other distributions or payments in any form." He also ordered Duker and Broussard to produce unedited personal income tax forms dating back to 1985, along with unedited notes used to prepare those statements. [30]

On April 17, 1997, Judge Shanstrom ordered that a jury trial for the class-action profit-sharing case would commence on Jan. 12, 1998. [31] Four days later, Shanstrom ruled that Judge Erickson was correct in allowing the admissibility of a letter Duker sent to R. Stephen Browning, an attorney in Helena, on May 29, 1986. Duker had stated in the letter that CFAC "has implemented a Profit Sharing Program for all employees. This program calls for one-half of the annual profits, after deducting debt service and capital expenditures, to be distributed to the employees." CFAC's attorneys argued that the letter was a private communication between Duker and an attorney and that it was improperly "purloined" by the plaintiffs' attorneys. As the case evolved into a dispute over the meaning of the phrase "distributable profits," the Browning letter became more important. The company's owners had claimed in court that CFAC employees were entitled to profits determined after tax deductions and after Duker and Broussard were paid. The 1986 letter explained things differently, stating that profit-sharing "payments are made from pre-tax profits, and the CFAC formal program also creates an entitlement for the employee which is preferred over both equity holders and payments for income tax." The plaintiffs alleged that Duker and Broussard had taken exorbitant

payments for themselves, thus diminishing available profits for distribution. [32]

CFAC's attorneys had argued that the "smoking gun" letter, as the 1986 Browning letter came to be called, was inadmissible since it was a "purloined confidential attorney-client communication." Duker claimed he sent the letter to Browning in advance of their meeting with the Montana Board of Investment on May 30, 1986, at which time Duker and Broussard sought to obtain financing for the new aluminum company from the state of Montana. Judge Erickson had determined the letter was not privileged because Duker's attorneys had not proven the letter was sent to Browning for the purpose of seeking legal advice, and that it was not sent to Browning in his capacity as Duker's legal adviser. Following Judge Shanstrom's March 13 hearing, Duker's lawyers filed an affidavit in which Browning stated the letter was received as part of his continuing legal services to CFAC and that he was not a business adviser for CFAC. Plaintiffs' attorneys moved to strike the affidavit, and Duker's lawyers made counter motions. Shanstrom ruled on April 21 that Browning's affidavit was stricken from the profit-sharing case because it was made after Erickson's finding on the letter had been made, the plaintiffs' attorneys were not given the opportunity to cross-examine Brown at the March 13 hearing, and Erickson was correct in ruling that the letter was not privileged and should be admitted at trial. [33]

Judge Shanstrom issued several more rulings on May 1, 1997. After addressing the matter of a magistrate judge's statutory authority, he denied the defendants' motion to strike a jury demand. The defendants had argued that their claims were equitable in nature and not subject to a right to trial by jury. Shanstrom also denied a motion by the defendants to exclude oral statements regarding the profit-sharing agreement. Judge Erickson had recommended that oral statements could be used to clarify ambiguous terms in a contract and should not be excluded. Shanstrom also denied the defendants' motion to exclude all evidence pertaining to settlement offers and discussions, but he granted the defendants' motion to exclude evidence pertaining to the defendants' liability insurance. He also addressed the defendants' motion to separate Roberta Gilmore's personal claims from the class claim. The defendants had argued that unlike the class claims,

Gilmore's individual claims involved allegations of fraud, so there was a chance Gilmore's claims could prejudice a jury. Shanstrom had consolidated the cases on March 21 and refused to change his earlier decision. He also denied the defendants' motion to strike the plaintiffs' punitive damage claims, noting that the claims did not fit into any of the defendants' arguments. Shanstrom also denied the defendants' motion to exclude any evidence pertaining to Eural, which the defendants argued was irrelevant and prejudicial. The plaintiffs had claimed that "the CFAC contract with Eural is a mechanism to divert additional amounts away from CFAC thus diminishing the amounts available to the employees under the profit sharing agreement." [34]

Closing in on a settlement

With so much of the court case turning against them, it came as no surprise to many when Duker and Broussard increased their settlement offer from $12 million to $50 million. The offer came during a settlement conference held in Billings, Mont., on May 13-15. U.S. Magistrate Judge Richard Anderson presided over the meeting. Attorneys for the defendants began by offering CFAC's employees $36 million but later increased the offer to $50 million. The offer was contingent on the salaried workers dropping their claim to future profit-sharing. Anderson ordered attorneys for the plaintiffs to formally respond to the offer by June 5. CFAC President Tom Hodson explained that under the terms of the offer, union workers would receive a cash payment of about $53,000 apiece and salaried workers would receive about $71,000 apiece, based on how profit-sharing had been calculated in the past. "I think our settlement proposal is an excellent proposal and one that should be given serious consideration by the class," Hodson said. The plaintiffs as a whole claimed they were entitled to about $155 million in profits and accumulated interest through 1995. "It's peanuts," an employee told the media. "I think everybody is serious about taking them to court, just because of the way (Duker) screwed us over." The employee said the issue had become one of principle. "It makes us look greedy, but we're not doing this to be greedy. We're doing this to get what is due to us back." [35]

