The Region submitted these cases for advice on whether the Unions engaged in picketing without giving notice required by Section 8(g) of the Act when they held a demonstration near the Employer’s hospital involving stationary protesters lining a public sidewalk, a car caravan driving in a loop on the streets surrounding the hospital, and a gathering with the press across the street from the hospital. We conclude the demonstration was not picketing and therefore no Section 8(g) violation occurred.

California Nurses Association (CNA) and Caregiver Healthcare Employees Union (an affiliate of CNA) represent bargaining units of the hospital’s registered nurses and certain other hospital employees, respectively. The demonstration, which took place on January 2, 2021, in the midst of the Covid-19 pandemic, protested staffing levels at the hospital. It proceeded in two phases. In the first phase, which lasted around 30-45 minutes, approximately 75 demonstrators stood on the sidewalks along a three-lane public road adjacent to a driveway and pedestrian accessway leading to the Employer’s Emergency Department. Approximately one third of the demonstrators stood on one stretch of sidewalk leading up to the driveway, roughly another third stood on the opposite side of the driveway on the same side of the road, and the remaining demonstrators stood across the road from the driveway. Most of the demonstrators were identifiable as hospital employees because they wore hospital scrubs and/or identification badges. The demonstrators mostly stood in a single row facing the road, generally at least six feet apart from each other, and wore face masks covering their nose and mouth. Meanwhile, a caravan of approximately 10 cars, which were led by a union representative and some of which had signs supporting the Unions’ cause affixed to their sides, repeatedly drove in a loop on the roads surrounding the hospital property, including the stretch of road faced by the stationary demonstrators. As the caravan passed this stretch, which likely occurred 10-15 times, the cars honked their horns and at least on some passes slowed below the speed limit and activated their hazard lights. Some of the stationary demonstrators raised their fists as the caravan passed and intermittently at other times, but themselves made little to no noise. In the second phase of the demonstration, the demonstrators, including those who had driven in the caravan, gathered with members of the press in a parking lot across the road from, and not belonging to, the hospital.

We conclude neither phase of the demonstration constituted picketing because there was no “confrontation in some form” between the demonstrators and employees, customers, or suppliers trying to access the hospital. *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797, 802 (2010) (quoting *Chicago Typographical Union 16 (Alden Press)*, 151 NLRB 1666, 1668 (1965)). There is no evidence that any members of the public were forced to interact with the demonstrators or were hindered in accessing the hospital because of the Unions’ demonstration. The demonstrators did not block access to, or patrol in front of, any entrances to the hospital or hospital property. Indeed, most demonstrators stood stationary on the sidewalks virtually the whole first phase of the demonstration. Although a few demonstrators periodically walked around, including a union representative who was documenting the demonstration by photo and video, this did not rise to the level of confrontational patrolling. See *Carpenters Southwest Regional Council (Ritchie’s Installations)*, 355 NLRB 1445, 1445 (2010) (de minimis movement of banner by union supporters did not constitute patrolling necessary to establish picketing). The mere fact that demonstrators stood close to a hospital driveway and pedestrian walkway does not establish picketing under current Board law. See *Sheet Metal Workers Local 15 (Brandon Medical Center)*, 356 NLRB 1290, 1290, 1292 & n.5 (2011) (union agent standing at vehicle entrance holding leaflet towards visitors was not picketing); *Eliason*, 355 NLRB at 803-04 (disavowing broader definition of picketing as “the
posting by a labor organization . . . of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union” (quoting Lumber & Sawmill Workers Local 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965))). Likewise, neither the signs on cars nor the cars’ periodic honking could reasonably be deemed confrontational toward visitors to the hospital. See Alden Press, 151 NLRB at 1669 (general parading with signs through public areas at shopping centers and public buildings was not picketing because it lacked the necessary condition of confrontation). The second phase of the demonstration clearly did not involve confrontational conduct since it merely involved people milling about and talking with the press even further away from hospital property than the first phase.