In June 1997, CFAC sued the Aluminum Workers Trades Council over the union's claim to future profit-sharing. The company argued that the union gave up future profit-sharing in its 1995 labor contract. In the new

lawsuit, CFAC accused AWTC's former president Lowell Eckelberry of claiming that the plant's hourly workers were "third-party beneficiaries" in the 1985 contract between Duker and ARCO. CFAC also alleged that union leadership was now claiming that Eckelberry did not have the authority to sign the 1995 labor contract that gave up profit-sharing. The lawsuit asked the court to declare that the company had no obligation to pay union workers future profit-sharing. Herb Grossman, a labor relations consultant working for CFAC, said a union attorney told him AWTC in fact was seeking future profit-sharing despite language in the 1995 labor contract. Grossman said he spoke to another union attorney who confirmed the earlier statement. Grossman said when he met with union leaders in late May 1997 and asked them through their attorneys what their position was about future profit-sharing, they told him they believed they were entitled to future profit-sharing. Grossman said the company would never have signed the 1995 labor contract without the elimination of future profit-sharing. [36]

On July 23, 1997, Judge Shanstrom issued a sweeping 34-page ruling in which he denied requests for a summary judgment by both sides in the profit-sharing lawsuit and ordered a trial to take place in January. Noting that Judge Erickson had earlier found that Attachment B to the hourly workers' 1985 labor contract "unambiguously designates 50 percent of the annual distributable profits, as determined by CFAC, for employee profit sharing," Shanstrom ruled, "The plain and unambiguous language of Attachment B commands such a result. Any argument to the contrary is folly." He also noted that Duker and Broussard had testified that paying profit sharing was their obligation, but the meaning of the term "distributable profits" needed to be determined by a jury trial. Shanstrom also did not adopt Erickson's finding that the hourly workers had extinguished their third-party beneficiary contract through ARCO when they signed the November 1985 labor contract. Shanstrom also denied the defendants' claim that the union workers had waived their claims to past profit-sharing after AWTC President Larry Craft wrote to Duker on Dec. 28, 1990, and stated that the union believed CFAC's owners had been correctly distributing profit sharing funds. The union later filed a grievance about missing profit-sharing payments in early 1992 stating that the union first became aware of the breach of the agreement on Jan. 31, 1992, which was "sufficient to preclude summary judgment," Judge Shanstrom ruled." [37]

Judge Shanstrom did grant a partial summary judgment to the workers on two arguments – that hourly workers had a contract with CFAC's owners that entitled them to 50% of the company's profits, and that CFAC's funds must be held in a constructive trust pending a final decision in the case. The next step would be to define "distributable profits." CFAC had claimed that its board of directors had sole authority over how much, if any, distributable profits existed at the end of any given year. Over the past decade, Duker had received nearly $176.8 million in salary, dividends and tax payments, owner Jerome Broussard had received $138.5 million, and the company's employees had received about $90 million. Most of the payments to the employees came during the 1980s, and payments had dried up by the 1990s. Workers claimed they were owed about $159 million. [38]

"We feel very good about it," CFAC President Tom Hodson said about Shanstrom's ruling two days later. "We view this as a victory for the company." Hodson was encouraged by the direction the case was heading. "By dismissing the various motions for summary judgment, the judge is telling both sides to argue the case in court," Hodson said. "We're looking forward to that opportunity, and we're prepared to see the case through to the end. And we fully expect to win no matter how long it takes." Hodson also took Shanstrom's ruling to mean that the hourly workers had given up their claim to profit-sharing after they signed the 1995 labor contract. Allan McGarvey said he wasn't sure why Hodson felt so good. "I don't know what they're celebrating," he said. "Perhaps it's that they've survived this long." McGarvey admitted he had hoped for a more favorable ruling. He noted that the union had rejected the recent $50 million settlement offer by Duker and Broussard. Hodson told media that CFAC was finished with settlement talks with the union. The case would be settled at trial on Jan. 12, 1998, he said. "What the judge is telling us is to argue the case in court," Hodson said. The plaintiffs had hoped that Shanstrom would make a ruling on the meaning of "distributable profit" ahead of a trial. "We're definitely on the course to trial now, and there isn't going to be any resolution of it until we go to trial," McGarvey said. [39]

The next day, attorneys at Powers & Lewis, the Washington, D.C. law firm representing the hourly workers, sent a letter to the union leadership summarizing Judge Shanstrom rulings. The court had held

that the union had a contract entitling its members to their share of 50% of CFAC's profits; the meaning of "distributable profits" would be decided at trial; the question of whether or not Duker and Broussard were ERISA fiduciaries would be determined at trial; provisions of the ERISA plan did not provide a separate basis for profit sharing; Duker and Broussard would hold any money wrongfully taken by them as constructive trustees; and the hourly employees' class claim to be third-party beneficiaries of the ARCO-MAIC contract was preempted by the National Labor Relations Act. The last ruling had no bearing on whether union members were eligible for past profit-sharing earnings, but it did affect any future profit-sharing obligations the company might have for union workers without renegotiations, the attorneys told the union leaders. [40]

Hungry Horse News editor Tom Lawrence commented on the profit-sharing lawsuit in a July 31 editorial. During the period when profit-sharing checks were issued, employees "bought new trucks and nice homes and became accustomed to the profit-sharing checks," he said. "That's when the money started to dry up." While there was a difference of opinion about how much money was not paid to employees, one thing was certain, Lawrence said – "Both management and employees have done well in the past decade." CFAC's owners paid themselves about $300 million, while the employees shared more than $90 million. "We hope both sides can resolve this dispute in a way that doesn't hurt the hard-working employees of the company," he said. "And we hope that CFAC remains a vital part of the Columbia Falls business community." [41]

Reaching a settlement

A settlement in the case was reached on Dec. 19, 1997 – about three weeks before the trial was scheduled to start. The employees claimed the owners owed them $154 million, but after six years of litigation the owners agreed to pay the workers $97 million while admitting no wrongdoing. [42] Overseeing the settlement negotiations was U.S. Judge Donald W. Molloy. Born into an Irish-American family in Butte in 1946, Molloy's father had worked in the copper mines before flying 30 missions over Europe during World War II and after the war opening a medical practice in Malta, Mont. Molloy was a running back for the University of Montana football team. He joined the Navy after

graduating and flew F-4 Phantom fighter jets off the USS John F. Kennedy for five years in Asia and the Middle East. Molloy received a law degree at the University of Montana's School of Law in 1976. He served as a law clerk from 1976 to 1978, had a private practice in Billings from 1978 to 1995, and became a federal judge in August 1996. He later served as Chief Judge for the Montana District from 2001 to 2008, succeeding Jack Shanstrom, and assumed senior judge status in August 2011. Molloy was succeeded as District Court Judge by Broussard's attorney in the profit-sharing case, Dana Christensen, in 2011. Molloy became well known for a number of high profile cases, particularly environmental cases. [43]

Parties to the profit-sharing lawsuit met with Judge Molloy and Magistrate Judge Anderson at the Missoula Federal Courthouse on Dec. 18 and 19. After two days of negotiations, Duker and Broussard offered $32 million to the 220 salaried employees and $65 million to the 800 union and hourly employees in the case. The settlement needed to be approved by Judge Shanstrom and by a simple 51% majority vote by the members of each class. An additional $5 million would be paid to the employees by the end of December 1998. The total settlement was $57 million less than what the employees alleged Duker and Broussard owed them. [44] The attorneys representing the salaried workers would receive $6 million out of the $32 million share allocated for the salaried workers, while the attorneys from Powers & Lewis would receive 10% of the $65 million allocated for the hourly workers. A total of 1,000 workers, including retirees, would share in the settlement. The average payment for hourly workers employed throughout the profit-sharing period was expected to be about $100,000 and the payout for salaried workers was about $150,000. [45] Mareva injunctions for freezing assets held on the Isle of Man and in Gibraltar were also resolved in the settlement. [46]

"I'm not going to put an opinion on it, because I represent too many people," AWTC President Terry Smith said about the settlement offer. "We're not going back with a recommendation. We feel we've filled an obligation to do the best we could to come up with a settlement number." Smith said the court ordered new negotiations in light of recent rulings that directed the case toward a jury trial. The union represented about 450 active employees and about 350 retired

employees in the lawsuits, and the salaried class contained about 225 employees. Informational letters describing the settlement would be mailed out to employees on Dec. 22 and 23, and an informational meeting for hourly workers was scheduled for Dec. 29 in Columbia Falls, with Judge Molloy and Judge Anderson fielding questions. [47]

The hourly workers had demanded as much as $100 million. A court-ordered gag rule was in effect, and most employees were not talking after attending informational meetings. The settlement would be distributed based on the number of hours each union employee worked, and it was estimated to average about $6 per hour and total over $100,000 per hourly worker. “And that’s one hell of a lot of money,” one union worker told media. “Maybe he (Duker) isn’t paying us everything we’ve got coming, but how can you just turn your nose up at a check for $60,000 after taxes? We can pay off our houses, we can pay off our cars. We can buy a new boat or plan for retirement. Or we could refuse the offer and wait through seven years of trials and appeals. We’ve got a bird in the hand. Do we shoot for two in the bush? It’s a crap shoot I’m not willing to bet on.” Many of the hourly employees were waiting to cast their votes after attending informational meetings. Ballots were to be counted in early January, just before the scheduled trial date. [48]