Significantly, we reject the suggestion that the demonstration blocked access to the hospital. Although some isolated demonstrators crossed the hospital’s driveway and others may have momentarily stood in the driveway, there is no credible evidence that this significantly delayed anyone trying to access the hospital. Cf. UNITE HERE! Local 5 (Waikiki Beach Hotel), 365 NLRB No. 169, slip op. at 1 n.2 (2017) (finding violation of Section 8(b)(1)(A) where any employee attempting to cross picket line was delayed for several minutes), enforced, 768 F. App’x 627 (9th Cir. 2019) (unpublished). As to the stationary demonstrators, we do not find that they effectively blocked sidewalk access to the hospital due to Covid distancing concerns. Since the demonstrators on each stretch of sidewalk mostly stood in a single row and there was additional maneuverable space abutting the sidewalks, the demonstration left sufficient room for pedestrians to pass by, even if it was not a full 6 feet of space. Any given pedestrian entering or exiting the hospital would have passed no more than approximately 25 individuals, who were wearing face masks. Passing these individuals would present a health risk similar to one resulting from passing other pedestrians on a sidewalk generally during the pandemic. Even assuming the demonstration ran afoul of California Department of Public Health (CDPH) guidance on gatherings during this timeframe in the pandemic, that is irrelevant to whether the demonstrators engaged in picketing. Finally, the caravan of cars intermittently passing by the stationary demonstrators likewise did not hinder access to the hospital. Although the Employer argues that the caravan forced an ambulance to slow down before entering the hospital driveway, video footage shows that the ambulance slowed down to achieve a safe speed for turning into a driveway and not because of any cars in front of it. The decisions finding Section 8(g) violations cited by the Employer are inapposite. Unlike the instant cases, those decisions involved conduct at least close to traditional picketing: union supporters carrying picket signs patrolling in front of an entrance to an employer’s facility. See Correctional Medical Services, 349 NLRB 1198, 1199-1201 (2007) (20 individuals, some of whom carried placards, walked continuously in a circle in front of main entrance to facility while sporadically chanting), review granted on other grounds sub nom. Civil Service Employees Ass’n, Local 1000 v. NLRB, 569 F.3d 88 (2d Cir. 2009); Service Employees Local 535 (Kaiser Foundation), 313 NLRB 1201, 1201 n.1, 1202-03 (1994) (15 participants “milled around” at the hospital entrance carrying signs during press conference); Hospital & Health Care Employees District 1199 (United Hospitals of Newark), 232 NLRB 443, 443 (1977) (approximately 25 employees carrying about 20 placards walked in a circle in front of hospital’s main entrance), enforced mem., 582 F.2d 1275 (3d Cir. 1978); West Lawrence Care Center, 308 NLRB 1011, 1011, 1015 (1992) (three union representatives walked outside a nursing home with signs stating, among other things, that management was unfair to its workers). Moreover, to the extent those decisions conflict with Eliason and subsequent decisions, they lack precedential value. Relatedly, we reject the proposition that the term “picketing” has a unique meaning under Section 8(g). The Board has never so held, and, at least with respect to Section 8(b)(4) and 8(b)(7), the Board has explicitly rejected the notion of distinct definitions. See Eliason, 355 NLRB at 803 n.22.

Because the Unions’ demonstration did not constitute picketing, the Unions did not violate Section 8(g) by failing to provide advance notice to the Employer. Accordingly, the Region
should dismiss the charges, absent withdrawal.

This email closes these cases in Advice. Please let us know if you have any questions or concerns.

[1] We do not credit an Employer representative’s assertion that on a couple occasions, some demonstrators stood in the driveway, apparently oblivious that they were doing so, thereby forcing cars to wait 15-30 seconds to enter. The representative indicated that he failed to capture this on camera because the demonstrators had moved by the time he was ready to take a picture. We find it implausible that it would have taken 15-30 seconds to take a snapshot, particularly given that he was recording photos and videos throughout the first phase of the demonstration.

2 See CDPH Guidance for the Prevention of COVID-19 Transmission for Gatherings (Nov. 13, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings-November-2020-11-2020.aspx. We question whether the demonstration is the type of “social situation” the CDPH guidance was intended to restrict, particularly given the included statement that “[a]ctivities protected by the First Amendment may proceed under this guidance notwithstanding any guidance, orders, or directives to the contrary.”

3 The Employer has also cited St. Joseph Hospital Corporation, 260 NLRB 691, 691-692, 699 (1982), where the administrative law judge had found that unions engaged in picketing where protesters carried signs while walking in groups along the sidewalks surrounding the hospital. There were no exceptions to this finding, id. at 691 n.1, though the Board subsequently cited it in Correctional Medical Services, 349 NLRB at 1200. In any event, the case is distinguishable because, unlike here, protesters walked in groups and carried signs.