Attorneys from Powers & Lewis sent an informational letter and ballot to all AWTC members on Dec. 22. The attorneys said $65 million with an additional $5 million to be paid in December 1998 was a good settlement offer. “Your attorneys strongly believe this is a favorable resolution of the case,” the attorneys wrote. They also said that even though the amount was less than what they believed the workers were owed, about $75 million to $80 million, the settlement should be accepted because there was a chance the plaintiffs might lose in federal court, where a jury verdict for the plaintiff must be unanimous. There was the additional threat of long drawn-out litigation and appeals. The settlement offer covered profit sharing from Aug. 1, 1987 through Oct. 18, 1995. According to Powers & Lewis, CFAC did not underpay profit-sharing during the new company’s first two fiscal years. Distribution to each union worker would be based on the number of hours each worked minus litigation expenses and the 10% fee for Powers & Lewis. The attorneys also said they were working with CFAC to provide the workers a chance to defer a portion of the settlement to a 401(k) plan for tax

purposes. The balloting would be handled by the Van Allen Tax Service in Columbia Falls, and the results of the ballot would be presented to Judge Shanstrom on Jan. 7. A fairness hearing would be held on Jan. 21, at which time the court would be asked to approve the settlement. [49]

By Dec. 23, informational letters and ballots were in the hands of CFAC's hourly workers, who had about two weeks to decide and vote. Terry Smith said he thought most of the union workers wanted to settle, but there were outspoken union members with another opinion. During the early years of profit-sharing when aluminum prices were high, some hourly workers took home $30,000 in profit-sharing per year. "We don't want any more than we have coming," one hourly worker told the media. "But there're a lot of people who don't care what he offers. They want to go to trial." The worker said he expected the union would reject the offer, but the hourly workers might change their mind after they heard Judge Molloy's talk about how long the court process could take on Dec. 29. "I'd say it all hinges on that judge," the worker said. [50] A large crowd of current and former AWTC members showed up at the Columbia Falls High School on Dec. 28 to hear Molloy. "I just came up here to answer questions," Molloy told the media. "But I wasn't asked many." The settlement offer had generated a great deal of discussion among workers at the smelter. "It's a pretty testy situation at work right now," a worker said. The next day, McGarvey told local media he expected the salaried workers would accept the $32 million settlement offer. "I think we're going to settle," he said. "It is generally well received." [51]

While ballots were being cast, analysts were trying to predict how the settlement would affect the local economy. According to Paul Polzin, director of the Bureau of Business and Economic Research at the University of Montana, the size of the settlement was significant by any measure. "The bottom line is that $100 million is a lot of money," he said. Polzin said it equaled the total annual payroll of the Flathead County wood products industry, or about 12% of the total labor income for Flathead County in 1995. Polzin pointed out that the full amount of the settlement would not come flooding into the Flathead County economy. A good portion of the money would go to state and federal income taxes, and some of the plaintiffs no longer lived in Flathead County. Polzin also noted that prevailing opinion among economists was

that when people received large windfall payments, they did not spend it as ordinary income but instead invested the money. Workers were reportedly already consulting with investment advisers and tax consultants. But even if only a fraction of the settlement found its way into the local economy, the multiplier effect would make the money very noticeable to merchants and businesses. “For every dollar that is spent like ‘ordinary income,’ there will be another dollar created in the Flathead economy,” Polzin said. [52] The statewide impact became known a year later. Non-farm labor income in Montana rose 4.8% in 1998, with about 0.5% resulting from the $65 million wage settlement. But excluding the 0.5% contribution from the profit-sharing case, the 4.3% increase was still the state’s largest non-farm labor income since the early 1990s. [53]

On Dec. 30, Judge Shanstrom sent a copy of the order for a fairness hearing on the hourly class settlement to AWTC members. Attachment A provided details on how the settlement process would be worked out along with a brief history of the litigation. It also argued on behalf of a settlement. “Regardless of the initial outcome in the trial court, there almost certainly would be appeals by either or both sides to the United States Court of Appeals for the Ninth Circuit and perhaps the United States Supreme Court,” Judge Shanstrom said. “Thus, unless this Action is resolved by settlement, it probably would be a number of years before it would be resolved. In order to avoid the continued uncertainty, delay and expense of further litigation, counsel for the AWTC and the class of hourly employees and counsel for the Defendants have agreed to a settlement on terms which are considered by them to be a fair compromise of the risks of litigation and to be reasonable, adequate, and in the best interests of the class.” Counsel for the hourly employees had informed the court that its total expenses would not exceed $1 million. [54] The Jan. 12 trial was canceled as CFAC employees voted and prepared for the Jan. 21 fairness hear. [55]

Reluctant acceptance

About 70% of the hourly workers voted in favor of accepting the settlement offer in results announced Jan. 6, 1998. Terry Smith expressed relief that the lawsuit and its disruptions were finally nearing an end, and suggested the money would be available shortly after the fairness hearing. An attorney for the salaried class predicted the

salaried employees would vote to accept the offer. [56] On Jan. 8, the Hungry Horse News proclaimed in large front-page type, “It’s a deal!” Larry Craft, a truck driver who had worked at the CFAC plant for 29 years, wouldn’t say how he voted on the settlement offer, but he didn’t approve of the deal that union members made. Craft was named as a plaintiff in the original lawsuit and had filed the first grievance charging CFAC’s owners with withholding profit-sharing money from union workers. “I don’t feel good about it all,” he told media. “We would have liked to get a lot more.” Noting that about 10% of the union members didn’t vote, he said he was amazed that people wouldn’t participate in such a major decision. “That’s what this country’s all about,” he said. [57]

Craft was a member of the negotiating team that hammered out the proposed settlement during two days of meetings with CFAC representatives that concluded on Dec. 19, 1997. “We got the best deal we could get,” he told the Hungry Horse News. “We decided to take it to the members and let them decide.” Craft said he and other workers still felt Duker and Broussard cheated them out of their money, and by not getting the full amount they were seeking, they were allowing theft to be rewarded. “That’s exactly it,” he said. “But I think people are just willing to settle. It’s time to get rid of it, as far as people are concerned.” Craft said he wasn’t sure what hourly workers would do with their settlement money. He said he planned to put as much of it as possible into his savings for retirement. Craft said the seven-year-long dispute caused a lot of hard feelings at the plant, but that mood might change. “It’s going to get better,” he said, unless Judge Shanstrom overturned the deal during upcoming fairness hearings. [58]

Many of the plant workers were angry that Duker and Broussard were being rewarded for what could be viewed as theft, according to the Daily Inter Lake. “I’m dissatisfied with the amount,” Craft said. “And I’m dissatisfied that Duker and Broussard can get away with this white-collar crime by buying their freedom. There’s certainly a sense of relief that this is over, but it’s not joyous relief. It’s not, ‘Let’s have a party.’” Craft also was concerned that some workers would spend their settlement money unwisely. Relief also seemed to be a prevalent feeling among hourly workers after the vote. “It’s been going on so long the men are tired of it,” said Bill Baldwin, who retired from CFAC in 1989 after 30 years. “They think if it had gone any farther, it would go

another two or three years." Baldwin also had worried that if the case went to trial, the workers might have ended up with less money. "Most people are glad this is over," said Bob Higson, one of the plant's original workers who retired in 1990 after 36 years at the plant. "Everyone is sick and tired of it. It's better to get what we got and be done with it." Plant managers shared that viewpoint. CFAC President Tom Hodson said the company was pleased to see the issue come to a conclusion. "We need to get it behind us," he said. [59]

Hungry Horse News editor and publisher Brian Kennedy commented on the settlement in an editorial headlined, "Money won't solve all CFAC problems." He noted that $97 million, the amount in the settlement, and $154 million, the amount the employers sought, were both "a pile of money." But a third of the hourly workers voted against the settlement, with some dissatisfied with their union leadership and some dissatisfied that the salaried workers got a better deal. "It's clear the settlement is not a final answer to long-simmering problems," Kennedy said. "More must be done. Trust between employees and owners was the biggest casualty." Kennedy said Duker and Broussard needed to do more than just repay the workers to heal the wounds. Allowing trust to fester was no way to run a company, he said. [60]

The Daily Inter Lake's Jan. 8 editorial also took on the issue of trust. "The shame is that the employer-employee relationship that started out with such promise back in 1985 soured so quickly," the editorial said. "People will make their own conclusions about what went wrong without knowing all the facts that would have come out at the trial that was scheduled to begin this month. Such details might have helped the community better understand what caused the breakdown in trust. But a lengthy trial would not have done much to restore that trust. The truth is, in many cases, one suspects, it will never be restored: Hard feelings will remain." The Inter Lake also commented on the magnitude of the settlement. "The other reality is that there's bound to be a little envy out there as people do their own calculations about individual settlements," the editorial said. "But the fact is that under the terms of the original agreement and the court-approved settlement, workers earned what they will get, and we're happy for them." [61]

One week after the vote, Tom Hodson said the settlement should mark the end of disputes at the smelter plant. "We want to put it behind us,"

he said. “We’re going to be happy to have it behind us.” Hodson had no comment on why Duker and Broussard doubled the offer from $50 million to $97 million, or what he believed were the owners’ chances in court. “We’re pleased with the progress so far,” he said. “It’s still premature until the fairness hearings.” Hodson also said the settlement should not be construed as an admission of guilt or responsibility. CFAC settled because it was the right thing to do, he said. “We want to get back to making metal,” he said. “We have no plans to change anything we’ve been doing for the past 12 years.” [62]

Rep. Rick Hill visited the aluminum plant on Jan. 15, 1998, to assure the company he supported its future. “I want to help retain those jobs for Montana,” he told the Hungry Horse News. Hill said he believed the plant would be a major player in the local economy in the future now that the profit-sharing case was settled. “They believe that, and I certainly believe that,” he said. “They feel it’s good to get this behind them.” Hill said he couldn’t disclose the details of talks he’d had with CFAC management, but he did offer them advice on taxes. Hill said he also spoke with employee representatives. “I represent all of Montana,” he said. “I think it’s been a difficult situation for the workers and the managers.” [63]

Joan Smith, wife of CFAC’s former general manager Lee Smith, commented on the outcome in a series of letters to the local newspapers. On Jan. 15, she criticized the Hungry Horse News for how it covered the profit-sharing lawsuit. “Could this be a case of the pot calling the kettle black?” she said. “Why would an editor make a judgment regarding how a company is rightly or wrongly run without benefit of the facts? Your bias is evident.” [64] She also criticized the Daily Inter Lake in a Feb. 3 letter. “Over the past six years, we, the public, have endured repeated slanted writings in your newspaper regarding the employee lawsuit against the owners of CFAC,” she said. “I find it appalling when relentless greed is touted as an admirable quality. The questionable risk Ms. Gilmore allegedly suffered diminished considerably when she aligned herself with a firm long known for opportunistic practice. On the other hand, the financial risk to the owners upon purchase of the plant was real. Perhaps the owners have learned a valuable lesson, however – that sharing one’s good fortune

only whets the human appetite for more, and encourages jealousy, greed and dishonesty.” [65]

Rita Graham responded to Smith in a Feb. 10 letter to the Daily Inter Lake. Graham argued that while CFAC’s owners took risks in taking over the plant, the employees also took risks. When Duker took over the plant for one dollar and offered the employees a 50/50 profit-sharing agreement, the employees took substantial cuts in wages and benefits, and with those cuts came a decrease in their standard of living, Graham said. This agreement with the employees, she pointed out, provided important leverage in obtaining tax cuts and a good power deal with the BPA. And the employees stood by their agreement while the owners did not. Graham agreed with Smith that greed was a key element, but that it was the owners’ greed and not the employees’ greed that caused so much trouble. “The lawsuit was about right and wrong and no matter how you cut it, the plant owners were wrong,” Graham said. “The only regret is that criminal charges were not brought against the plant owners and involved managers.” Graham identified Smith as the wife of former plant manager Lee Smith, and she pointed out that the Smiths were likely to receive a large share of the settlement money. “Local charities, such as hospice, Wings, the food bank and Big Brothers and Sisters would be happy to accept your settlement check,” she concluded. [66]

Letters commenting on the settlement filled local editorial pages for a time. In a Jan. 29 letter to the Hungry Horse News, Dick Downen praised the efforts of Roberta Gilmore and her attorneys. “Hats off to Bobbie Gilmore,” he said. “She had the courage to stand up to big business. Without her courage and determination, the employees would have been left holding the bag, and Duker and Broussard would have been $97 million richer. Hodson said it was not an admission of guilt. Nobody gives $97 million away if they are right.” [67] A letter by Steve Thompson in the Missoula Independent described Duker and Broussard as white collar criminals who should have been prosecuted in court for theft and sent to Deer Lodge State Prison, not just sued in civil court by the workers. “Well, it appears that you go to jail only if you’re an employee and you steal a small sum of the company’s profits,” he said. “If you’re the owner of the company, and you steal $154 million plus loose change from the workers, the judge may give you a pat on the back should you

agree to give some of it back." Thompson quoted CFAC employee Keith Stahlberg who said, "The defendants stole money and need to pay it back – every penny of it." Thompson also cited Flathead County Prosecutor Tom Esch, who said he was undecided about whether he would have prosecuted CFAC's owners. In a case that complex, Esch said, it would be very difficult to prove the owners had intended to defraud the workers. [68]

In a Feb. 26 letter to the Hungry Horse News, Sam Hagen said he wanted to respond to the negative comments as a family member of a CFAC worker. "The employees were basically robbed of money they earned and deserve," he said. "So many people make it sound like the employees have no right to get their money back. I have also heard that the employees are greedy. How is a person greedy to want what is rightfully theirs?" [69] Beryl Wagner, a millwright at the CFAC plant, commented on the lawsuit and settlement process in an April column in the Hungry Horse News. He recounted how CFAC's owners began to keep the company's profits to themselves starting in 1988 and then in 1995, as the union began to negotiate a new contract, "Brack Duker brought in professional and unscrupulous negotiators." Duker threatened to close the plant, as he had threatened in 1988, and scared the union into signing a new contract. After seven years of fighting the owners in court, the court set a trial date for Jan. 12. Later the scheduled trial "was dropped with no explanation to us. By dropping this court date there would be no chance to schedule another one for at least a year or a year and a half. Our lawyer's advice was that we would not win our suit, thus causing a vote taken by the CFAC employees to come out in favor of the settlement." [70]

Fairness and taxes

Following a two-hour fairness hearing in Missoula on Jan. 21, 1998, Judge Shanstrom approved the $65 million settlement offer for the hourly workers. Mike Baker, an hourly worker with 22 years at the plant, was one of two union workers who spoke at the hearing. Baker told the judge that the hourly workers were not satisfied with how the settlement evolved, and some remained concerned about the safety of work conditions and the possibility of retaliation by management. He presented a petition signed by about four dozen other CFAC workers opposed to the settlement. He said that before he voted he was told he

would get $71,098, but now it was $52,610. Baker noted that many workers were worried about tax payments but were persuaded to settle because they were afraid of a prolonged court fight. Baker pointed out that the hourly workers did not receive what they felt they were owed by CFAC's owners, and if the money had been paid out over the years, workers would not have the huge tax liability they faced now. Baker said many hourly workers voted to accept the settlement because they feared a vote against the settlement would have delayed the trial for months. Despite the 70% vote in favor of the settlement, Baker said, hard feelings remained among the hourly workers. [71]

AWTC President Terry Smith told the court he was satisfied with the settlement and noted that a retaliation clause in the settlement should protect the workers. He also said he wasn't surprised at the discord – the hourly workers approved the settlement by a 70-30 vote, meaning about 240 hourly workers opposed the settlement. "I don't know if anyone's happy with the settlement," he said. "Both sides had to give." Keith Stahlberg made an impassioned plea to Judge Shanstrom. "The defendants stole money and need to pay it back – every penny of it," he said. The case was the most "overwhelming" in his 33-year career, Shanstrom said, recalling one day filling his Suburban with 15 boxes of materials to take home for reading. He suggested the settlement was the best outcome for CFAC's hourly workers. There was a chance that in trial the workers could have ended up with less money, Shanstrom said – especially since some of Duker's assets were held in Gibraltar and the Isle of Man, and he wasn't sure if he had jurisdiction over those assets. "As far as I'm concerned, the employees have won," he said. He said he saw no reason why he should reject the $65 million offer negotiated by the union and company representatives. "There's no way I can find in good conscience that this is not a reasonable and fair settlement," he said. "The litigation has to come to an end." [72]

Judge Shanstrom approved the $32 million settlement for the 220 salaried employees the next day after a two-hour hearing. The salaried employees would split about $25 million after the McGarvey, Heberling, Sullivan & McGarvey law firm took its $6.6 million cut. Allan McGarvey said a typical salaried worker who was at CFAC since 1985 and worked an average number of hours would receive about $240,000, based on an employee's salary and the number of hours worked. "A few people

are getting very large checks," he said. "Some are getting quite small checks." About 83% of CFAC's salaried employees voted to accept the settlement, but some voiced objections at the fairness hearing. Most of the objections voiced at the hearing concerned the formula for distributing the money among the salaried workers. "It's difficult to split it to make everybody happy," McGarvey said. Roberta Gilmore, the lead plaintiff in the lawsuit who blew the whistle and refused to sign an audit statement, would share in the salaried workers settlement and receive a separate payout. "It is an undisclosed amount," McGarvey. Judge Shanstrom noted that since CFAC was structured as an S-corporation for tax purposes, there was the potential that the settlement at trial might have been much lower. He also pointed out that Duker had transferred "a lot of money" out of the U.S. to Gibraltar and the Isle of Man where he might not have jurisdiction to secure those funds should the employees win their trial. "He repeated the concern that just because you get the judgment doesn't mean you get the money," McGarvey told local media. [73]

Judge Shanstrom also approved attorney fees of 20.85% for the salaried employees and 10% for the hourly workers. "This is one of the most complicated, challenging and hotly contested cases in Montana history," he said in his orders approving the legal fees. "Over 100 depositions were taken. More than 20 experts were retained. The case presented difficult and unusual questions of law and difficult fact issues encompassing more than a decade. It was ably and vigorously defended by more than 20 lawyers from some of the leading firms in the state and country. It presented substantial risks, especially in the earlier stages." Shanstrom noted that attorneys James Goetz and Jeffrey Renz, representing the plaintiffs' attorneys for legal fees, called a 20.85% class litigation fee fair and reasonable. Seventy salaried employees had retained McGarvey, Heberling, Sullivan & McGarvey on a 33% contingency, and the remaining members of the class must share in the costs, Judge Shanstrom said. The Aluminum Workers Trades Council agreed in a private contract to pay its lawyers 10% after litigation expenses. Among the plaintiffs' local expert witnesses were Roberta Gilmore, Robert Saurey and Revo Somersille. Among the defendants' local expert witnesses was University of Montana economist Paul Polzin. Local attorneys for the hourly workers included Michael LaBelle, Tom Powers and Joan Jonkel. Local attorneys for the defendants included

Douglas Wold, lead counsel, and Leslie Budewitz for Duker, and James Robischon and Dana Christensen for Broussard. “The $400 million claim settled at $100 million and was then the largest case of its type in Montana,” Wold later described the profit-sharing case. [74]

Attorneys for the salaried employees contacted Sen. Max Baucus for assistance in obtaining tax breaks for the workers as soon as the fairness hearing concluded. “I am very pleased that this problem has been resolved and want to do whatever I can to help employees get the full value of the benefits included in the settlement,” Baucus said. The employees were denied an opportunity to properly invest the money over the years, and it was in the best interest of everyone that they should be allowed to use a portion of the settlement for their retirement, he said. Many of the one thousand past and present employees in the case were eligible for more than $100,000, which would push them into higher tax brackets than if the money had been spread out over the years. Allan McGarvey expressed pessimism about the situation. “It comes to a point where you can’t do anything short of an act of Congress, so that’s what you pursue,” he said. Baucus agreed, noting that finding a remedy would be difficult. “Tax legislation that primarily affects a single company or a small group of taxpayers is extremely difficult to enact,” he said. Roger Sullivan said no obvious tax-deferral options existed in the current tax code. He pointed out that CFAC had offered some tax assistance in the settlement offer, but tax laws only allowed workers to defer up to $10,000 and several hundred retired workers were ineligible for any deferral. With Baucus already involved, Sullivan said that he would also approach Sen. Conrad Burns in hopes of creating a bipartisan effort. [75]

Not everyone was happy to see a U.S. Senator go to bat for the winners of a huge legal settlement. In a Feb. 19, 1998, letter to the Hungry Horse News, Maurice Johnson said she was glad the lawsuit was over but, “My concern is just why Sen. Baucus is interested in a few hundred people.” She said she wrote letters to Rep. Pat Williams and Sen. Conrad Burns about tax problems faced by waitresses and waiters without success. “Just why is Sen. Baucus ignoring hundreds of millions of low-paid waitresses, waiters and worried about a few hundred workers in this location?” she asked. “It points out the fact that the little

guys in this country have little or no representation. Big campaign donations get all the representation." [76]

Negotiations continued between the employees' attorneys and the Internal Revenue Service and the Montana Department of Revenue through March 1998. Agreements on how settlement checks were to be handled by the government tax agencies had been made and then broken. Workers hoped to be able to defer taxes by putting a portion of the settlement money into a 401(k) plan. Allan McGarvey said both hourly and salaried workers would pay a payroll tax of 7.65% for the first $68,000, minus taxes they already paid at CFAC. They then would pay 1.45% on the rest of their settlement money, up to 50% of the total. Then all earnings would be subject to income taxes. With workers growing irate about the late payment of their checks, lawyers and union representatives were predicting the checks would be in the mail by April 25 to 29. [77] "There is a good chance we will have it resolved in a matter of weeks," McGarvey said about the tax negotiations. "We want to know, 'What part is wages, what part is non-wages?' It's all taxable." Sen. Baucus, as the second ranking Democrat on the Senate Finance Committee, was assisting the workers in the negotiations. McGarvey said his phone had been ringing off the hook with calls from anxious employees seeking their settlement money. "Some people are much more eager to get their money than others," he said. "They call every day. Others would prefer we take our time." [78]

McGarvey announced on March 24, 1998, that a deal had been reached with the IRS, but Judge Shanstrom still had to approve the deal. "It's not signed, it's not sealed, but this is very good news," McGarvey said. AWTC President Terry Smith said that in the initial agreement, 48% would be considered wages and 52% would be considered interest and punitive damages. McGarvey said some elements of the payout would be taxed at the maximum rate, and some would not be taxed at all. "It's complex," he said. [79] On April 8, Smith announced that a deal had been reached with the IRS. The deal was needed before the money could be paid out. One couple told the media they needed the money to close on a house they were buying on April 10. "There's no way we're going to make it," the wife said. "It just keeps going on." [80] By mid-April, negotiations continued between the IRS and the employees. A key issue was how much of the settlement was wages that would have been

earned had profits been distributed over the years. Roger Sullivan said some of the money should be considered interest for money owed long ago, and in the case of the salaried employees some of the money should be considered as a penalty against CFAC under a Montana wage-penalty statute. “That was one of the claims that the salaried workers pursued under state law,” Sullivan said, but it was not an alternative available for the hourly workers. Sullivan said the Louisville, Ky. accounting firm Potter & Co. was chosen to hold the settlement money in trust for the workers because it had a long-standing business relationship with the Aluminum Workers Trades Council and its national affiliates. [81]

Many employees in the lawsuit were concerned about where the settlement money was, when it would be paid out, and if the CFAC plant was going to be sold first. According to McGarvey, most of the settlement money was deposited on Dec. 31, 1997, and had been invested prudently and gaining interest. The money would be paid out to the employees once a settlement was reached with the IRS about taxes. [82] Two “qualified settlement fund trusts” were established with Potter & Co. to distribute the money to about 900 past and present workers, and Potter & Co. served as trustee of both funds. “Initially, Potter looked at the income tax returns, financial statements, profit sharing plan records and documents of the company from 1985 through 1995 (the end of the agreement) to determine if the new owner of the plant was complying with the terms of the agreement,” Vicki Lenz reported in The Lane Report. “And he was – for the first few years. Things started getting questionable with the new fiscal year that began in 1988.” [83]

Representatives of all parties to the case were located across the country in California, Washington, D.C., West Palm Beach, Atlanta, Louisville and two cities in Montana. “The judge, in his fairness order, said this was one of the largest and most complex cases ever decided in Montana history,” said Jim Noe, a CPA at Potter. The accounting firm began the distribution process by sending out letters to individuals to collect information. “Admittedly, there were a few glitches,” Lenz reported. “Potter received a phone call from a dead man – according to their records – wanting his check, and liens and legal claims held up a few checks.” [84] The accounting firm sent out letters to the involved

employees informing them when all the settlement money due from CFAC's owners had been received. "It is our intent to disburse funds in such a way to get each of you the highest net checks legally permissible under the IRS rules," the letter said. "However… we cannot subject the trust to expensive penalties and create problems where each of you would need to file claims to get refunds on excess withholding." [85]
Getting a settlement approved and getting the money were the most important elements of the case for many employees. What came next was embarrassment as the workers were put under the national media microscope.

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